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538	Chidambara Sannadhigal v. Veerama Reddi	...	16 L W 102; 31 M L T 54; 45 M 586; (1922) M W N 749; 43 M L J 640; (1922) A I R (P. C.) 292 **P. C.**
549	Mohammad Hadi v. Parbati	...	25 O C 2; 9 O L J 312; (1922) A I R (O.) 91.
551	Gurdit Singh v. Ishar Kuar	...	3 L 257; (1922) A I R (L.) 392.
553	Ganga Jali v. Dip Narain	...	9 O L J 325; (1922) A I R (O.) 129.
553	Shadi v. Jeoni	...	3 L 236; (1922) A I R (L.) 262.
555	Bijai Bahadur Singh v. Mathura Singh	...	9 O L J 327; 4 U P L R (O.) 66; (1922) A I R (O. 278; 25 O C 345.
557	Narinjan Singh v. Charan Das	...	3 L 239; (1922) A I R (L.) 363.
558	Bhairon v. Balak	...	9 O L J 331; 4 U P L R (O.) 88; (1922) A I R (O.) 287.
559	Abdulla Khan v. Jalam Singh	...	(1923) A I R (N.) 11.
562	Pranram Mookerjee v. Jagadish Nath Ray	...	26 C W N 61; 35 C L J 111; 49 C 250; (1922) A I R (C.) 455.
565	Kuppuswami Mudaliar v. Subramaniam Chettiar		41 M L J 545; 16 L W 927; (1923) M W N 75.
566	Gulab Thakur v. Fadali	...	*Nagpur Judicial Commissioner's Court.
573	Kasam v. Jorawar Singh	...	3 M L T 46; 16 L W 223; 5 N L J 209; 18 N L R 127; (1922) A I R (P. C.) 353; 43 M L J 676; 21 A L J 57; 25 Bom L R 1 **P. C.**
575	Kumudini Ray v. Kamala Kant Sen	...	35 C L J 106 (1922) A I R (C.) 247.
576	Shankari v. Jodha	...	3 L L J 437.
577	Satis Chandra Ghosh v. Kalidasi Dasi	...	34 C L J 529; 26 C W N 177; (1923) A I R (C.) 203.
597	Mahadeo v. Kisanlal	..	(1922) A I R (N.) 219.
600	Ramesh Chandra Sirkar v. Mohim Chandra Guha Deb Barua	...	35 C L J 156.
601	Abdur Rahman v. Wali Mohammad	...	(1922) Pat 313.
605	Balaji v. Sukamiya	...	*Nagpur Judicial Commissioner's Court.
607	Amulya Sundari Dassya v. Syama Sundar Saha	...	*Calcutta High Court.
609	Kallu v. Emperor	...	3 L 23; (1922) A I R (L.) 85; 23 Cr L J 577.
611	Emperor v. Lalji	...	25 O C 114; (1922) A I R (O.) 196; 23 Cr L J 579.
612	——— v. C. J. Robinson	...	3 L 250; (1922) A I R (L.) 216; 23 Cr L J 580.
613	——— v. Bashir	...	9 O L J 288; 4 U P L R (O.) 68; 23 Cr L J 681; (1922) A I R (O.) 275.
615	Sankaralinga Mudaliar v. Narayana Mudaliar	...	16 L W 412; 43 M L J 349; (1922) M W N 579; 31 M L T 342; 23 Cr L J 583; (1922) A I R (M.) 503.
619	Kariyappa Ningappa, *In re*	...	24 Bom L R 807; 23 Cr L J 587; (1922) A I R (B) 384.
620	Baz v. Emperor	...	3 L 213; (1922) A I R (L.) 389; 23 Cr L J 588.
621	Jaffar Ayub Katchi v. Emperor	...	(1922) A I R (N.) 195; 23 Cr L J 589.
623	Lachmi Singh v. Emperor	...	3 P L T 562; (1922) A I R (Pat.) 562; 23 Cr L J 59 .

623	Local Government v Ismail Bhai	...	(1922) A I R (N) 187; 23 Cr L J 591.
624	Arumuga Mudaliar, *In re*	...	16 L W 494; 31 M L T 254; 43 M L J 564; (1922) M W N 801; 23 Cr L J 592; (1923) A I R (M.) 59.
625	Masud Ahmed v. Jagan Singh	...	3 P L T 459; (1922) A I R (Pat.) 560.
626	Aradhan Mondal v. Abhoya Charan Mondal	...	*Calcutta High Court.
627	Jivraj Kaloobhai Patel v. Bhagvandas Gordhandas		24 Bom L R 1037.
629	Ramshivendra Narayan Ojha v. Awadh Bihary Saran	...	*Patna High Court.
631	Vaithinatha Aiyar v. Theyagaraja Aiyar	...	41 M L J 20.
638	Kamal Nain Singh v. Kesho Prasad Singh	...	1 Pat 701; (1922) A I R (Pat.) 310.
641	Kunj Lal v. Kanhai Mahto	...	*Patna High Court.
643	Shankarrao v. Manikrao	...	(1923) A I R (N.) 8
645	Jadunandan Singh v. Sheonandan Prasad Singh	...	(1922) Pat 200; 3 P L T 487; (1922) A I R (Pat.) 276; 1 Pat 644.
648	Dhirendra Kumar Bose v. Chandra Kanta Roy	...	36 C L J 82.
653	Budhan Teli v. Madan Mohan Lal	...	3 P L T 485.
655	Secretary to the Board of Revenue v. Mohamad Sheriff Hussain Meah	...	16 L W 333; (1922) M W N 583; 43 M L J 434; (1923) A I R (M.) 34 **F. B.**
656	Banwari Lal v. Moti Lal	...	3 P L T 466; (1922 A I R (Pat.) 493.
657	Indra Raj Singh v. Moradkhan	...	(1922) A I R (N.) 210; 18 N L R 178.
659	Kunj Behari Singh v. Sheodahin Pandey	...	3 P L T 447 (1922) A I R (Pat.) 504.
662	Jogesh Chandra Roy v. Annoda Charan Choudhury		26 C W N 368.
663	Bishun Prasad Singh v. Narsingh Das	...	3 P L T 650; (1922) A I R (Pat.) 555.
664	Alamsingh v. Gopaldas	...	(1923) A I R (N.) 7.
664	Kumud Kanta Chakraburtty v. Bignold	...	*Calcutta High Court.
667	Raghunathaswami Iyengar v. S. Gopauj Rao	...	(1921) M W N 732; 41 M L J 547; 15 L W 123; (1922) A I R (M.) 307.
671	Maung Tun Yin v Ma Sein Yin	...	11 L B R 331.
673	Narayana Aiyar v. Bayari Bivi	...	14 L W 524; 41 M L J 557; 1921) M W N 808; 45 M 103; (1922) A I R (M.) 221.
675	Ganga Ram v. Municipal Committee, Amritsar	...	(1922) A I R (L.) 41.
676	Sadhu Saran v. Ambika Lal	...	*Patna High Court.
678	Ranjit Singh v. Karim Bakhsh	...	(1922 A I R (L.) 475.
679	Jan & Son v. Cameron	...	20 A L J 728; (1922) A I R(A.) 471; 4 U P L R (A.) 214; 44 A 735.
681	Khuda Yar v. Amir	...	(1922) A I R (L.) 169.
682	Shantaram Balkrishna v. Waman Gopal	...	24 Bom L R 1029
687	Madam Pillai v. Badrakali Ammal	...	15 L W 464; 30 M L T 274; (1922) M W N 345; 45 M 612; (1922) A I R (M.) 311; 42 M L J 410 **F. B.**
690	Maung Thwe v. A. L. A. R Chetty Firm	...	11 L B R 335.
693	Brijmohansingh v Kasturchand	...	(1922) A I R (N.) 189.
694	Arunachellam Chetty v Ko Po Yan	...	11 L B R 341; (1923) A I R (Bur.) 1.
700	Ramasumran Prasad v. Gobind Das	...	(1922) Pat 291; 4 U P L R (Pat) 75; 3 P L T 704. (1922) A I R Pat) 615 **S. B.**
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707	Sibanand Misra v. Jagmohan Lal	...	3 P L T 533; (1922) Pat 331; (1922) A I R (Pat.) 499; 1 Pat 780.
711	agir Singh v. Santi	...	3 L 181.
712	Abdul Rahim v. Sheikh Kawadoo	...	(1922) A I R (N.) 236.
714	Subramaniam Chetty v. Sankara Iyer	...	15 L W 531; (1922) M W N 262; 31 M L T 70; (1922) A I R (M.) 236.
715	Ragho v Sakharam	...	(1922) A I R (N.) 200.
716	Tarlok Devi v. Joti Ram	...	(1923) A I R (L.) 58.
717	Vaddipparthi arayanamurthy v. Cadimsetti Appalanarasimhulu		14 L W 536; 41 M L J 563.
719	Ambica Charan Sen v. Girish Chandra Sen	...	*Calcutta High Court.
720	Kanchedilal v. Motiram	...	(1922) A I R (N.) 192.
721	Karuna Krishna v. Rakhaldas	...	*Calcutta High Court.
722	Hari Chand v Jugal Kishore	...	(1922) A I R (L.) 349.
727	Ram Ratan v. Upendra Chandra	...	*Calcutta High Court.
727	Yusaf v. Zainab	...	*Lahore High Court.
728	Jabarkhan v. Rahimkhan	...	(1922) A I R (N.) 197; 18 N L R 190.

729	Jalal Din v. Nathuram	..	(1922) A I R (L) 474.
730	Sarbo Mussalmani v. Safar Mandal	...	*Calcutta High Court.
731	Sundar v Shiaman	...	(1922) A I R (L.) 386.
732	Kasturibai v. Baliram	...	(1923) A I R (N) 15.
733	Amir v. Nadir Ali	...	*Lahore High Court.
734	Narayanasami Naicker v. Periasamy Odayar	...	14 L W 116; (1921) M W N 465; 41 M L J 163; 44 M 951.
740	Abdul Karim v. Thakar Ram-Jaggu Ram	...	*Lahore High Court.
741	Ganesh Moreshwar v Vasudeo Vithal	...	24 Bom L R 911; (1922) A I R (B.) 424.
744	Rup Chand v. Allah Jawaya	...	(1922) A I R (L) 459.
746	Mahadu Kashiba v. Krishna Tatya	...	24 Bom L R 977; (1922) A I R (B.) 410
747	Daleep Singh v Khurshed Hussain	...	20 A L J 715; (1922) A I R (A.) 459; 4 U P L R A. 216; 44 A 705.
749	Hussain Bakhsh v. Jhanda Singh	...	(1922) A I R (L.) 706.
750	Debi Prasad v. Gujar	...	20 A L J 696; (1922) A I R (A.) 423.
750	Sukha Nand v. Behari Ram Ishar Das	...	*Lahore High Court.
751	Sardar Khan v. Fateh Din	...	(1922) A I R (L.) 480.
751	Sarup Singh v. Kheman	...	(1922) A I R (L.) 470.
752	Official Receiver, Trichinopoly v. Lakshman Aiyar		41 M L J 453.
753	Ghulam Rasul v. Ramzan Bibi	...	*Lahore High Court.
754	Amba v. Shrinivasa Kamathi	...	14 L W 575; 26 C W N 361; (1922) A I R (P. C.) 135 **P. C.**
758	Subbayyar v Subbarayalua Iyer	...	(1921) M W N 636; 41 M L J 541.
760	Wairs v. Fateh Din	...	*Lahore High Court.
761	Mahdo Das v. Gokal Das	...	20 A L J 742; (1922) A I R (A.) 478; 4 U P L R A. 208.
763	Hira v. Hardat Singh	...	47 P L R 1922; (1923) A I R (L.) 26
764	Baijnath v. Mohammad Ismail	...	20 A L J 647; (1922) A I R (A.) 417; 44 A 677.
767	Sher Dil v. Ghulab	...	(1922) A I R (L.) 471.
769	Har Bhagwan v. Hukam Singh	...	4 L L J 245; 3 L 242; (1922) A I R (L.) 243.
776	Bind Bahadur Singh v. Rituraji	...	20 A L J 702; (1922) A I R (A.) 420.
777	Madan Gopal v. Malawa Ram	...	*Lahore High Court.
778	Nehal Singh v. Fateh Chand	...	20 A L J 708; (1922) A I R (A.) 426; 44 A 703.
780	Baley Mahammad Sahi v. Aijanmai	...	35 C L J 71; 26 C W N 529; 1922 A I R (C.) 30.
783	Basdeo Ram Sarup v Dilsukhrai Sewak Ram	...	20 A L J 717; (1922) A I R (A.) 461; 44 A 718.
785	Saif Ali v. Chiragh Ali	...	*Lahore High Court.
786	Puttu Lal v. Daya Nand	...	20 A L J 712; (1922) A I R (A.) 499; 44 A 721.
787	Surrendro and Company v. Liquidator, Punjab Tannery Co. Ltd.	...	*Lahore High Court.
790	Roshan Lal v. Lallu	...	20 A L J 722; (1922) A I R (A.) 443; 44 A 714.
792	Hem Raj v. Beant Singh, Vakil, Liquidator the Punjab Tannery Co Ltd	...	*Lahore High Court.
794	Kalyan Singh v. Dharam Singh	...	20 A L J 721; (1922) A I R A. 489.
795	Haridasi Dasi v Bidhumukhi Dasi	...	35 C L J 66; (1922) A I R C. 38.
798	Lallu Singh v Gur Narain	...	20 A L J 744; (1922) A I R (A.) 467 **F. B.**
802	Sawan Mal v Raunaq Mal	..	3 L 209; (1922) A I R (L.) 47.
804	Nandkeshwar Misra v Sudarshan Ram Tewari	...	*Patna High Court.
805	Peare Lal v. Sundar Singh	...	20 A L J 658; (1922) A I R (A.) 436 44 A 756.
807	Chhaber Singh v Radhu Ram	...	4 L L J 334.
809	Pirbhu Dayal v. Tula Ram	...	20 A L J 672; (1922) A I R (A.) 401.
811	Haider Ali Shah v. Bhikhe Shah	...	*Lahore High Court.
812	Shib Dayal v. Jagannath Prasad	...	20 A L J 674; 44 A 636; (1922) A I R (A.) 490 **F. B.**
815	Firm Gurdas Ram-Kotu Ram v. Bhagwan Das	...	(1922) A I R (L.) 182.
817	Dangar Khan v Emperor	...	23 Cr L J 593.
818	Po Me v. Emperor	...	1 L B R 340; 23 Cr L J 594
819	Janki Das v. Emperor	...	38 P L R 122; 4 L L J 409; 23 Cr L J 595; (1922) A I R L. 424.
820	Fateh Chand v. Emperor	...	20 A L J 706; (1922) A I R (A. 428; 23 Cr L J 596.
821	Ahmad Nur v. Emperor	...	23 Cr L J 597; 4 U P L R (L.) 110.
824	Krishna Pillai, *In re*	...	16 L W 585; 43 M L J 555; 31 M L T 419; 23 Cr. L J 600; (1923) M W N 56; (1923) A I R (M.) 134.
825	Ahmad v. Emperor	...	23 Cr L J 601; 4 U P L R (L.) 108.
826	Varadarajulu Pillai, *In re*	...	16 L W 536; 31 M L T 400; (1923) A I R (M.) 141; 23 Cr L J 602.

827	Sundar Lal v. Emperor	...	20 A L J 666; (1922) A I R (A.) 233; 44 A 642; 23 Cr L J 603.
829	Tulsiram v Tilokchand	...	23 Cr L J 605.
830	Murad v Emperor	...	23 Cr L J 606.
831	Athi Iyer, *In re*	...	14 L W 728; 23 Cr L J 607.
832	Chatturbhuj v Emperor	...	23 Cr L J 608.
833	Sher Ali v Emperor	...	23 Cr L J 609.
834	Shuja-ud-din Ahmad v. Emperor	...	20 A L J 662; (1922) A I R (A.) 435; 23 Cr L J 610.
835	Emperor v. Haji Jiand	...	23 Cr L J 611; (1922) A I R (S) 31.
836	Maqbul Ahmad v. Emperor	...	20 A L J 694; (1922) A I R (A.) 430; 23 Cr L J 612.
837	Walia v Emperor	...	(1922) A I R (L.) 68; 23 Cr L J 613.
838	Erada Padinharedil Govindan Nair, *In re*	...	16 L W 349; 43 M L J 396; 31 M L T 304; 23 Cr L J 614; 1922) A I R (M.) 499.
841	Bhai Khan v. Emperor	...	4 L L J 225; (1922) A I R (L.) 189; 23 Cr L J 617.
843	Mohideen Pakkiri, *In re*	...	16 L W 335; 31 M L T 282; 43 M L J 475; (1922) M W N 690; 23 Cr L J 619; 45 M 839; (1923) A I R (M.) 50.
845	Khilinda Ram v. Emperor	...	3 L 359; 23 Cr L J 621; (1922 A I R (L.) 458.
846	Radha Kishen v. Emperor	...	23 Cr L J 622.
847	Uma Dutt Misir v. Emperor	...	20 A L J 693; 44 A 657; 23 Cr L J 623; (1922) A I R (A.) 503.
848	Muhammad Ali v Emperor	...	23 Cr L J 624.
849	Umri v Shah Mohammad	...	4 L L J 389; 3 L 218; (1922) A I R (L.) 178 **F. B.**
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855	Ganpati Teli v Daji	...	*Nagpur Judicial Commissioner's Court.
856	Parthasarathi Naidu v. Mukundammal	...	43 M L J 55; 16 L W 670; (1922) M W N 729; 45 M 867 (1923) A I R (M.) 84.
857	Maula Bakhsh Khan v Fateh Jang	...	(1922) A I R (L.) 358.
858	Mela Singh v Gurdas	...	3 L 62; (1922) A I R (L.) 433 **F. B.**
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862	Haji Oosman Haji Ismail v Haroon Salleh Mahomed		24 Bom L R 978.
869	Subbe Goundan v. Krishnamachari	...	20 M L T 217; 42 M L J 372; 15 L W 537; (1922) M W N 269; 45 M 449; (1922) A I R (M.) 112.
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885	A K R. M. C. T. Chetty Firm v. Maung Aung Bwin		11 L B R 354.
886	Harjas v Harke	...	46 P L R 1922; (1922) A I R (L.) 366.
887	Ko Tine v Ismail Cassim Moorad	...	11 L B R 356.
890	Chiragh Din v Seraj Din	...	3 L 386
892	Ram Nath v Raggha Sah	...	25 O C 125; (1922) A I R (O) 211.
895	Sardar Ali v Fazil	...	*Lahore High Court
896	Kuber Singh v Raj Kunwar	...	25 O C 142; (1922) A I R (O) 197.
897	Charu Chandra v Fanindra Narain	...	*Calcutta High Court.
898	Official Assignee of Madras v. Ramachandra Aiyar		16 L W 569; 1922) M W N 653; 43 M L J 569; (1923) A I R (M.) 55.
900	Pramatha Nath Roy v. William Arthur Lee	...	31 M L T 193; (1922) A I R (P. C.) 352; 4 U P L R (P. C.) 103; 43 M L J 765; 27 C W N 156; 2 A L J 918 **P. C.**
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903	Suraj Prasad v Sonar Mahto	...	2 P L T 648.
906	Muhammad Ata Ullah Khan v Gopala Mal	...	*Lahore High Court.
907	Duvvury Ramamurthy v Pabbineedi Bulliraju	...	4 M L J 431; 4 L W 560.
910	Ind Eng & Motor Co v Glandstone Wyllie & Co.		26 C W N 102.
912	Perumal Moopan v Venkatachariar	...	15 L W 486; 42 M L J 533; (1922) M W N 263; 31 M L T 35 (1922) A I R (M.) 193.
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919	Tuljaram Row v Ramachandra Row	...	41 M L J 465; 14 L W 515; (1921) M W N 776.
9 9	Nanchlal v Gulshanrai	...	18 N L R 8 (1922) A I R (N.) 217.
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927	Muthayya Chetty v Somasundaram Chetty ...	16 L W 527 (1923) A I R (M.) 85.
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931	Pendurti Joseph v. Pendurti Ramamma ...	43 M L J 431: (1922) M W N 637: 16 L W 639; 31 M L T 416. (1922) A I R (M.) 9.
932	Bichhia Lal v. Munshi Ram ...	(1922) A I R (L.) 866.
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940	Ram Singh Rajput v Murtibai ...	*Nagpur Judicial Commissioner's Court.
942	Basdeo Narain Singh v Harakh Narain Singh ...	*Patna High Court.
942	Dakoju Subbarayudu v. Musti Rama Dasu ...	15 L W 504; 42 M L J 321: 30 M L T 202; (1922) M W N 875; 45 M 872.
944	Lachman Lal Pathak v. Baldeo Lall Thathwari ...	(1922) Pat 228 3 P L T 603; 1 Pat 619; (1922) A I R (Pat.) 556.
945	Emperor v. Abdul Hamid ...	3 P L T 58; 1922 Pat 274; 4 U P L R (Pat.) 79. 23 Cr L J 62?: (1923 A I R Pat.) 1 **S. B.**
958	Bazari Hajam v. Emperor ...	(1922) Pat 46: 4 U P L R (Pat.) 1; 3 P L T 526 1 Pat 24; (1922) A I R (Pat.) 73; 23 Cr L J 639;
959	Sheopal v. Emperor, ...	9 O L J 353; 4 U P L R (O.) 12; 23 Cr L J 639; (1922) A I R (O.) 227.
961	Sri Gangaji Cotton Mill's Co. Ltd. v. East Indian Railway Co. ...	(1922) A. I. J. 761; 4 U P L R (A.) 212; (1922) A I R (A.) 514; 44 A 763.
966	Saheb Bakhsh Singh v. Thakur Din Singh ...	5 O L J 384; 4 U P L R (O.) 85; (1922 A I R (J. C.) 229.
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969	Annan v. Dubar ...	9 O L J 389; 4 U P L R (O.) 95; (1923) A I R (O.) 15.
970	Abdul Karim Khan v. Muhammad Jan ...	20 A L J 590; (1922) A I R (A.) 370; 44 A 663.
971	Arunachala Aiyar v. Subbaramiah ...	1922 M W N 600; 31 M L T 267; 16 L W 582; 43 M L J 632; (1922) A I R (M.) 63
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973	Manindra Chandra Nandi v. Ram Kumar Lal Bhagat ...	3 M L T 131; 4 U P L R P C. 38; 43 M L J 689; 1 Pat 5[illegible]; 27 C W N 29; 24 Bom L R 1251; (1922) A I R (P C) 504; 20 A L J 588; 16 L W 905. 6 C L J 542; 4 P L T 1 **P. C.**
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978	Fakhrullah Khan v. Ram Sarup ...	20 A L J 786; 4 U P L R (A.) 218; (1923) A I R (A.) 64.
980	Fort Press Co. Ltd. v. Municipal Corporation of the City of Bombay ...	43 M L J 491 L W 654; 24 Bom L R 1228; (1922) A I R (P. C.) 465; (1922) M W N 798; 46 I A 767; 36 C L J 539 **P. C.**
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983	Doraisamy Aiyangar v. Narayana Aiyangar ...	16 L W 147; 1922 M W N 462. 43 M L J 285; (1922) A I R (M.) 445.
985	Inderpal Singh v. Bafati ...	20 A L J 771; 4 U P L R (A.) 206; (1923) A I R (A.) 40
986	Hamid Mirza Beg v. Ahmad Mirza Beg ...	9 O L J 389; 4 U P L R (O.) 89; (1922) A I R (O.) 266.
989	Bahadur Singh v. Mohni Koer ...	20 A L J 780 4 U P L R (A.) 204; (1922) A I R (A.) 453.
991	Bharam Chand Gain v. Kanak Sarkar ...	26 C W N 359; 35 C L J 203.
993	Jogendra Krishna Roy v. Kurpal Harshi & Co. ...	35 C L J 175; 49 C 545; (1923) A I R (C.) 68.
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INDIAN CASES

1922.

VOLUME LXVIII.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

April 6, 1922.

Present:—Viscount Cave, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

T. P. SRINIVASA CHARIAR, SINCE DECEASED (NOW REPRESENTED BY T. P. RANGACHARIAR AND ANOTHER)—APPELLANTS

versus

C. N. EVALAPPA MUDALIAR—RESPONDENT.

Endowments—Temple property—Origin traceable to trust—Conversion by trustee—Onus *on trustee*—*Dharmakartha, position of*—*Trustee's unfounded claim to trust property, whether* per se *ground for removal*—*Concoction of accounts*—*Misconduct.*

Where the discoverable origins of property show it to be trust property, the *onus* of establishing that it must have illegitimately come into the trustee's own right does not rest upon the beneficiaries. The *onus* lies heavily on the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition. [p. 5, col. 1.].

In the absence of unique circumstances, a property discovered to be originally trust property, cannot be allowed to be converted into the private property of the trustee. [p. 8, col. 1.]

The position of a *dharmakartha* is not that of a *shebait* of a religious institution, or of a *mahant* of a *mutt*, which functionaries have a much higher right with larger power of disposal and administration and have a personal interest of a beneficial character. [p. 7, col. 2.]

Vidyapurna Tirtha Swami v. *Vidyanidhi Tirtha Swami*, 27 M. 435; 14 M. L. J. 105, referred to.

A *dharmakartha* is literally and no more than the manager of a charity and his rights are never in a higher legal category than that of a mere trustee. [p. 7, col. 2.]

A trustee who is guilty of seriously reprehensible conduct by setting up an assertion of private ownership in himself and a powerful resistance to the recovery of the properties for the trust which he administers, and seeks to maintain his assertion by concocting accounts ought not, on any sound principles of law or of administration, to be permitted to continue in his office, and it is open to the true beneficiaries of the trust, as also to the Court before whom such delinquencies are established, to insist upon the first step towards trustworthiness in administration being taken by the removal of the trustee. [p. 8, col. 2; p. 9, col. 1.]

Appeal against the judgment of the High Court, Madras, (Wallis, C. J., and Seshagiri Aiyar, J.) in A. S. No. 5 of 1915, dated the 6th March 1917, which varied the decree of the District Judge, Chingleput, dated the 11th December 1914.

Sir *George Lowndes*, *K. C.*, and Mr. *E. B. Raikes*, for the Appellants.

Mr. *DeGruyther*, *K. C.*, and Mr. *Kenworthy Brown*, for the Respondents.

JUDGMENT.

LORD SHAW.—This is an appeal against the judgment and decree of the High Court of Judicature at Madras, dated the 6th March 1917, which varied a decree of the District Judge of Chingleput, dated the 11th December 1914.

The suit was instituted by the present appellant and another, under the Civil Procedure Code, section 92. The prayer of the plaint was for an account of the respondent's management of a temple in the district of Chingleput since his assumption of office, and that he "be made accountable for all losses occasioned to this temple by his breaches of trust, for his removal from office, and for the settlement of a scheme for the management of the Devastanom and its properties." Incidentally, the judgment for accounts made in the suit has raised a question of complexity and importance as to th

ownership of lands of considerable extent and value. The issue upon that topic is the principal one raised in this appeal. It is, whether these lands belonged to the temple or are the private property of the respondent, who, in point of fact, is its Dharmakartha or hereditary trustee.

The grounds for the removal of the respondent from the position of Dharmakartha have been added to by the conduct of the respondent in the course of the suit, and now include not only misfeasance and breach of trust, but the proved falsification of the temple accounts.

This question of removal from the position of trustee will be afterwards dealt with, but it may here be mentioned that the former question, *viz.*, the question of the true ownership of the temple properties, so keenly contested by the respondent has not only to be determined on its merits, but may turn out to have a bearing upon the question of his removal from office.

The case is very involved, and their Lordships have to acknowledge the care which has been manifested with regard to it in the Courts below, and in particular the elaborate investigations of the history of this property made by the District Judge.

As it is desirable that the Board should endeavour to exclude from this judgment all such details as might obscure the question of principle dealt with, it may be well to consider the respective positions of parties in the clear language adopted by the District Judge. His narrative of the plaintiff's case is this:—

"2. The plaintiffs allege that they are the *tirthom mirasidars* and *ubhoyakars* of the said temple, that the defendant is its trustee, that its management since 1842, when the Government handed over the same, has been in the family of the defendant, that the endowments to the temple consist of *mirs* from the Government, income from lands and contribution from *ubhayakars*, that the administration of the temple by the defendant has been unsatisfactory and that he is guilty of various acts of misfeasance, malfeasance, nonfeasance, breach of trust and neglect of duty. The instances of misconduct are set forth in paragraph 9 of the plaint, the main item being with reference to the lands, wet and dry, and *manyams* described in A 1 to A 8 schedules of the plaint which it is alleged to belong to the temple, and the defendant is charged with misappropriation of the income from them without bringing the same into the temple accounts, and it is alleged that these accounts are not regularly and correctly kept".

His narrative of the defendant's case is as follows:—

"3. The defendant contends that he is the hereditary trustee of the temple and that his ancestors were the trustees even before the Government assumed management thereof, and denies that he is guilty of any act of misfeasance, etc., alleged in the plaint. He further states that the plaint temple never owned or enjoyed any of plaint A1 or A2 schedule lands, that item No. 1 of A3 schedule is enjoyed by the temple, and that, in item No. 2 of A3 schedule and in the first seven items of A 5 schedule, the Melwaram right alone belongs to the temple, that lands in A1, A2, A7, A8, were always exclusively owned and enjoyed by the defendant and his ancestors as their absolute property. The defendant further states that all the incomes arising from the lands belonging to the temple have been regularly entered in the temple accounts and duly accounted for, that the said income is not sufficient for the upkeep of the temple, and that the defendant has been meeting the deficit from his private funds, and that the accounts filed in Court were regularly maintained by the temple Karnams."

These statements show broadly and correctly the attitude of the parties to this litigation.

The temple in question is an endowment or institution for the worship of the God Vishnu. It is dedicated to a Saint or Incarnation called Tirumushi Alwar. The temple lands are at Madavilagam and other villages in the district of Chingleput, in the vicinity of the City of Madras. As the plaintiff in Head 3 of the plaint avers:—

"There is a Public Vishnu Temple at Madavilagam, a hamlet of Tirumushi, in Poonamalle Division, Saidapet Taluk, dedicated to Sri Jagannatha Perumal and Tirumushi Alwar."

That, in point of fact, a temple did exist there from ancient times, and that it was in possession of certain endowments in the shape of lands, seem to be undoubted,

The Board has had a reference to various historical authorities upon the subject of the Chingleput District, and upon the *mirasi* tenure therein. These records are voluminous. It is too much to expect that anything definite can be obtained prior to the devastation of the district by Hyder Ali in the latter half of the eighteenth century. The most valuable document is the Fifth Report of the Select Committee on the Affairs of the East India Company of the year 1812. Says the Report:—

"The *jagheer* (Chingleput) appears to have been obtained in the year 1760 and 1763, from the Nabob of Arcot, in return for the services rendered him and his father, by the Company....The *jagheer* was twice invaded by Hyder Ali, in 1768, and in the war of 1780, when he entered it with fire and sword. On the termination of the latter war, in 1784, hardly any other signs were left in many parts of the country of its having been inhabited by human beings than the bones of the bodies that had been massacred or the naked walls of the houses, choultries, and temples, which had been burnt. To the havoc of war succeeded the affliction of famine; and the emigrations arising from these successive calamities nearly depopulated the district.

"The system of management in the *jagheer*, while it was rented by the Nabob, was of the same oppressive and unjust character which marked the administration of affairs in his own territory, the Carnatic."

A period of no little confusion ensued even after the Company Government assumed the *jagheer* in the years previous to 1730, the confusion being much relieved in 1794 when the country was placed under the management of Mr. Lionel Place, who continued as administrator until 1798, and whose Final Report respecting the *jagheer* is dated the 6th June 1799. Mr. Place's views with regard to *mirasi* are stated to have undergone a material change, and, in the language of the Report:—

"He had become convinced that the *mirasidar* had an undoubted hereditary property in the soil, that he derived this right originally from the Sovereign to whom he acknowledged obedience, and the rendering of a stated proportion of the produce, as the tenure by which he held it; that he sold, mortgaged, gave away and left his lands to his posterity."

It would not elucidate the points at issue in this suit to enter further into the development, historically, of the adjustments of the rights regarding the land and its tenure and cultivation. This following excerpt, however, may be made from Mr. Place's Final Report:—

"702. The following *definition*, therefore, of *mirasi* or property in land seems to be deducible from the discussions that have passed on it,

"703. That it is a right to the use and substance of the soil vested in the present proprietor, his heirs and successors so long as he does or can cultivate it and pays the dues of Government and is obedient to its authority; and that when he does not or cannot cultivate his lands, when he withholds the dues of Government, or is disobedient to its authority, such part as he *neglects*, or, in the latter case, the whole, *escheats* to Government, who may confer it on whom it pleases."

These excerpts have been given because the fact has been acknowledged that the villages, afterwards referred to, with the lands in suit in the present case, are held under the *mirasi* tenure. Nor, secondly, is it disputed that Vishnu as a juristic entity, and, as such, owner of the temple dedicated to and appearing under the following names: Sri Jagannatha Peramal and Tirumushi Alwar, can, according to law, and must, if it accord with fact, be reckoned as a *mirasidar* holding a village *mirasi*. The point in the case is, was the property in suit held under *mirasi* tenure by this *mirasidar* in the interests of the institution and worshippers of Vishnu attached to it, or was it held by the respondent personally?

The respondent founds, and strongly founds, upon the state of the records of this property as for the year 1825. He maintains that there is sufficient indication from this record that the property in suit had wholly belonged, not to the temple as part of its endowments, but to Evalappa, his grandfather, as his own personal property.

The date of the origin of this temple is not apparently now ascertainable, but the first broad and fundamental fact appearing from the record founded upon is that in 1825 *de facto* such a temple did exist;

secondly, that the institution was at that date managed by a Dharmakartha; and, thirdly, that it was the owner of some lands. What were those lands, and, in particular, did they include those in suit in the present case? On that point the singularity of the position is that it appears to be, and that very rightly, assumed in the judgment of the Courts below, that originally the temple did own the lands, but that the state of affairs crystallized in the *paimash* of 1825 left it at least doubtful whether some change had not been effected under which a personal acquisition by the Dharmakartha had taken place.

And it is the fact, with regard to the large majority of the items composing the village lands, that the plots and portions are set out in detail in the name of Evalappa Mudaliar, without describing him as trustee, and without giving any indication contrary to that of personal ownership. It is this circumstance upon which the respondent in the appeal strongly relies.

It may be said of the 1825 *paimash* or record, taken as a whole, that it does involve certain self-contradictions which contribute to leaving the point at issue in considerable doubt.

It will serve no useful purpose to load this opinion with details, although all these details have been carefully considered. It may suffice to say as follows: The *paimash* Jariff Taram chitta for Madavilagam village dated the 31st August 1825, forms the Exhibit A, and its headings and general preliminary statements must be attended to. It states the "persons who are present at the Jariff," mentioning by name the Government Officer. Then follows this entry; "Alwar temple village *miras*." This appears to describe in general terms the ownership by the temple of all the village *miras*. Then there appears this entry: "Appasami Mudali and Arunachala Mudali, *gumasthas* of Evalappa Mudali, Dharmakartha of the aforesaid temple—total, two persons." Up to this point it seems plain enough that the lands are owned by the temple, and that Evalappa is its Dharmakartha. When the specific entries begin there occur the following "remarks": "Village *miras*—Sri Tirumushi Alwar", and a little further down, "No. 1 *miras*. Tirumushi Alwar Devastanom Dharmakartha Nattu Evalappa Mudali." Then still another: "Alwar Mantapam *tope* No. 1 *miras* Tirumushi Alwar Devastanom." Up to this point the doubt as to the lands being temple lands—it being admitted that they are part of the village *miras*—has not arisen. When these items came to be entered, the column of remarks shows "village *miras*", and by far the most important of the entries are those referring to the *miras* itself, *viz.*, "No. 1 *miras*", and one of the most important pieces of the property is a *tope* or grove, which is entered as *punja*, and in the remarks is stated to be Alwar Mantapam tope. So far all is clear.

The confusion arises, however, from another document, Exhibit A-1, called "Register of lands as per *paimash* or *mamul* account". It is to be observed that in it again occurs "No. 1 village *miras*, Tirumushi Alwar", and in No. 83, "No. 1 *miras* Tirumushi Alwar Devastanom", there being added the words "Dharmakartha Nattu Evalappa Mudali".

While this is so, the remarkable thing is that all the other entries, with perhaps one or two exceptions, are stated to be "No. 1 *patta*, Evalappa Mudali," with no indication that those particular items are temple lands or that Evalappa holds them as Dharmakartha. This fact, and practically this fact alone, forms the foundation of the respondent's claim that he is personal owner of these numerous items. The inconsistency of this with the other entries above referred to is unexplained, and in particular it is unexplained how property originally temple property ever came into his private ownership. No express grant is produced; no legal authority for a conversion so singular is suggested.

In these circumstances, their Lordships are not prepared to say that if the records had stopped here they would have agreed with the judgments of the Courts below, and would have attributed the entries opposite Evalappa's own name as entries asserting private property. It is unlikely; but, for the reasons to be hereafter stated, it is not necessary to decide the question. Let it be assumed, however, that the point of ownership stands doubtful upon the 1825 records. To such a situation it is conceivable that the observation of the learned Chief Justice would apply. He says:—

"It is, of course, impossible at this distance

of time to say exactly how it was that these properties passed from the temple into the hands of the trustee's family, and the case may undoubtedly appear to be one of suspicion. But we cannot say, at this distance of time and in view of this long enjoyment, that the title of the temple has been sufficiently established in the present suit as to the great bulk of those properties, that is to say, in respect of those properties which, in the *paimash*, are not entered as temple properties. Where we find in the *paimash* properties entered as temple properties, that is sufficient to throw the onus on to the trustee of showing how these properties ceased to belong to the temple."

Their Lordships must dissent entirely from the view that, where the discoverable origins of property show it to be trust property the onus of establishing that it must have illegitimately come into the trustee's own right rests upon the beneficiaries. Upon the contrary, the onus is, and is heavily, upon the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition. Even upon the records of 1825 their Lordships would have inclined to this view.

But the records did not end here. In their Lordships' opinion it is necessary in a case of this kind to view the records, transactions and proceedings as a whole. And in their view the greatest weight must be attached to the elaborate proceedings of 1876, and, in particular to the Survey and Settlement Register of the Village of Madavilagam. That Register contains 169 items, including, among other particulars, an identification, so far as possible, of each item with the old number or name of fields, and, in particular, the extent and assessment of each plot of land in the whole list. The Register is signed by Major C. J. Stuart, Acting Deputy-Director of Revenue Settlement, and is dated from the Revenue Settlement Office. It cannot be too clearly premised, however, that the Board would not hold any such record to be conclusive evidence of ownership; but, upon the other hand, their Lordships cannot be blind to the importance of such a document which appears, *de facto*, to have settled the bounds of the possessions of these plots for a period of thirty-five years, that is to say, from 1876 to 1910. This is especially important in any case where the personal as against the trust claim is supported also, and alone, by a reference to an earlier record of a similar character, marred as that record happens to be by the contradictions to which reference has been made.

It is, however, unnecessary, it may again be said, to enter into details. But the facts as to the 1876 records are outstanding and make the position much clearer. Evalappa had been succeeded by Varadappa, and numerous cases, including those in which in 1825 the entries of the owner had only been in the name of Evalappa Mudaliar, with nothing added thereto, now appear, with the point as to the character of the ownership, cleared up.

The Survey is headed "Descriptive Memoir of Madavilagam of the Saidapet *taluk*." Extracts from it form Exhibit B of the present proceedings. Their Lordships have, however, seen a print of the Descriptive Memoir itself, bearing to be signed by Major Stuart, "Acting Deputy-Director of Revenue Settlement." The following entries are important:—

"*Mirasi Tenure.* As the Government have recognized the *Mirasidar's* claim to a percentage fee (*swatantram*) on the Taram assessment, the following arrangements are made for its future collection and payment."

This entry speaks for itself. The tenure was *mirasi* tenure, and there was one *mirasidar*. Then occurs the following:—

"The fee is fixed at 2-annas in the rupee of assessment of both dry and wet lands for which the lands are divided into (1) Pangu (II) Durkast and (III) Waste."

The word "Pangu" refers to the original cultivated land—that is to say, land cultivated by persons or a person, or institution, belonging to the village. "Durkast "refers to lands granted by the Government for cultivation not by villagers, but by outsiders. "Waste" refers to jungle or uncultivated land

The main point to be kept in view is the form of the entries of the lands, the issue as to which is whether they are temple lands or are private property or Pangu lands. The importance, accordingly, of special reference to Pangu lands is clear. That entry is as follows:—

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"*Pangu Lands.* This is an Ekabogam village and the lands have hitherto been held by one *pattadar*. The fee registered against these lands is at present a mere matter of account and need not be collected, as the *mirasidar* himself holds the lands. But if these lands hereafter become waste by relinquishment and are taken up again by a stranger, they will be chargeable with the fee, plus the Taram assessment, and the fee thus collected will be payable to the *mirasidar*."

The village is spoken of as an Ekabogam village. "Ekabogam" according to Wilson is:—

"The possession or tenure of village land by one person or family without any co-sharer. The appellation is continued in some instances where other parties have been admitted to hold portions under the original tenure as long as that remains unaltered."

It is stated that the lands have been hitherto held by one *pattadar*, and that the *mirasidar* himself holds the lands. The extreme importance of this entry arises from the events which had taken place in and about the early sixties of last century.

It seems fairly plain that by the middle of the nineteenth century various demands were being made to obtain a statement of the rights of *mirasidars* in this part of India. In the volume named "Chingleput, late Madras District," compiled under the orders of the Madras Government by Mr. Charles Stewart Crole, the position is thus described.—

"In 1834 it began to induct outsiders into the permanent possession of lands, and issued *pattas* to such persons. In 1859 it compelled the *mirasidars* to declare once for all the extent of their individual holdings, and proceeded to issue *pattas* accordingly, which it at first styled *mirasi pattas*.

"In the same and following years it warned *mirasidars* that they would have to pay the assessment on all lands in their holdings, whether they cultivated or not, and limited by new rules, which have since increased in stringency, the occasions on which, and then only as a matter of grace, remissions would be given.

"In 1863 the Government directed the abolition of the words '*mirasi patta*' and "*payikari patta*" which had previously appeared as a heading on those documents in order to distinguish *mirasi* from ordinary tenure, and it ordered the name of the '*pattadar*' merely to be inserted, thus distinctly proclaiming that it would no longer recognize any difference in tenure."

This historical circumstance gave great weight to the Settlement and Survey, about to be referred to, made in the year 1876. It is in particular noticeable that a special column of *pattadars*, with a demand for their names, appears in the Return, and that this coincides with the acknowledgment of the *mirasi* tenure. The application of this to the situation of the village, whose ownership is in suit, will be immediately seen. It would rather appear that no public document of anything like equivalent value to that of the Report of 1876, with regard to the details of any properties which were at once *mirasi* and *patta*, had ever been previously issued.

It is accordingly of special importance to know who was the *mirasidar* holding a *patta*, and, therefore, *pattadar* of those particular lands in suit. Appended to each entry of grants of land in the village is a column headed "*pattadar's* Name and No." It cannot be seriously disputed that the *putta* was No. 1 *patta*.

Who, then, was the holder of these lands, occupying the position at once of *mirasidar* and *pattadar's* No. 1? Item by item the entries under "*pattadar's* Name and No." are Nattu Varadappa Mudaliar, Trustee of Tirumushi Alwar Pagoda" The entries are repeated and repeated in the same sense. And, in short, there is here an official affirmation that these lands are temple lands; that they are held in No. 1 *patta*; and that the trustee of the temple is Varadappa.

It would accordingly appear to be clear that this official document, which it cannot be doubted was prepared after minute inspection and enquiries on the spot, sets at rest any doubt as between private and temple ownership and clearly affirms the latter. Varadappa was not the private owner; he was the Dharmakartha or trustee. It, however, must be admitted that although this was the official view, the record does not commit Varadappa himself to such an affirmation or admission.

Most fortunately, however, there are elements of probation existing, applicable to the regime of Varadappa, which greatly help to

clear this difficulty away. These instances may be given : —

(1) On the 8th February 1888 Varadappa brought a suit against the Government in regard to certain lands and trees, which he alleged he was debarred from cultivating. He desired a declaration to establish his right "to the said property as absolute owner thereof." It is, however, an entire mistake to reckon this an assertion of private ownership, because Varadappa describes himself as plaintiff and a Dharmakartha of the temple at Madavilagam village, and the first three statements of his plaint are as follows : —

"1. The village No. 137 *viz*, Madavilagam and all its *miras* appertain to, and form portion of, the endowments of the temple of Tirumushi Alwar situated in the said village, Poonamalle Division, Saidapat Taluk, Chingleput District.

"2. The plaintiff above named is the hereditary Dharmakartha of the said Devastanom.

"3. Plaintiff's ancestors have, from time out of mind, been enjoying the lands under numbers described below by building choultry, cultivating the soil and raising a *tope*, &c., paying revenue to the Government for the said lands."

As *mirasidar* and as trustee of the temple his grievance against the Government was that he was not entitled to extend the rights which he asserted over certain further lands and trees, and accordingly the suit was substantially for the purpose of enabling that extension to be made, presumably for temple purposes, and accompanied with the assertion that— *quoad* the temple—the village of Madavilagam "and all its *miras*" were the endowments of the temple of which Varadappa was the Dharmakartha.

(2) A statement signed by "Nattu Varadappa Mudaliar, Dharmakartha," and made before the Deputy Tahsildar, Poonamalle Division, is also produced. This statement refers to the *paimash* of 1876, and is to the effect that the entire village is the Ekabogam village of the temple, *viz*, of Tirumushi Alwar ; that he, Varadappa, is the Dharmakartha of the temple ; and he goes on to state : "Whenever any one wants to build a house on vacant lands other than the land on which houses have been in existence from time immemorial in the village Nattam of this village, it is usual for me to grant lands to such persons, and to get deeds executed therefor."

(3) This was quite true, and various deeds of that character are referred to in the proceedings—that is to say, they are called rental agreement deeds, and are addressed to Varadappa, as on the 27th March 1876, and signed "Nattu Varadappa Mudaliar, Dharmakartha of Tirumushi Alwar Devastanom"; or, as in that of the 7th March 1904, after Varadappa's death, to Evalappa the second, his son, thus named: "S. Nattu Evalappa Mudaliar Avergal, son of S. Nattu Varadappa Mudaliar, Shrotriemdar, Kondaikatti Vellala, Vaishnavite, *mirasdar* of the village of Madavilagam as well as Dharmakartha of Tirumushi Alwar Devastanom."

It is of importance to observe that Varadappa is named and names himself the Dharmakartha. This is in truth the legal equipollent to trustee. The position of Dharmakartha is not that of a *shebait* of a religious institution, or of the *Mahant* of a *mutt*. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character.

In the very learned judgments delivered in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1), the distinction between those functionaries is explained. But a Dharmakartha is literally and no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee.

The details need not further be entered upon as to these deeds, which appear to be numerous, and to assert clearly the fiduciary position in which Varadappa and even his successor, the present respondent, stand. They are by no means confined to a period subsequent to Major Stuart's report in 1876; one, for instance, is dated the 22nd January 1870, executed to Varadappa as "Dharmakartha of Tirumushi Devastanom," and describes Madavilagam as "the *miras* village of the said Alwar." In fact, there are documents extending over a period of about forty years, all framed on that footing, a footing which negatives private but affirms temple ownership. Their Lordships do not

(1) 27 M. 435; 14 M. L. J. 105.

doubt that that was a public fact in 1876, when the report was made; and the subsequent transactions in the life of Varadappa, and even of his successor, the present respondent, confirm that view. This was plainly the state of affairs when, on Varadappa's death, the respondent succeeded him as hereditary Dharmakartha.

A separate argument involving some detail was submitted with regard to the *topes*, or grover, belonging to the temple, on which their Lordships will only say that after full investigation they are convinced the *topes* in suit have been sufficiently traced to temple ownership.

The doubts, accordingly, which would have warranted the line of judgment indicated from the opinion of the High Court, above cited, have now disappeared. In the opinion of the Board the properties in suit are established to be temple properties. The statements and records made in the year 1910 do not substantially bring any fresh light on the situation. It must, of course, be plain that it would require circumstances unique to warrant the transfer or transformation of those endowment lands into the private property of the trustee. There is, in fact, nothing of the sort. In the present suit the respondent's right and title as personal owner have been successfully challenged, and the lands in question must, all of them, be restored as endowments of the temple.

In case it should be thought to have been omitted, their Lordships merely further observe on this head that during the period extending from 1825 there were clearly established several items of the property in dispute which could be identified as still remaining as temple lands To these items there were added, in the course of discussion, several further items which were traced from register to register, and clearly and separately identified as temple lands by name and freed from the doubt as to the personal ownership of the former *mirasidar*, Evalappa. They, too, have been claimed by the respondent as his own, and this is a notable circumstance. These facts might have proved obstacles to the learned Judges of the High Court in forming their conclusion and assisted in removing any doubt which they felt; but the view which has been taken by their Lordships of the larger issue, namely, of the effect of the 1876 register on the transactions to which Varadappa was a party, affects the whole of the lands in suit, and makes it unnecessary to deal with the individual items referred to.

It will now be seen how serious is the position of the respondent as a claimant for the continuance of the trusteeship of this temple and its endowments. The doubts in the minds of the Courts below on the subject of his being allowed to continue in office, are sufficiently plain. But when it is now decided that the whole of this litigation has substantially been occupied by an unfounded assertion, supported by the concoction of accounts—an assertion by the trustee of private ownership in himself and a powerful resistance to the recovery of these properties for the trust which he administers—it does not appear to their Lordships to be open to them, on any sound principles either of administration or of law, to permit the continuance of the respondent in the office of Dharmakhartha.

The conduct of the respondent, even in the course of the present suit, has been sufficiently grave to be thus noted by the Judges below. Says the District Court Judge:—

"My finding is that the Exhibit K series were got up for the purposes of this suit, and that they have been proved to contain false entries in many instances."

In the High Court the pronouncement was quite as strong. The learned Chief Justice observes:—

"The District Judge has found that the defendant failed to keep proper accounts and that the accounts which he has brought into Court in this case were written up for the purposes of this case. We have ourselves examined the accounts and we regret to say that there are very serious reasons for believing that that has been the case and that the accounts have been largely written up for the purposes of this case."

Their Lordship have considerable doubt as to whether any litigant found to have been guilty of serious reprehensible conduct of this description could ever have

been retained in the office of Dharmarkartha. The worshippers of the temple, the true beneficiaries in the endowments, are entitled, at least in regard to the trusteeship thereto, as also a Court of Law before whom such delinquencies are established, to insist upon the first step towards trustworthiness in administration being taken by the removal of the trustee. Most unhappily the guarantee for that trustworthiness has been destroyed. Although the Board very willingly admits that much allowance must be made for the inaccuracy of Karnams, and of other officials who may have been anxious to fortify the trustee's personal rights by methods which were unwarranted, the respondent must, however, stand answerable for such conduct.

Their Lordships do not doubt that if the High Court had been of the opinion now delivered with regard to the merits of the suit, the trustee would have been removed from office. The Board desires that in the remit, which their Lordships will humbly recommend to His Majesty to make, the High Court shall select as trustee a person or persons of such sufficient standing in the District as will enable the transfer from the respondent of the property to be effectively made and the administration thereof purely for the purpose of the endowment effectively secured.

The scheme drawn up in the District Court, and referred to in the proceedings of the High Court, would appear to be not unsuitable for the case, but these two fundamental alterations must be taken into account. In the first place, the list of endowments must, of course, be enlarged to suit the affirmation as to the extent of the temple property made in the plaint and here affirmed, and, secondly, a new and independent trustee will be nominated to administer the scheme.

Their Lordships will humbly advise His Majesty to remit the case accordingly to the High Court, with a finding that the properties in suit belong to the endowments of the temple; that the respondent as Dharmakartha and trustee thereof be removed from office; that a scheme be framed for trust administration under a new trustee; and that the judgment of the High Court of the 6th March 1917, except as regards costs, be recalled, and that the respondent do pay the costs of this appeal.

Solicitor for the Appellants:—Mr. *Douglas Grant.*

Solicitors for the Respondent:—Messrs. *T. L. Wilson & Co.*

R. N. & W. C. A.

Appeal allowed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 499 of 1921.
August 9, 1921.

Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

Kumar SARAT KUMAR RAY—DEFENDANT—APPLICANT

versus

RAM CHANDRA CHATTERJEE—OPPOSITE PARTY.

Commission—Application by defendant asking for commission to examine himself—Discretion of Court—Appellate Court, interference by—Civil Procedure Code (Act V of 1908), O. XVI, rr. 19, 21, O. XXVI, r. 4.

Rules 19 and 21 of O. XVI of the Code of Civil Procedure have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. A case of this description is governed by O. XXVI, r. 4 of the Code. [p. 10, col. 1.]

In cases under O. XXVI, r. 4 of the Code of Civil Procedure a distinction must be observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. Where an application is made by a defendant who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a *forum* of his choice though he resides beyond the jurisdiction of such Court. [p. 10, col. 2]

A Court of Appeal should exercise great caution when invited to interfere with an order of the Trial Court made with jurisdiction in the exercise of its discretion as to the granting of a commission. Each case must depend upon its own circumstances and no rule as to the exercise of that discretion can be laid down [p 11, col. 1.]

In this case the suit was instituted in the Burdwan Court and the defendant resided in the Rajshahye District; the lower Court refused the application

of the defendant to be examined on commission. This order was set aside by the High Court, and the defendant was allowed to be examined on commission in Calcutta on payment of Rs. 1,000 as costs to enable the plaintiff to make arrangements for his cross-examination, the sum to be retained by the plaintiff irrespective of the result of the suit. [p. 11, col. 1.]

Civil Rule against the order of the Subordinate Judge, Burdwan, dated 21st July 1921.

Dr. *Sarat Chandra Basak* and Babu *Surendra Mohan Ghose*, for the Petitioner.

Babus *Dwarka Nath Chuckerbutty*, *Kali Kinkar Chuckerbutty* and *Apurba Charan Mookerjee*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order of the Trial Court in respect of two applications made by the petitioner, who is the defendant in a pending suit. His first application was to have himself examined on commission in support of his own case. His second application was for the issue of a commission to examine Babu Brojo Lal Chakravarty, a Vakil of this Court, to prove three documents which have been produced at a late stage of the proceedings.

As regards the first application, it cannot be disputed that the defendant was not entitled to the order as a matter of right under rr. 19 and 21 of O. XVI of the Code of Civil Procedure. Those rules apply to persons who are ordered to attend in person to give evidence, including persons who may be parties to a suit, but are required to give evidence as witnesses. The rules have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. A case of that description is governed by O. XXVI, r. 4 of the Civil Procedure Code which provides that any Court may in any suit issue a commission for the examination of any person resident beyond the local limits of its jurisdiction. Here the defendant resides in the District of Rajshahye, beyond the local limits of the jurisdiction of the Burdwan Court where the suit has to be tried. Consequently, the Court has a discretion in the matter and has to regard all the circumstances before the application is granted or refused. In the present case, the defendant alleged that he was indisposed. It is possible that the gravity of his ailment has been exaggerated and it may not be absolutely impossible for him to be present in the Court in Burdwan although he resides at a distance of more than 200 miles from the Court premises. It must not be overlooked, however, that in cases under O. XXVI, r. 4, a distinction has been observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. This distinction has been emphasised in connection with the corresponding rules of the Supreme Court in England, as is clear from the decisions in *Ross* v. *Woodford* (1), *New* v. *Burns* (2), *Emanuel* v. *Soltykoff* (3) and *Keeley* v. *Wakley* (4). In these cases, particularly in the judgment of Chitty, J., in *Ross* v. *Woodford* (1) and of Lindley, L. J., in *New* v. *Burns* (2), it is pointed out that where an application is made by a defendant and specially by a defendant who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a *forum* of his choice though he resides beyond the jurisdiction of such Court. We do not overlook that in the cases mentioned the defendants resided not merely beyond the jurisdiction of the British Court but also beyond the seas, namely, in South Africa, in Canada and in Russia respectively. The principle, however, is based on good sense and there is no reason why it should not be borne in mind when a Court is called upon to consider an application under O. XXVI, r. 4 by a person residing beyond the local limits of the jurisdiction of the Court though a resident in British India. To compel such a defendant to come over, at great expense, to attend the trial or to give up his case, might be oppressive and unfair, and, on this ground it was ruled in *Adamji Khadi Bhai* v. *Issuf Ahmed Mulla* (5) that it would be wrong to apply to the case of a defendant the principles that are applicable to the

(1) (1894) 1 Ch. 38; 63 L. J. Ch. 191; 8 R. 20; 70 L. T. 22; 42 W. R. 188.

(2) (1895) 64 L. J. Q. B. 104; 14 R. 339; 71 L. T. 681; 43 W. R. 182.

(3) (1892) 8 T. L. R. 331.

(4) (1893) 9 T L. R. 571.

(5) 16 Ind. Cas. 760.

case of a plaintiff asking for a commission to examine himself.

It is plain, however, that a Court in the position of a Court of Appeal must exercise great caution when invited to interfere with an order of the Trial Court made with jurisdiction in the exercise of its discretion. In this connection, we may re-call the observations of Lord Esher, M. R. in *Emanuel* v. *Soltykoff* (3): "The Court had to exercise its discretion as to granting a commission, and this Court would be very unwilling to interfere with the exercise of that discretion by the Court below. Each case must depend upon its own circumstances, and no rule as to the exercise of that discretion could be laid down. If this Court saw that the discretion had been wrongly exercised, if it saw that the case in all its bearings was not laid before the Court below, if it saw that the Court below misapprehended an important part of the case, this Court would interfere. The Court below seemed to have treated the matter as if it was merely a commission to examine witnesses." In the case before us the Court below overlooked the distinction which should be observed in the treatment of an application by the defendant as distinguished from a similar application by the plaintiff. In these circumstances, we hold that the order of the Court below should be set aside and the defendant should be examined on commission. But we are clearly of opinion that such examination should not take place at his residence in the interior of the Rajshahye District. If an order of that description were made in favour of the defendant, the plaintiff might be seriously prejudiced. We consequently direct that the defendant be examined on commission in Calcutta and in order to ensure that the plaintiff may not be unduly embarrassed, we direct that the defendant do pay to the plaintiff the sum of Rs. 1,000 (rupees one thousand only) as costs in order to enable him to make adequate arrangements for the cross-examination of the defendant. The payment of this sum will be a condition precedent to the carrying out of our order, and the money will be retained by the plaintiff irrespective of the result of the suit. The other expenses in connection with the commission will be borne in the first instance by the defendant. How such costs should be ultimately dealt with, will be determined by the lower Court on the result of the suit. The petitioner undertakes to deposit the sum of Rs. 1,000 in the Court below to the credit of the plaintiff within two weeks from this date and the plaintiff will be entitled to take that money forthwith from the Court.

As regards the second point we are of opinion that Babu Brojo Lal Chakravarty also should be examined on commission in Calcutta. We do not decide the question of the admissibility of the documents which are sought to be proved by his evidence. When he has been examined on commission, the matter will be considered by the Subordinate Judge in the light of the evidence placed before him. We make this order so as to avoid possible difficulty at the appellate stage.

The result is that this Rule is made absolute and the order of the lower Court set aside in the manner directed. The petitioner must pay the costs of this Rule to the opposite party. We assess the hearing fee in this Rule at five gold *mohurs*.

Let the record be sent down to the Court below at once in order to enable that Court to resume the trial of the suit.

B. N. & N. H.

Rule made absolute.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 303 OF 1919.

August 31, 1921.

Present:—Sir William Ayling, KT., Officiating Chief Justice and Mr. Justice Odgers.

CHINNAPPA PILLAY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KAILASAM PILLAY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Will—Execution of more than one testament—Implied revocation of earlier by later Will, tests for determination of—Clause in last Will "as Wills previously executed have not been brought into force," meaning of.

The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former or the two are incapable of standing together. [p. 13, col, 2.]

Petchell, In the goods of, (1874) 3 P. & D, 153; 43 L. J.

P. 22; 30 L. T. 74; 22 W. R. 353 and *Lemage* v. *Goodban*, (1865) 1 P. & D. 57; 35 L. J. P. 28; 12 Jur. (N. S.) 32; 13 L. T. 508, referred to.

If it is possible to collect from the terms of the later Will an intention to dispose of the testator's propety in a different manner from the former Will, the earlier Will stands revoked. The testator's intention is to be the guide and it does not matter if the second Will does not provide for the whole subject-matter of the first. [p. 14, col. 1.]

Dempsey v. *Lawson*, (1877) 2 P. D. 98 at p. 105; 46 L. J. P. 23; 36 L. T. 515; 25 W. R. 629 and *Plenty* v. *West*, (1852) 1 Rob. 264; 16 Beav. 173; 22 L. J. Ch. 185; 17 Jur. 9; 1 W. R. 3; 51 E. R. 743; 96 R. R. 82, referred to.

A clause in a later Will "as the Wills previously executed by me have not been brought into force" means only that the testator not having died since he made his previous Wills the dispositions now made by him were to be operative. [p. 14, col. 2.]

Appeal against the decree of the District Court, South Arcot, dated the 31st of March 1919, in Original Suit No. 13 of 1919.

Messrs. *A. Krishnaswami Aiyar* and *K. Balasubramania Aiyar*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar* and *S. Muthiah Mudaliar*, for the Respondents.

JUDGMENT – In this appeal two alleged testamentary papers of one Vankatachalam Pillai, deceased, who died on 26th August 1914 are in question. They are dated, respectively, 24th January 1913 and 2nd January 1914 and are marked Exhibits A-1 and A. The latter is propounded by a minor Kailasam Pillai, son of Venkatachalam, by a concubine of his, Velliammai by name. This Kaillasam Pillai applied to the District Court of South Arcot for leave to prove A and for the issue to him of Letters of Administration with this Will annexed. A-1, the alleged earlier Will, is propounded by respondents Nos. 3 and 4, who are two of the three sons of Thillainayagam Pillai, brother of the testator, who was adopted into another family. The learned District Judge found for the genuineness of both these papers, A and A-1, and admitted them both to Probate. He also found that the earlier Will was not revoked by the later. Letters of Administration were granted jointly to the widow of deceased (respondent No. 2) and respondents Nos. 3 and 4.

Three questions are raised on this appeal.

(1) The genuineness of the Wills.

(2) The revocation of the earlier by the later.

(3) Inferential intention to revoke.

As to the first point, Mr. A. Krishnaswamy Iyer for the appellants, the divided brother of the testator and his son, frankly stated that he could not say the Wills were forgeries, *i. e.*, were not in the handwriting of the testator. We think it sufficient to say that we are satisfied from the evidence that the Wills A 1 and A are in the handwriting of the testator. We were then asked to refuse Letters of Administration on the ground that the history of the custody of these two documents was not satisfactory and was not such as to remove all doubt as to their genuineness. The story of the concubine, who is the only witness who saw the testator write and sign the Wills, is that the two Wills were given to her. After the death she put them into a box and gave them to her servant from whom 5th respondent took the Wills. Fifth respondent is the third of the sons of Thillainayagam Pillai mentioned above. There is evidence that after cremation the 3rd and 5th defendants and one Vadivelu Pillai (P. W. No. 2) and Monigar Ratnam Pillai (P. W. No. 4) met, and opened the box and took out the Wills and read them. The Wills were actually produced by Vadivelu Pillai in the Court of the District Munsif of Mannargudi in Original Suit No. 47 of 1915 filed by Valliammai to recover these Wills and other documents. On the other hand, 1st respondent's (1st appellant here) account is that deceased gave him a box containing mortgage and other documents and that when the testator died there was no box by his side as described by the plaintiff's witnesses. The District Judge who has examined the evidence with care has come to the conclusion that the account given by 1st appellant cannot be accepted and a further examination of the evidence does not lead us to a different conclusion. We, therefore, agree with the District Judge that there is no reason why these paper writings, A and A-1, should not be received as the testamentary papers of the deceased.

The 3rd point was not argued and we are not prepared to say that inferential intention to revoke, *i. e.*, any conclusive evidence of such intention derived from evidence of surrounding circumstances apart altogether from any inference to be derived

from the provisions in the documents themselves, is in any way established. If there is in fact an intention to revoke the earlier Will by the later it must be gathered from inferences drawn from the documents themselves.

This leads us to the second point which was argued at length before us. A somewhat detailed examination of the two Wills will be necessary. The earlier one (A-1) was in favour of Ramaswami Chetty, the executor who renounced. It begins: "As I feel weak often and as the Wills previously written by me are not operative, this Will containing the following dispositions shall come into force after my lifetime." The testator sets out a list of property owing or belonging to him and aggregating Rs. 18,012. He leaves Rs. 5,000 to Kailasam Pillai, and the interest to his mother as his guardian during his minority, Rs. 500 to Valliammai and her daughter, Rs. 120 each annually to his wife and aunt and Rs. 2,000 for his funerals and for Neivedyam. Out of the balance the executor is to perform Abishekam, Neivedanam and Kulathali. To the wife is further given the house in Mannargudi for life, remainder to Muttayan (3rd respondent). Out of the balance the executor is to conduct any charity he likes. The flower-garden at Chidambaram is left to charity. The Rs. 5,000 due on Varthamanam by Vadivelu Pillai is to be recovered and used for Nataraja temple if the Tiruppany work done b : Vadivelu is not done in 4 years (Exhibit G). The testator adds that a copy of the Will has been sent to the executor. This is denied by Mr. Ramaswamy Chetty in a letter to the Vakil for Valliammai (Exhibit E).

The later Will (Exhibit A) is also executed in favour of Ramaswami Chetty and begins: "As the Wills previously executed by me have not been brought into force, all the dispositions mentioned herein shall be operative after my lifetime."

Rs. 21,504 is said to be the amount of outstanding due to the testator as detailed in the schedule. There is no schedule to the paper. This Will begins with four new legacies, *viz.*, Rs. 5,000 for gilding the silver Mancham in Nataraja temple; Rs. 1,000 to Mottayan: Rs. 500 to Sundaramurthy (4th respondent), and Rs. 500 to Sadasivam (6th respondent). The legacy of Rs. 5,000 to Kailasam, interest to be paid to his mother during minority appears also in the Will. The legacy of Rs. 500 to Valliammai and her daughter is omitted, probably because in the interval between the two Wills the testator had endorsed 17 pro-notes in favour of the former. The legacies to his wife and aunt are the same but they are specified as to be derived from the interest on Rs. 3,000 which after their lives is to be devoted to 'any charity.' The amount of Rs. 2,000 for funerals, etc., is reduced to Rs. 1,000 and there is no disposition of the balance as in A-1. As for the disposition of the house in this Will, the wife is to have 'during her lifetime, the right only to enjoy my ancestral house.' There is no disposition of the property after this life estate and there is, therefore, an intestacy as to this.

Further, out of the balance the executor is directed to conduct a permanent charity in Nataraja temple. A certain Manai is given to the executor, on majority to Kailasam with the garden—presumbly the flower-garden given to charity in the former Will.

There is no mention of the amount due on Varathamanam.

Thus the resemblances between the bequests in the two Wills amounts to this:—

(*i*) The legacy of Rs. 5,000 to Kailasam is the same in both.

(*ii*) The legacies of Rs. 120 to the wife and aunt are the same, with this difference that they are directed to be paid out of interest on Rs. 3,000, in the later Will, and the capital is bequeathed after their lives.

(*iii*) The bequest of the house to the widow for life appears in both.

On this state of facts what is the law:—

Williams on Executors, 10th Edition, Volume I, page 119, approved in many cases and also by Sir J. Hannen, in *Petchell, In the goods of* (1), says:—

"But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as

(1) (1874) 3 P. & D. 153; 43 L. J. 22; 30 L. T. 74; 22 W. R. 353.

Swinburne says above, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they be all clearly testamentary, may be admitted to Probate, as together containing the last Will of the deceased."

Further, Lord Penzance in *Lemage* v. *Goodban* (2) said:—"Now it was argued that in the case of more than one testamentary papers, each professing in form to be the last Will of the deceased, it is necessary for the Court, before concluding that they together constitute the Will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered, relates to the disposition of the testator's property, and not to the form of his Will. What dispositions did he intend?—not, which, or what number, of papers did he desire or expect to be admitted to Probate,—is the true question"

So *Dempsey* v. *Lawson* (3) per Sir J. Hannen: "If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later Will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty* v. *West* (4)."

Therefore, if we can collect from the terms of the later Will an intention to dispose of his property in a different manner from the former Will, the earlier stands revoked. The intention is to be the guide and the case last cited shows that it does not matter if the second Will does not provide for the whole subject-matter of the first, *e.g.*, the intestacy as to the house referred to above. Now, there is here no express clause of revocation. What do the words "as the Wills previously executed by me have not been brought into force" mean? A very similar clause appears in A-1. Before answering this question we may pause for a moment to consider the arguments of Mr. A. Krishnaswamy Iyer that, if the testator intended all his prior *Wills* to be valid, no administration ought to go on any *one* paper. There is no evidence as to what happened to his prior Wills—they may have been destroyed. The concubine gives evidence that *these* two Wills were given to her. She does not speak as to others. It certainly looks as if A-1 was not intended to be destroyed by the testator. We must proceed on the state of things left by the testator so far as we have them in evidence. To return to the words quoted above. They may mean merely, "as a Will only operates on death and I have not yet died, my Wills have as yet had no operation." On the other hand, they may mean, "As I have not died since I made the previous Will, and, consequently, they have had no effect, they are to have none but the disposition I now make are to be operative." If the latter is the proper meaning, which appeals to us, in our opinion they point very strongly to an implied revocation in words. However, it is not necessary to stand on this ground alone. The resemblances in the two Wills have already been pointed out. It could hardly have been the intention of the testator that the legacies to Kailasam should be cumulative. The same applies to the legacies to the widow and aunt, and the repetition of the disposition of the life-estate in the house to the widow has no meaning or legal effect. As Sir F. Jeune, P. said in *Chichester* v. *Quatrefages* (5): "It appears to me that he (testator) never could have intended that the codicils should stand together, for the purpose only of doubling such legacies as a Court of construction might hold to be cumulative." In *Bryan, In the Estate of* (6), it was held that revocation might be implied from the terms of the last document as the funeral and testamentary expenses were provided for twice over (as in the case before us) and it was very doubtful if the legacies could possibly be held to be cumulative when they would amount to more

(2) (1866) 1 P. & D. 57; 35 L. J. P. 28; 12 Jur. (N. S.) 32; 13 L. T. 508.

(3) (1877) 2 P. D. 98 at p. 105; 46 L. J. P. 23; 36 L. T. 516; 25 W. R. 629.

(4) (1852) 1 Rob. 264; 16 Beav. 173; 22 L. J. Ch. 185; 17 Jur. 9; 1 W. R. 3 51 E. R. 743; 98 R. R. 82.

(5) (1895) P. D. 186 at p. 189; 64 L. J. P. 79; 11 R. 605; 72 L. T. 475; 43 W. R. 667.

(6) (1907) P. D. 125; 76 L. J. P. 30; 96 L. T. 584.

than the value of the estate. The case in *Dempsey* v. *Lawson* (3), was quoted with approval. Here, the legacies to Kailasam if cumulative together with funeral expenses and legacies to the widow and aunt as those to the new legatees in Exhibit A would amount to over Rs. 30,000, considerably over the total value of the estate. Again, it cannot be said that there is nothing inconsistent between the terms of the Wills: the resemblances show that if these are to be read together and taken as cumulative they cannot be satisfied in full from the estate. The dispositions as to the balance and the flower-garden are clearly inconsistent with each other. Though the Court of Appeal has held that the Court "will endeavour so to read the words as to support the admissibility of both documents to Probate"—*Townsend* v. *Moore* (7) it seems to us impossible here to do so, and, moreover, the words first used in the Will and discussed above and the whole tenor of the second Will seems to us to imply that the intention of the testator was that only the later Will should be operative and the prior Will should be revoked. To this extent we allow the appeal. No argument has been addressed to us to show that the learned District Judge was wrong in the order he made respecting to whom the Letters of Administration should be issued. We, therefore, direct Letters of Administration to issue with the second Will only, dated 2nd January 1914, annexed, to 2nd, 3rd and 4th defendants on their executing the necessary security bonds within 6 weeks from this date. We think that plaintiff's costs should be paid by 1st defendant. There will be no other order as to costs.

M. C. P.

Appeal allowed in part.

(7) (1905) P. D. 66; 74 L. J. P. 17; 53 W. R. 338; 92 L. T. 335.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 761 OF 1916.

January 30, 1920.

Present:—Mr. Justice Broadway and Mr. Justice Bevan-Petman.

FATEH KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

LANGRA—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardian, unauthorised, sale by—Suit for possession by minor—Compensation to vendee—Relegation of parties to original position—Specific Relief Act (I of 1877), ss. 38, 41.

An unauthorised guardian sold certain property of a minor. Out of the sale-proceeds certain other property of the minor was freed from a mortgage charge. In a suit by the minor for possession of the property, the vendee contended that the sale should be set aside only on the condition of his being compensated by the minor for the money that he had expended:

Held, (1) that as the action of the unauthorised guardian was *ultra vires*, the sale must be regarded as void *ab initio* and the minor must be given a decree for possession of the land free from all payments; [p. 16, col. 2.]

(2) that, however, having regard to the provisions of sections 38 and 41 of the Specific Relief Act, the parties were to be relegated to the position which they held before the deed of sale was executed. [p. 16, col. 2.]

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 4th December 1915, varying that of the Senior Subordinate Judge, Sargodha, dated the 16th June 1915.

Mr. *Nanak Chand*, for Appellants.

Mr. *Mukand Lal Puri*, for Langra, and *Ram Chand Manchanda*, for *Musammat* Bibi, Respondents.

JUDGMENT.—On the 13th April 1908 183 *kanals* 5 *marlas* of land were sold to Fateh Khan, Sultan Muhammad, Muhammad and Allah Yar for Rs. 1,700. The vendors were *Musammat* Panah Bibi and Raja who purported to be acting as guardians of Langra and *Musammat* Bibi. *Musammat* Panah Bibi was the widow of Sikandar, a brother of Langra, and *Musammat* Bibi was her daughter; Raja was the first cousin of Langra.

On the 15th August 1914 Langra instituted the suit which has given rise to this appeal. In it he claimed that the whole of the property sold belonged to him; *Musammat* Bibi's name having been entered as owner of a half incorrectly, and asked for a decree for possession of the said land or, in the alternative, possession of a half and a declaration that he would be entitled to the

other half on the marriage or death of *Musammat* Bibi. He alleged further that inasmuch as the sale had been effected by persons not authorized to sell on his behalf, the sale should be declared void *ab initio* and inoperative as against him. The suit was contested by the vendees who claimed that in any event they should be compensated, if possession was taken away from them, inasmuch as the money which represented the sale price had been utilised by them in the payment of debts due by Langra's father, those debts being partly charged on the property sold as well as other immoveable property and partly due on bonds and *bahi* accounts. The Trial Court held that Langra's claim to be the owner of this property was correct but that *Musammat* Bibi was entitled to half the land in suit so long as she remained alive or unmarried. The Court further held that the money paid by the vendees to the former mortgagees was a valid charge on the property and should be paid before possession was taken by Langra. The money paid by the vendees on account of debts due on bonds, etc., was disallowed. Accordingly, a decree was passed in Langra's favour for immediate possession of a half of the land on payment of half of Rs, 689-4-0, The sale-deed in question was cancelled and it was declared that Langra could not get possession of the remaining half so long as *Musammat* Bibi remained alive or unmarried

The vendees preferred an appeal to the District Judge against the decree of the Trial Court who considered that the proper course was, as far as possible, to put the parties in the position which they would occupy if no sale had taken place and that Langra was to get possession of his own half share at once and of the other half share subsequently on re payment of all that the vendees gave except the expenses of the sale-deed, *viz*, Rs. 30. The decree of the lower Appellate Court, therefore, was that Langra was to be put in possession of half of the land in suit on payment of Rs. 835 and in reference to *Musammat* Bibi's half share it was declared that he had similar rights and that in the event of her death or marriage he might obtain possession of that half on payment of a further sum of Rs. 835. Against this decree the vendees as well as Langra have preferred appeals, the vendees through Mr. Nanak Chand and Langra through Mr. Mukand Lal Puri.

It is now common ground that, inasmuch as the sale was effected by *Musammat* Panah Bibi and Raja who were not entitled to act on behalf of Langra, the sale must be regarded as void *ab initio*. It is not necessary, therefore, to discuss the various authorities cited by the learned Counsel at the Bar.

Mr. Nanak Chand contended that, having regard to the provisions of sections 38 and 41 of the Specific Relief Act, we should impose such conditions on Langra as would result in his clients being compensated for the money expended by them. Mr. Ram Chand Manchanda, who argued the case on behalf of Langra, urged that, inasmuch as the sale was void *ab initio*, no such conditions could or should be imposed. It appears that Ghulam, the father of Langra, on his death had left some $523\frac{3}{4}$ *kanals* under mortgage and also was indebted on bonds, etc., to the extent of Rs. 955. By the transaction entered into by *Musammat* Panah Bibi and Raja the land now in suit—183 *kanals* 5 *marlas*—was sold and by this sale the larger area of $340\frac{1}{2}$ *kanals* was freed from the mortgage charges. As, however, their action was *ultra vires*, the sale must be regarded as void *ab initio* and Langra must therefore, be given a decree for possession of the land in suit free from all payments. We think, however, that, having regard to the provisions of sections 38 and 41 of the Specific Relief Act, the vendees are entitled to claim that the parties should be relegated to the position they were in on the 13th April 1908, and we order accordingly.

We, therefore, accept this appeal so far as to declare that the sale-deed dated 13th April 1908 is void and of no effect as against Langra and that he is entitled to possession of half immediately without any payment whatsoever so far as that deed of sale is concerned and of the other half on the same terms in the event of *Musammat* Bibi dying or marrying. We further declare that the parties are relegated to the position which they held on the 13th April 1908 before the deed of sale was executed.

In the circumstances we leave the parties to bear their own costs.

N. H.

Appeal partly accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 51 OF 1922.

April 12, 1922.

Present :—Pandit Kanhaiya Lal, J. C. Mr. Lyle, A. J. C. and Mr. Ashworth, A. J. C.

HINGA—ACCUSED—APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Evidence Act (I of 1872), s. 27—Confession—Material corroboration.

The discovery of the dead body of a person, alleged to have been murdered, at a place indicated in a confession, would be material corroboration of the confession, but where it is difficult to say whether the discovery was made before the confession or afterwards the confession ought not to be accepted. [p. 25, col. 2.]

Appeal against the order of the Sessions Judge, Sitapur, dated the 1st February 1922.

Messrs. *L. S. Misra* and *K. P. Misra*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.

LYLE, A. J. C.—(*March* 28, 1922).—Hinga, Brahman, has been convicted under section 302, Indian Penal Code, of the offence of murdering one Lalta Pasi on the night of the 21st September 1921 and has been sentenced to death. He appeals and the case is also before us for confirmation of the sentence.

On the evening of the 21st September 1921, just before the nightfall, a man came to Lalta Pasi as he was washing at a well in his village and told him that he was wanted by the Tahsildar (by which term, apparently, the *zemindar's karinda* is meant) at the village Shahjahanpur, which is about a mile-and-a-half distant from Durgapurwa, (which appears also to be known as Bhagwanpur), in which Lalta Pasi lived. Lalta's son, Narain, was at home at the time and saw his father go off with the man but he did not see the man's face. Lalta Pasi did not come back and his son, Narain, went to search for him the next morning. He found that the Tahsildar had not been to Shahjahanpur and as he could get no trace of his father he went to the Police Station on the 23rd September and reported the fact that his father had disappeared. Sub-Inspector Mahabir Singh, who was present at the Police Station when Narain made his report, went to Bhagwanpur on the morning of the 24th September. He states that on the 24th of September, the very day on which he arrived at the village, he inspected a *kondon* field which is four furlongs from Shahjahanpur and five furlongs from Durgapurwa and which is now stated to be the place where the murder was committed. On the 26th of September he took the statements of two persons, Panchu and Budhu, who have been produced as witnesses and who have stated that they heard shouts from the direction of this *kondon* field, indicating that a man was being murdered there and they both recognised the voice of Gajodhar. The Sub Inspector states that he suspected Gajodhar and yet we find that, although he had the statements of these two persons directly implicating him and Gajodhar appeared before him on the 28th, he was not arrested until the 29th. I may note that the learned Sessions Judge has refused, and I think rightly, to accept the evidence of these two witnesses against Gajodhur. The Sub-Inspector states that he received information that Gajodhar had *pahi* cultivation at Manona which is about 14 miles to the north of Durgapurwa and that Hinga, the appellant, who lives in Manona, was related to Gajodhar. So far as I can find from the record, the Sub-Inspector had no other reason whatsoever for requiring Hinga to attend the investigation. All we know with regard to the relationship is in the confession of Hinga himself who says "*rishte men mere mausia hote hain.*" According to the Sub-Inspector, Hinga was brought to him in the evening of the 23th of September and on the 29th of September, Hinga made a confession and after making it took the Sub Inspector to a pond to the west of the village of Shahjahanpur and pointed out the body of Lalta which was floating in the pond. The body which was tied up in a *dhoti* and had one *ghara* tied to the neck and another to the feet, was taken out of the pond and after an inquest was held it was sent for medical

examination. The medical evidence is to the effect that the body was in such an advanced stage of decomposition that the cause of death could not be ascertained, and that one of the elbow joints was dislocated but no bones were fractured. Hinga was placed before a Magistrate on the 3rd of October 1921 and his confession was recorded but he has retracted that confession both in the Court of the Committing Magistrate and before the learned Sessions Judge. As a result of his inquiry, the Sub-Inspector sent up Gajodhar and Hinga for trial and the learned Sessions Judge, while refusing to rely on any of the evidence which has been produced against Gajodhar, has convicted Hinga on the ground that his retracted confession is corrobrated by the fact that he pointed out the whereabouts of the dead body of Lalta. Hinga's confession is as follows:—

"Gajodhar, Brahman, who was related to me as my mother's sister's husband, came to me at Manona and told me that I had to kill a man and that I should accompany him to Marjha and see Behari Singh. I went with him. On return from that place on Wednesday, three days ago, Gajodhar asked me to go and fetch Lalta Pasi from his house. I brought Lalta Pasi. At that time Gajodhar's brother, Jagannath, was also present. Gajodhar and Jagannath seated themselves under a *ber* tree in the *kondon* field and told me that I should strike with a *lathi* when I had brought him near. Thereafter, I went to Lalta at the hamlet of village Misni and said to him: 'Come along, you have been summoned by the Tahsildar of Nilgaon at village Shahjahanpur.' Thereupon Lalta accompanied me and when he reached near the *ber* tree, I gave him two blows with the *lathi*. He screamed out and fell down and then, when he got up and attempted to run away, Gajodhar and Jagannath came up and brought Lalta to the ground by belabouring him with *lathis*. Then Gajodhar, sitting upon Lalta, caught hold of his throat and Jagannath seized his hands. Shortly after, Lalta Pasi expired. Gajodhar and Jagannath were saying, 'Will you again lodge a complaint against us about the cattle and implicate the whole of our family?' No one approached us. Thereafter, we tied up his dead body in a *dhoti* and threw it in the pond of Shahjahanpur and then we went away to our respective houses."

The first point to be noted is, that though it may be admitted that Gajodhar was on terms of enmity with Lalta Pasi, yet Hinga had never even seen Lalta Pasi before and had no reason whatsoever for joining Gajodhar in committing the murder. Hinga lives at Manona, which is 14 miles away from the village in which Lalta Pasi lived. He is not a blood relation of Gajodhar and no reasonable explanation is given why he should have been required to attend the investigation at all. It is improbable, though not impossible, that, merely at the instance of Gajodhar, he would have agreed to join in committing the crime. He says that it was he who went in the evening to fetch Lalta Pasi from his house. In an attempt to corroborate this statement one witness, Mangrey, has been produced but the learned Sessions Judge has rightly refused to place any reliance on his evidence. Mangrey, while saying that Hinga is the person who came to fetch Lalta, has at the same time said: "The Thanedar suggested to me that the man with him dressed in a black coat was the man who went to call Lalta. He told me to say so." It is noticeable that Mangrey's statement was not recorded until the 29th of September, that is, the day on which the body was recovered.

An attempt has been made to explain this away by saying that Mangrey had gone away from the village on the morning after the man came to call Lalta; but as the Sub-Inspector declares that on the 24th of September he was informed that Mangrey Ahir had seen the man who took Lalta away from the village, one would have thought that the Sub Inspector would have tried to get hold of such an important witness at the earliest possible moment. And one would also have thought that the Sub-Inspector would have tested before reliable witnesses whether Mangrey could identify Hinga out of a number of other persons as the man who had come to fetch Lalta. In this connection it is also to be noted that there is no explanation in the confession as to how Hinga found out where Lalta lived. There is merely the bald statement "I brought Lalta Pasi." The next point to be noticed is that Hinga in his confession gave the *kondon* field as the scene of murder. The Sub-Inspector appears

to have selected this *kondon* field as the scene of the murder on the 24th of September for no very convincing reason. We may take it that when the man came to call Lalta to Shahjahanpur it had already been decided that he should be murdered and his body thrown into the tank at Shahjahanpur, and it seems at least unlikely that the murderers would choose a place for the commission of the crime which is not less than 4 furlongs as the crow flies, from the tank, when they could just as easily have chosen a place much nearer to the tank to commit the crime. The only reason given by the Sub-Inspector for thinking that the crime might have been committed in the *kondon* field is that it was beaten down in parts. In cross-examination, however, he admits that, although it had been raining on the 21st of September, he saw no foot-prints in the field. And it is very noticeable that the confession says nothing whatsoever about how the body was carried from the *kondon* field to the tank. All we have is: "Thereafter we tied up the dead body in a *dhoti* and threw it in the pond at Shahjahanpur and then we went away to our respective houses." Then, again, Hinga has stated that he gave Lalta two *lathi* blows and that when Lalta attempted to run away Gajodhar and Jagannath both came up and belaboured Lalta with *lathis* until he fell to the ground. As the intention was to murder him we may take it that the blows inflicted by Gajodhar and Jagannath were of considerable violence, yet the medical evidence is that not a single bone was broken. It is also to be noted that, according to this confession, Hinga took no part whatsoever in the actual murder. Again, although criminals do at times confess for no apparent reason, they generally do so in some vague hope of escaping from the penalty of their crime when they know or believe that there is evidence against them. In the present instance it is difficult to understand why Hinga should have made the confession at all. There was no reason whatsoever for connecting him with the crime and not a particle of evidence had, up to the time of his confession, been obtained against him. If, however, we believe that it was on his information that the body was recovered from the tank that fact would be the very strongest corroboration of his confession, and though the confession may be vague and unconvincing in itself, yet, when so corroborated it would be sufficient on which to base a conviction. I shall, therefore, now consider whether it is established beyond any reasonable doubt that it was owing to the statement made by Hinga that the body was discovered in the tank. The evidence with regard to the recovery of the body is contained in the statements of the Sub-Inspector and Chaudhri Karamat Husain. There are two very remarkable discrepancies between the statements of these two witnesses. The Sub-Inspector declares that Hinga gave some information to him sometime after 12 o'clock on the 29th September, that he proceeded to record his statement and he finished taking down the statement at about 4 P. M., and that after he had done so Hinga took him to the pond between 4 and 5 P. M. and pointed out the body lying on the water among the reeds and that the body was taken out of the water about 5 P. M. On the other hand, Chaudhri Karamat Husain before the Committing Magistrate said that he reached the place where the investigation was being held before 12 noon and the discovery of the body took place within an hour afterwards. Before the learned Sessions Judge the Sub-Inspector stated that Chaudhri Karamat Husain arrived some time between 10 and 11 A. M. so that, according to the Chaudhri, the body must have been discovered at any rate before 1 P. M., while, according to the Sub Inspector, it was not discovered until after 4 P. M. And after it was discovered it was taken out and examined and an inquest was held and the body was sent off to Sitapur. All this was done according to Chaudhri Karamat Husain in his presence, yet he says that he left the place at about 4 P. M. What is the reason for this extraordinary discrepancy. Both the Sub-Inspector and Chaudhri Karamat Husain stated that the body could not be seen from the bank of the pond but it is very noticeable that they give different explanations of how it was hidden. The Sub-Inspector says that it could not be seen because of reeds (*narai*) and he says "*narai ke andar upar utrati hui lash baramad hui.*" On the other hand, Chaudhri Karamat Husain does not mention the existence of reeds at all. He says that "there are trees

in the pond at the place where the body was found. The body was among the low-growing parts of those trees. The trees stood out a little above the surface of the water." How can this discrepancy be explained? Again, the Sub Inspector states that it was after the statement of Hinga had been fully recorded that Hinga took them to the tank. Chaudhri Karamat Husain states that Hinga's statement was recorded in his presence and that he was questioned about the *gharas*. This is a clear indication that the statement was taken not before but after the body was recovered. It is in the evidence of the Sub-Inspector that other persons were present at the time of the recovery of the body, yet not one of them has been produced to give evidence on a point which is absolutely vital to the case. The discrepancies between the statements of Chaudhri Karamat Husain and the Sub-Inspector cannot but raise a reasonable doubt as to whether Hinga did in fact give information leading to the discovery of the body. The pond is quite close to the village site and it is difficult to avoid the suspicion that the body which had come to the surface owing to decomposition and was floating on the water may have been seen by one of the villagers and information of the fact given to the Sub-Inspector. If the confession was properly obtained, it was necessary to stick to the *kondon* field as the scene of the crime in spite of the improbability of the crime having been committed there, as that place had been selected by the Sub Inspector at the very beginning of his investigation and he was pinned down to it by the statements which he had already recorded of Panchu and Buddhu. And suspicion is strengthened by the fact that evidence of more than a doubtful nature has been produced in an attempt to strengthen the case against Hinga. I refer to the statements of Mohkam and Panchan who live $1\frac{1}{2}$ and 3 miles respectively from Manona and have been produced to say that they saw Hinga and Gajodhar together on a Wednesday, presumably on the day of the murder.

Though I am not prepared to say that Hinga did not give the information which led to the recovery of the body, yet I consider that there is at least a reasonable doubt whether he did so, and I think that in the circumstances it would not be safe to rely on his confession.

I would, therefore, allow the appeal, set aside the conviction and sentence, acquit the appellant and direct that he be immediately released from custody.

ASHWORTH, A. J. C.—(*March* 28, 1922).—In this case Hinga, Brahman, appeals from his conviction under section 302, Indian Penal Code, by the Sessions Judge of Sitapur on a charge of murdering one Lalta Pasi on the night of the 21st September 1921. The Sessions Judge has sentenced the appellant to death and this sentence is before us for confirmation.

The deceased Lalta Pasi on the evening of the 21st September 1921 had just returned to his house from washing at a well when a man came for him and said that he was wanted by the "Tahsildar" (by which term is meant the *zemindar's karinda*) at the village of Shahjahanpur about a mile away. At the time when the message reached the deceased, his son, Narain, P. W. No. 1, was at home and he saw his father go off with the man, though he did not see the man's face. As his father did not return that night, the son, Narain, searched for him next morning. He found that the Tahsildar had never been to Shahjahanpur and continued the search for his father throughout the 22nd and 23rd. At 6 P. M. on the evening of the 23rd September he reported the fact of his father not returning at the *Thana*. The Sub-Inspector Thakur Mahabir Singh, got to the village of Bhagwanpur, where the deceased man lived, at 7 A.M. on the morning of the 24th and then went to Shahjahanpur. He suggests that he suspected one Gajodhar, because he ascertained from two persons, Panchu and Buddhu, that they had heard shouts in a certain *kondon* field near their threshing-floor, that the shouts indicated that some one was being murdered and, lastly, that they both recognised the voice of Gajodhar. These witnesses have come into Court and corroborated this statement of the Sub-Inspector, but the Sessions Judge has disbelieved their evidence as to the recognition of the voice of Gajodhar and we think rightly. It appears that the real reason why the Sub Inspector suspected this Gajodhar was that Gajodhar had been ejected from a certain holding which had been given to the deceased man and, again, the deceased had brought a criminal complaint against

one Jagannath, Gajodhar's brother, in respect of the rescue of some cattle which the deceased had been impounding. Accordingly, the Sub-Inspector on the 28th managed to procure the attendance of Gajodhar and took his statement. He says that he let him go. The same evening the appellant, Hinga, was brought before the Sub-Inspector. The reason for his being suspected, as given by the Sub-Inspector, is merely that Hinga was related to Gajodhar. He also was questioned and something or other in his demeanour must have excited the suspicion of the Sub-Inspector as he kept him under arrest. The next day he says that Hinga made a long statement, which he recorded between the hours of 2 and 4 P. M. on the 29th, and afterwards went with the Sub-Inspector to a pond at Shahjahanpur where the body of Lalta was discovered floating in some deep water amid the reeds. In consequence of this statement of Hinga, both Gajodhar and Jagannath were taken under arrest. Hinga made a confession before M. Muzaffar Muhammad Khan, Magistrate of the First Class, who subsequently committed the case on the 3rd of October. It is not explained why he was not put before the Magistrate earlier. In this confession he stated that Gajodhar was his mother's sister's husband and that he had asked him to assist in getting Lalta murdered. At his suggestion he went to Lalta and fetched him on the excuse that the Tahsildar of Nilgaon at village Shahjahanpur required his presence. On bringing him to a certain spot agreed upon the appellant struck the deceased twice with a *lathi* whereupon the deceased was attacked by Gajodhar and Jagannath and throttled. All three of them subsequently tied up the body and threw it into the pond at Shahjahanpur. Jagannath was discharged by the Committing Magistrate and Gajodhar was acquitted by the Sessions Judge on the ground that there was no sufficient evidence to corroborate their implication by Hinga the accused. Hinga has been convicted by the Sessions Judge on the basis of his own confession of the 3rd October (which he retracted both in the Court of the Committing Magistrate and that of the Sessions Judge) on the ground that it is sufficiently corroborated by the fact of his having pointed out the whereabouts of the body in the pond at Shahjahanpur.

The Sub-Inspector has attempted to make out that the appellant Hinga had made a long statement to him between 2 and 4 P. M. on the afternoon of the 29th previous to his pointing out the whereabouts of the body. There are, however, strong grounds for believing that whatever statement was made by Hinga to the Sub-Inspector was subsequent and not previous to his pointing out the whereabouts of the body. Chaudhri Karamat Husain, *zamindar*, who is a prosecution witness and who associated with the Sub-Inspector in his investigation into the disappearance of Lalta, is stated by the Sub-Inspector to have come to him on September the 29th between 10 and 11 A. M. while the Sub-Inspector was in *bagh*. The Sub-Inspector goes on to say: "It was sometime after 12 o'clock when Hinga accused, gave me certain information. I finished taking down what he stated at about 4 P. M. I went to the pond between 4 and 5 P. M." Now, Chaudhri Karamat Husain has stated explicitly that Hinga gave information leading to the discovery of the body within half an hour of his, Karamat Husain's arrival on the scene. It is impossible to resist the idea that the certain information given by Hinga at 12 o'clock was that he could point out the body. In my experience in a case of this nature a Sub-Inspector would not take down a detailed statement of a person who was in a position to give some palpable corroboration of his story without first demanding that corroboration.

It has been indeed suggested that this discrepancy between the evidence of the Sub Inspector and that of Chaudhri Karamat Hussain as to the time that the body was discovered throws a doubt on the fact of its being discovered by reason of information given by the appellant Hinga. Hinga, in the course of his examination before the Sessions Judge, has stated as follows:—

"Next day in the evening I was taken to a pond. The Chaudhri was there shooting. He brought down a bird. They said there was no bird there but a corpse. The Thanedar had it got out by means of Chamars. I was again pressed by the Thanedar. He told me to say that Jagannath, Gajodhar and I

had put the body there. I refused. I was again shut up overnight and sent for trial."

There does not seem to be, however, any reason to doubt that the body was discovered on information received from Hinga. Chaudhri Karamat Hussain, the *zemindar*, should, I think, be believed when he states that Hinga, Brahman, the accused, gave information leading to the recovery of the body. The Sub-Inspector's placing of the time when the body was discovered as subsequent to the lengthy recording of Hinga's statement was, I am of opinion, due to the Sub-Inspector's desire to show that Hinga's statement to him was corroborated by the finding of the body subsequent to his making it. Obviously if the body was found before he made the statement the statement might be challenged as the desperate expedient of a man who had to explain how he came to know where the body was. Chaudhri Karamat Hussain's statement is open to no suspicion and it is not only in respect of the time of the finding of the body that he has differed from the Sub Inspector but also in respect of the injuries noticed on the body. The Sub-Inspector has spoken of a dent in a bone of the skull but in this he is contradicted by the evidence of the Civil Surgeon. Chaudhri Karamat Hussain states that he noticed no injury on the body and though it is mentioned in the inquest report which he signed he signed that report without reading it. It is to be observed that in his first examination by the Committing Magistrate, Hinga, the accused, never objected that the evidence of his finding the body was false nor alleged that he had been ill-treated by the Police. He set up an *alibi* but reserved all details of it for the Sessions Court. It was for the accused to summon some of the many witnesses of the discovery of the body, if he wished to challenge the allegation that the body was pointed out by himself Chaudhri Karamat Hussain was cross-examined as to whether he had a gun and he has denied this. If he had not a gun he could not have shot the bird as pretended by the accused before the Sessions Judge.

The Sessions Judge has stated that there is no corroboration of the confession of the accused except the fact that the accused pointed out the whereabouts of the body in the pond. It appears to us that there is considerable corroboration of this confession apart from the finding of the body on Hinga's information. The confession states that the appellant was asked to go and fetch Lalta Pasi from his house and did so. The evidence of the son of the deceased establishes that a man did fetch the deceased from his house. Again in the confession it is stated that the accused told the deceased that the Tahsildar wanted the deceased at Shahjahanpur. The evidence of the son of the deceased proves that this was what was said by the man who fetched him. The confession states that Gajodhar and Jagannath, when murdering the deceased, used the words: "Will you again lodge a complaint against us about the cattle and implicate the whole of our family?" It is proved that the deceased had lodged a complaint against Jagannath for rescuing the cattle. This complaint is Exhibit D. Again, in the confession it is stated: "Gajodhar and Jagannath seated themselves under a *ber* tree in the *kondon* field and told me that I should strike Lalta with a *lathi* when I had brought him near." Now the Sessions Judge has distrusted the witnesses Panchu and Buddhu, who say that they heard the sounds of an altercation in a *kondon* field one night at about the time of the deceased's disappearance, chiefly because he does not think that they could have recognised the voice of Gajodhar. It seems, however, impossible to doubt that the Sub Inspector did hear something about a noise in the *kondon* field on the night of the disappearance of the deceased. The evidence of not only Mahabir Singh, the Sub-Inspector, whose statement as to the time that he discovered the body we think untrue, but also of M. Abdul Hamid Khan, Officer incharge of Sidhauli, who was concerned in investigation of the case on the 27th and 28th September, establishes the fact that the inquiry began on the 24th September at the *kondon* field where there was a suspicion of foul play having taken place. The reason for this suspicion is stated by the Sub-Inspector to be that a constable had told him of there being a field showing signs of having been trampled down. This I take to mean that Panchu and Buddhu had on the 24th told people of the noise that they heard in the night before they were examined on the 26th by the Sub-

Inspector, and that this led a constable to examine the neighbourhood where they had heard the noise. M. Abdul Hamid Khan put in a map, Exhibit E, showing this field. Mahabir Singh also put in a map, Exhibit C, showing the field. Now in both these maps a tree is shown near the spot where the murder was committed. In this confession the appellant has stated that he was told to bring the deceased up to a *ber* tree and did so. This detail, therefore, of the confession is corroborated by the existence of a *ber* tree near the *kondon* field which fell under suspicion as the scene of foul play at a very early stage of the proceedings. Lastly, there is one most important item of the confession which receives strong corroboration. The accused has stated that on reaching near the *ber* tree he gave the deceased two blows with a *lathi*. Deceased screamed out and fell down and then when he got up and attempted to run away Gajodhar and Jagannath came up and brought the deceased to the ground by belabouring him with *lathis*. Then Gajodhar sitting upon Lalta deceased caught hold of his throat and Jagannath seized his hands. Shortly after Lalta expired. Now the Sub-Inspector Mahabir Singh attempted to make out a case that the deceased had received a severe injury on the head. The medical evidence makes it clear that this was not the case. Dr. Masha Allah Khan has given evidence that there was no injury to the skull, the bones of which were entire. No marks of injury were discovered on the body and the cause of death could not be ascertained. Inasmuch as the theory of Mahabir Singh was that the deceased had been killed by a blow on the skull it is impossible to hold that the appellant could have been tutored by the Police suggesting to the contrary that the deceased was killed by strangulation. In so far as the accused says this, his evidence is corroborated by the medical evidence, to this extent that the deceased was not killed by any severe blow which would break a bone or leave an impression on a bone. Later on in his evidence Dr. Masha Allah Khan says: "It is possible that the death may have been due to suffocation and all signs of it might have disappeared as a result of decomposition. Marks of violence would similarly have disappeared if they were confined only to soft tissues." This statement, especially the last few words of it, corroborates the confession and does not corroborate the statement of Mahabir Singh as to signs of a severe blow denting the skull of the deceased. As stated above, the evidence of Chaudhri Karamat Husain likewise corroborates the confession as against Mahabir Singh's evidence. We have, therefore, an important corroboration of the confession as to the method of death and this corroboration also goes to disprove the statement of the accused in Court that his confession was induced by the Police.

I am of opinion that where an accused person has pointed out the whereabouts of the body of a man who has undoubtedly been murdered and has made a confession which not only is uncontradicted by any of the facts proved in the case but indeed receives corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make out a strong case to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there is such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking part in it.

It seems scarcely necessary to refer to the suggestion of the Counsel for the accused that possibly there was no murder whatever. The fact that water pots were slung on to the body of the deceased in order to make it sink precludes the possibility of suicide.

It remains to state that, believing as I do the confession of Hinga, it is obviously to be regretted that the person or persons whose tool he professes to have been should escape. The Sessions Judge in stating that there was no evidence to corroborate the retracted confession of the appellant so far as it implicated Gajodhar and Jagannath is not strictly accurate. There is good evidence that these men had a motive for compassing the death of the deceased. There is also evidence that the appellant, Hinga, was a relation of Gajodhar's. Indeed it appears incidently in the evidence of the Sub-Inspector Mahabir Singh that Gajodhar had brought food for Hinga and, therefore, was present in *bagh* when Hinga first gave information leading to the discovery of the body. At

the same time we agree with the lower Court that there is not sufficient corroboration to be found in these facts of the confession so far as Gajodhar and Jagannath are concerned.

No argument has been addressed to us as to sentence, and the part which the appellant admitted in his confession that he had played in bringing about the death of the deceased was such that we can see no ground for not inflicting the extreme penalty. The case appears to us to fall under section 114 of the Indian Penal Code. If the appellant after decoying the deceased into the clutches of his murderers had retired before the murder was committed he would have been liable to be punished as an abettor. Being present when the murder was committed, he must be deemed to have committed the murder himself.

Accordingly, I would dismiss the appeal of Hinga, uphold his conviction, and, confirming the sentence, direct that it be carried into effect in accordance with law.

LYLE, A. J. C., AND ASHWORTH, A. J. C.,—(*March* 28, 1922).—As we differ in opinion in this case, the case with our opinions will be laid before the Judicial Commissioner for his opinion under the provisions of section 429 of the Criminal Procedure Code.

KANHAIYA LAL, J. C.—(*April* 11, 1922).—This is a Reference under section 429 of the Code of Criminal Procedure in a case in which the appellant Hinga has been convicted on a charge of murdering Lalta Pasi on the night of the 21st September 1921. The learned Judges, who heard the appeal and the reference for the confirmation of the sentence of death passed on the appellant, differed in their view of the evidence adduced and the case has, therefore, been referred to me for opinion.

It appears that Lalta Pasi was living in the village Durgapurwa, a hamlet of Misni. On the southwest of it about 20 fields away stands the *abadi* of Nanakpur, a hamlet of the village Umra, where Gajodhar used to live. Gajodhar had some *pahi* cultivation in the village Manone, which is about 14 miles north of this locality. He used to stay there at times with a relation of his named Kuddi. In 1327 Fasli he was ejected from some land, which he held in the village Misni, by the proprietor of the Nilgaon estate, and the land, from which he was ejected, was given to Lalta Pasi for cultivation. It is said that Gajodhar was consequently annoyed with Lalta and allowed his cattle to graze in the fields, cultivated by the latter. On the 3rd September Lalta made a report at the Police Station Sidhauli, stating that on the previous evening at about three *gharis* before sunset he found 10 or 12 heads of the cattle grazing in his *bajra* fields, that Basu and Ram Ghulam were standing there, and that when he tried to drive those cattle and take them to the pound, they raised an alarm and two other persons, named Jagannath and Debi Nath, came up from the village and rescued the cattle by force (Exhibit D). He also filed a complaint in the Court of the Tahsildar-Magistrate of Sidhauli, for the hearing of which the 23rd September 1921 was fixed. Among the persons accused were a son and a nephew of Gajodhar.

On the evening of the 21st September 1921 at about a *ghari* after nightfall a person, who described himself as a *sipahi* of the Nilgaon estate, came to call Lalta, saying that the Tahsildar of the Nilgaon estate was at the village Shahjahanpur and wanted him there. Lalta took with him a *lota*, a string and a spare *dhoti* and accompanied him and was not thereafter seen alive. The present appellant is said to be that person. Narain, the son of Lalta, states that he did not recognise the man, who had come to call his father, or seen his face, that his father told him that a *sipahi* had come to call him and that he saw his father going away with him. Mangrey, a neighbour, states that he heard a man calling out and enquiring where the house of Lalta was and he told him where it was and pointed out Lalta as he came along. Mangrey admits that he did not know the man from before, but in the Court of Session he indicated the appellant, Hinga, as the man who had come to call Lalta, adding that the Thanedar had suggested to him that the man with him dressed in a black coat was the man who went to call Lalta, and told him to say so.

As Lalta did not return home that night Narain searched for him on the following morning, and finding that the Tahsildar did not come to the village Shahjahanpur and that there was no trace of his father,

he made a report on the 23rd September 1921 at the Sidhauli Police Station at 6 P. M. stating the circumstances under which his father left the house and had not since returned or been traced. An investigation was started on the next day at 7 A. M. and it was ascertained that there was a *kondon* field, the crop of which was beaten down in parts. On the 26th September 1921 the second officer took down the statements of Panchu and Buddhu and ascertained from them that they had been present in their threshing floor on the night of the 21st September 1921 and had heard the cries of some person coming from the side of the *kondon* field shouting for help and saying that he was being killed. These persons profess to have gone that side to see what the matter was and to have recognised one of the assailants in the dark night by his voice as Gajodhar. A search of Gajodhar followed, and a Police constable was deputed to bring him and his relatives. On the 28th September 1921 Gajodhar was produced before him. The Officer-in-charge of the Police Station had meanwhile arrived. He took down the statement of Gajodhar and let him go and went away himself too, leaving the investigation in charge of the second officer. On the evening of the 28th September 1921 Hinga was brought from the village Manona. On the next day he is said to have made a statement and pointed out the dead body of Lalta, lying in a pond, where it was floating amid bushes, tied up in a *dhoti* by means of a rope to which two earthen *gharas* were attached. An inquest report was drawn up, in which it was stated that there was an injury on the skull 6 or 7 fingers long, disclosing a fracture of the bones (Exhibit B), but the medical evidence shows that no injury to the skull, the bones of which were entire, or to the other parts of the body, was noticeable. The body was in an advanced state of decomposition and in the opinion of the Medical Officer the cause of death was not ascertainable.

The body was identified by Narain and other persons as that of Lalta. On the 30th September 1921 Hinga was sent to a Magistrate, who recorded his confession on the 3rd October 1921. In that confession he stated that Gajodhar was his relation (*mausia*) and had asked him to join in the murder, that he had gone to call Lalta Pasi and had told him that the Tahsildar of the Nilgaon estate had come to Shahjahanpur and wanted him, that Lalta accompanied him up to the *ber* tree near the *kondon* field, that he attacked him from behind with a *lathi*, that Gajodhar and another person joined him in killing him to death, and that the body was subsequently tied up in a *dhoti* and thrown into the pond at Shahjahanpur. This statement was retracted before the Committing Magistrate and the Sessions Judge: and the question is what value can be attached to it and how far it is corroborated by the other evidence adduced.

If the dead body was discovered in consequence of the confession, the corroboration would be material, but the evidence produced about the time when the dead body was discovered is discrepant and it is difficult to say whether the discovery was made before the confession or afterwards. The learned Committing Magistrate observes that the confession was made after the accused had been three days in Jail; but the report on which the confession was recorded is not on the record and no order requiring his production on the 3rd October is traceable. On the 1st October an order was passed that he was to be sent to the Jail and kept apart from the other under-trial prisoners, but it does not appear why his confession was not recorded on that date and whether the delay was due to an attempt to get a conditional pardon given to him or to some other cause. The confession ascribes to the accused a leading part in the murder, though he had no possible motive for it beyond his distant relationship with Gajodhar, at whose instance the murder is said to have been committed. According to the confession the accused gave two *lathi* blows, and when Lalta fell down and attempted to run away, Gajodhar and another person came up and belaboured him with *lathis* and then throttled him, but, as has been stated already, no marks of injury to the skull or bones were found anywhere. It is surprising that accused should have been sent for from the village Manona and

detained while Gajodhar was brought and let go after his statement was taken down, though Panchum and Buddhu had implicated him in their statements. It is also noticeable that though the scene of the attack had been located several days earlier the body remained undiscovered till after the arrival of the appellant. The body was found in an advanced state of decomposition and must in the ordinary course have been badly stinking. The Shahjahanpur pond in which it was situated is close to the *abadi*. People go there for fishing and in the ordinary course it could hardly have remained unnoticed very long. There is a striking discrepancy between the statement of the Investigating Police Officer and Chaudhri Karamat Husain, the only search witness examined. The former states that the body was discovered between 4 and 5 P. M. after Hinga had made his statement, while the latter says that he was sent for at noon and the confession made half an hour later. Before the Committing Magistrate he said that the body was pointed out within an hour of his arrival. Mohkam and Pancham, residents of the village Manona, say that they saw the accused going with Gajodhar on the evening of Wednesday, that is, on the day the murder was committed; but if what they state is true (*kuch din baqi raha hoga*) the accused could hardly have covered a distance of 14 miles and reached the place where the deceased lived and the murder was committed a *ghari* after sunset. The evidence of Panchu and Buddhu, who profess to have heard the cries of the murdered man on the night of the murder but had not mentioned the same to any person till five days later, was rightly disbelieved by the learned Sessions Judge.

On the evidence adduced the confession cannot be accepted and the conviction of the appellant cannot stand. As pointed out by Straight, J. in *Queen-Empress* v. *Babu Lal* (1) the failure of the prosecution in many cases is due to the inveterate desire of the investigating officer not to work up to the confession but to get hold of a confession first and then work from it downwards. This is a case of that kind. The case is not free from doubt and the corroboration afforded by the alleged discovery of the body after the confession was recorded is open to question. I would agree, therefore, with the learned First Additional Judicial Commissioner in giving the accused the benefit of the doubt and acquit him of the offence with which he has been charged.

LEE, A. J. C., AND ASHWORTH, A. J. C.—(*April* 12, 1922).—In accordance with the opinion of the learned Judicial Commissioner the appeal is allowed, the conviction and sentence are set aside, the appellant is acquitted and he will be immediately released from custody.

N. H.

Appeal allowed.

( ) 6 A. 509 at p. 542; A. W. N. (1884) 229; 4 Ind. Dec. (N. s.) 155 (F. B.).

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITIONS NOS. 409, 410 AND 411 OF 1921.

September 19, 1921.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswamy Sastri.

In re KOCHUNNI ELAYA NAIR—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss 54, 58, 60, 177, 491—Martial Law Ordinance (II of 1921), cls. 6, 16—Offence committed in Martial Law area—Arrest of offender outside area, legality of—Summary Magistrate, remand by, of offender arrested outside Martial Law area, legality of—Habeas corpus, writ of—Jurisdiction of High Court.

It is not illegal for a Summary Magistrate appointed under Martial Law Ordinance II of 1921 to remand a person arrested by the Police outside the Martial Law area but charged with the commission of cognizable offences within the said area. Nor is the arrest by the Police outside the area illegal, as the Police only purport to exercise powers vested in them under the Criminal Procedure Code. [p. 30, col. 2.]

The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law. The Courts constituted under the Ordinance will follow, as far as possible, the procedure laid down in the Code. [p. 28, col. 2.]

Per *Spencer, J.*—The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender

may be found that determines the Court which has jurisdiction to try the offence. [p. 28, col. 2.]

Quære.—Whether the jurisdiction of the High Court to issue writs of *habeas corpus* is not excluded by clause 16 of Martial Law Ordinance II of 1921. [p. 29, col. 1.]

Per *Kumarasawami Sastri, J.*—Clause 16 of the Martial Law Ordinance does not refer to the general jurisdiction of the High Court to issue writs of *habeas corpus*. The section does not apply where the acts of the Martial Law Magistrates are wholly without jurisdiction. [p. 30, col. 1]

A Magistrate appointed under clause 6 of the Ordinance cannot try offences committed outside the Martial Law area or hold Court outside. But where he has powers as a Magistrate under the Criminal Procedure Code, there is nothing in the Ordinance to prevent the exercise of functions assigned to such Magistrate outside the area when the proceedings have not reached the stage of a trial but are only in the course of investigation preliminary to the offender being charged before a Magistrate. [p. 31, col. 1.]

When a Magistrate, who is vested with more than one power, under one of which only he has power to order a remand, purports to act in the exercise of another power which gives him no authority to do so, the case is one of irregularity which can be cured by the amendment of the order where there is no prejudice to the accused. [p. 31, col. 1.]

CR. M. P. No. 409 OF 1921.

Petition praying that, in the circumstances stated in the affidavit filed with Criminal Miscellaneous Petition No. 411 of 1921, on the file of the High Court, the High Court will be pleased to issue a writ of *habeas corpus* calling upon Mr. G. Batty, a Summary Magistrate under the Martial Law Ordinance in South Malabar to cause the body of Koshunni Elaya Nair, petitioner herein, to be produced for the purpose of determining or adjudging the legality of his detention.

CR. M. P. No. 410 OF 1921.

Petition praying that, in the circumstances stated in the affidavit filed with Criminal Miscellaneous Petition No. 411 of 1921, on the file of the High Court, the High Court will be pleased to issued a writ of *certiorari* removing to this Court for the purpose of being quashed the proceedings of Mr. G. Batty, a Summary Magistrate, under the Martial Law Ordinance in South Malabar, ordering the arrest and detention of the petitioner herein.

CR. M. P. No. 411 OF 1921.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing the release of the petitioner on bail pending trial of offences, if any, against him.

FACTS appear from the judgment.

Mr. *S. Srinivasa Aiyangar*, for the Petitioner.—The action of the Summary Magistrate in ordering petitioner's remand was illegal. Though the offense is alleged to have been committed in the Martial Law area, the petitioner was outside the area at the time of his arrest. The order appointing the Summary Magistrate only vests in him jurisdiction to try offenses committed inside the Martial Law area. He can neither hold Court outside the area or exercise jurisdiction over persons who are not within it. The words 'in any administration area' in clause 2 of the Ordinance means within the area and not for that area.

The Magistrate's order being clearly illegal is subject to revision by the High Court. The High Court has general power, even apart from the provisions of section 491, Criminal Procedure Code, to issue writs in the nature of *habeas corpus*. *Nataraja Iyer, In re* (1), *Ameer Khan, In the matter of* (2).

Mr. *J. C. Adam*, Public Prosecutor, for the Crown.—The Ordinance does not override the general provisions of the Criminal Procedure Code. The Police have power to pursue an offender anywhere in British India in cognizable cases. The offences were committed within the Martial Law area and petitioner's escape outside the area will neither debar the Police from arresting the offender nor the Magistrate before whom he is taken from remanding him to custody. Here the Summary Magistrate is also an ordinary First Class Magistrate under the Criminal Procedure Code.

ORDER.

CR. M. P. No. 409 OF 1921.

SPENCER, J.—This is an application for the issue of a writ of *habeas corpus* to cause the person of Kochunni Elaya Nair to be brought before the High Court for the purpose of determining the legality of his detention. The accompanying affidavit states that Kochunni Elaya Nair, the second Stanee of

(1) 16 Ind. Cas. 755; 36 M. 72; 23 M. L. J. 393; (1912) M. W. N. 1012; 13 M. L. T. 367; 13 Cr. L. J. 723.

(2) 6 B. L. R. 392.

the Mannarghat Nair family, was arrested on September 3rd and imprisoned in the Palghat Sub-Jail. It is alleged that he had, at the moment of arrest, just arrived at his own residence situated within the limits of the Palghat Municipality and that, after some questions being put to him as to the Moplah outbreak at Mannarghat, the Assistant Superintendent of Police directed the Inspector to take him into the Sub-Jail, that no warrant of arrest was shown to him and that he was not told anything about the offence with which he was charged. He was accordingly taken to the Sub-Jail, and on the 6th September an application for bail was put in before the Sub-Divisional Magistrate of Palghat, and was summarily rejected. It is added that the Taluk of Palghat and the town of Palghat within which the petitioner's residence and the Sub-Jail are situated, are outside the Martial Law area.

The Public Prosecutor informs us that he is instructed by the District Magistrate of Malabar to say that the accused is charged with having committed offences under sections 121, 395, 431, 436 and 380, Indian Penal Code and abetment of the same committed within Martial Law area and that he will be sent up for trial by the Special Tribunal constituted under Ordinance No. III of 1921 of the Government of India published in the Gazette of India, September 5, 1921.

Mr. S. Srinivasa Iyengar, on behalf of the petitioner, contends, (1) that the accused could not be legally arrested for an offence committed inside the Martial Law area when he was at the time of arrest at a place outside it, and (2) that the Magistrate, Mr. Batty, before whom he was brought and who refused to release him on bail, was at Palghat, a place outside the Martial Law area, and had no jurisdiction to exercise his powers at the spot, seeing that clause 6 of Ordinance No. II of 1921, dated 26th August 1921, provides for the constitution of Summary Courts of criminal jurisdiction for the purposes of this Ordinance in any administration area that may be proclaimed as a Martial Law area under clause 2. He argues that "in any administration area" means "within the area" and not "for that area."

The first point for which the learned Vakil is contending is a very strange one. It amounts to this that an offender has only to slip out of the Martial Law area to be immune from arrest and trial for acts done by him inside that area. The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the Court which has jurisdiction to try the offence—see section 177 of the Code of Criminal Procedure. Section 54 of the Criminal Procedure Code authorises any Police Officer to arrest without a warrant and without an order from a Magistrate a person who has been concerned in any cognisable offence, and the offences referred to by the Public Prosecutor or some of them are cognizable offences. Section 58 authorizes a Police Officer, for the purpose of arresting without warrant any person whom he is authorised to arrest under this Chapter (V), to pursue such persons into any place in British India. Section 60 directs a Police Officer making an arrest without warrant to take the person arrested without unnecessary delay before a Magistrate having jurisdiction in the case. There is no alternation of the law in this respect in consequence of the constitution of Martial Law Courts. The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law. On the contrary, clause 12 and the other clauses of Ordinance No. II indicate that the Courts constituted under the Ordinance will follow, as far as possible, the procedure laid down in the Code. Presumably, the Police will, as early as possible, take the petitioner into the Martial Law area and obtain the orders of a Court constituted under that Ordinance. This they can do without any order in the nature of an extradition order seeing that the whole of the Malabar District, a portion of British India, is under the administration of the British Government. It is for the petitioner's Vakil to show that the Police acted without jurisdiction in this instance, and as he has not succeeded in doing this, the first point raised by him fails.

I now proceed to deal with the second contention raised. The powers vested in this Court to issue writs of *habeas corpus* in the Presidency Town are contained in section

491 of the Criminal Procedure Code. Analogous powers are given us by section 456 in respect of European British subjects in any part of our jurisdiction whether in the City of Madras or in the Mofussil. In *Nataraja Iyer, In re* (1) Sundara Iyer and Sadasiva Iyer, JJ., expressed an opinion, following *Ameer Khan, In the matter of* (2), that the High Court has, by virtue of clause 18 of the Charter Act, power to issue writs of *habeas corpus* even outside the City of Madras and in respect of all British subjects whatsoever. Assuming that those learned Judges were right in this view, if we attempt to issue a writ of *habeas corpus* in this present case, we are confronted with clause 16 of Ordinance No. II of 1921 which declares that no Court shall have authority to make any order under section 491 of the Code of Criminal Procedure or to revise any order of sentence or to transfer any case from a Summary Court or have any jurisdiction of any kind in respect of any proceedings of the Summary Court. But Mr. Srinivasa Iyengar contends that if a Magistrate vested with the powers of a Summary Court in a Martial Law area steps outside that area and attempts to exercise his functions outside the territorial jurisdiction assigned to him by the Ordinance, his acts will be illegal and subject to our control and revision. We understand that Mr. Batty is the Sub-Divisional Magistrate of Palghat Division and that he ordinarily exercises the powers of a First Class Magistrate in Palghat which is outside the Martial Law area. If then the petitioner was brought before him by the Police as being the nearest Magistrate referred to in section 167 of the Code of Criminal Procedure, he would, as Sub-Divisional Magistrate, have authority to authorize the detention of the accused in such custody as he might think fit for a term not exceeding 15 days: or, if he had no jurisdiction to try the case, he might order the accused to be forwarded to a Magistrate having such jurisdiction. If, on the other hand, when the prisoner was brought before Mr. Batty, he was purporting to act as a Court of Summary jurisdiction constituted by the Martial Law Ordinance, what would be the proper order he should make upon an application being made to him? The proper course to be taken by a Magistrate who has no jurisdiction would be to decline jurisdiction and to reject the application on that ground. We must now see what is the illegal act which Mr. Batty is alleged to have committed according to the affidavit attached to the petition. This affidavit states that, when an application for bail was put in before the Sub-Divisional Magistrate on the 6th September, he summarily rejected the application without even hearing the Vakil. Now, to summarily reject an application would be the only course open to a Magistrate who finds he has no jurisdiction to deal with it, and in this view there was nothing illegal in the procedure of Mr. Batty and no act committed by him with which we could interfere, assuming that we have the power to do so. It is not stated in the affidavit that Mr. Batty ordered the petitioner to be remanded to prison but it is alleged that it was the Assistant Superintendent of Police who said "Better shove him in the Fort to-day" and directed the Inspector to take him there.

The result is that this point also fails and the application is dismissed.

There is a connected Criminal Miscellaneous Petition No. 410 of 1921 applying for the issue of a writ of *certiorari* which fails and must be dismissed for the same reason.

As regards Criminal Miscellaneous Petition No. 411 of 1921 which is an application to release the petitioner on bail, the information that we have is that the petitioner is arrested in connection with non-bailable offences. No further details are before us, and in the absence of such details we would not in any case exercise a discretion in petitioner's favour. That petition is also dismissed.

KUMARASWAMI SASTRI, J.—This is an application for the issue of a writ of *habeas corpus* by the petitioner who is charged with having committed offences under sections 121, 395, 431, 436 and 380 of the Indian Penal Code alleged to have been committed by him within the area proclaimed to be under Martial Law. He was arrested by the Police while he was in Palghat, a place outside the area and was remanded to Jail by Mr. Batty (who is the Sub-Divisional Magistrate of the Palghat Division and also a Magistrate invested with summary powers of trial under the Martial Law Ordi-

anee) under orders of the Military Commander for the purpose of the petitioner being sent for trial before the Special Tribunal constituted under Ordinance III of 1921. The grounds urged on petitioner's behalf are, (1) that the Police had no power to arrest a person who commits an offence within the Martial Law area but is found outside, (2) that the jurisdiction of Summary Courts and of Magistrates empowered to try offences conferred by Ordinance II of 1921 is purely territorial and that consequently Mr. Batty who purported to act as a Martial Law Magistrate outside the Martial Law area was without jurisdiction thus making the detention in Jail illegal. It was also contended that the Special Tribunal constituted under Ordinance III would have no power to try offenders who are found outside the Martial Law area even though the offences were committed within the area. I do not think it necessary to go into this question which is one to be decided by the Tribunal when the petitioner is placed before it for trial.

The power of the High Court, as an abstract question of law, to issue a writ of *habeas corpus* in the present case is not contested by the Public Prosecutor, though he contends that the facts of the case will not justify the High Court in issuing the writ. It has been held in *Nataraja Iyer, In re* (1) and *Ameer Khan, In the matter of* (2), that the Court has jurisdiction, having inherited the power from the Supreme Court. This jurisdiction is apart from the power conferred by section 491 of the Code of Criminal Procedure and is in no way curtailed by the provisions of the section. The Martial Law Ordinance excludes powers conferred by section 491 and does not refer to the general jurisdiction to issue the writ. Moreover, section 16 cannot apply to cases where the acts of the Martial Law Magistrate are wholly without jurisdiction, for example, when he proceeds to places outside the Martial Law area and tries persons or passes sentences. It only applies to acts done within the jurisdiction and powers conferred by the Ordinance, however illegal or irregular such acts may be, and not to proceedings passed wholly without jurisdiction.

As regards the first contention, I do not see anything in the Martial Law Ordinance which prohibits the arrest of persons who commit offences inside the Martial Law area but escape outside. The Penal Code has not been abrogated within such areas and so far as the arrest of such offenders is concerned the provisions of the Code of Criminal Procedure will apply so far as the arrest outside is concerned. Section 54 of the Code of Criminal Procedure gives the Police power to arrest without a warrant a person who is charged with the offences with which the petitioner is charged, and it seems to me that it makes no difference where the offence was committed so long as it is within British India. Section 60 directs that the person arrested should be produced without unnecessary delay before a Magistrate having jurisdiction in the case or before the Officer-in-charge of a Police Station. Under section 167 a Magistrate, whether he has jurisdiction or not to try the case, can order detention of the accused in custody for a period not exceeding 15 days and if he has no jurisdiction to try the case he can order the accused to be taken to the Magistrate having jurisdiction. Mr. Batty as Sub-Divisional Magistrate had power to remand the petitioner.

As regards the second objection it must be borne in mind that under section 6 of the Ordinance it is only persons who are already Magistrates that are appointed under the provisions of the Code of Criminal Procedure to exercise the power of a Summary Court. It is a specific power conferred on one who has the other ordinary powers of a Magistrate. There can be little doubt that their powers to sit as Magistrates trying offenders brought before the Summary Courts for trial are purely territorial and that they cannot exercise their powers of trial outside the Martial Law area. Section 2 provides that Martial Law shall be in force and the provisions of the Ordinance shall apply in the area specified in the Schedule and such other areas as the Governor-General in Council may by Notification direct. Section 3 refers to the administration of Martial Law in any area in which Martial Law is in force. Section 6 provides for the establishment of Summary Courts in any administrative area. Section 7 directs that no Summary Court shall

try any offence unless such offence was committed in the administration area in which the Court is constituted. These provisions make it clear that a Magistrate appointed under section 6 cannot try offences committed outside the area or hold Court outside. There is, however, nothing in the Ordinance to show that, as Magistrates appointed under the Code of Criminal Procedure, they cannot exercise the functions assigned to such Magistrates outside the area when the proceedings *have not reached the stage of a trial but are only in the course of investigation* preliminary to the offender being charged before a Magistrate. When a Divisional Magistrate is also appointed to try offences under section 6 there is nothing to prevent his exercising the ordinary powers of a Magistrate outside the area and arresting and remanding persons who are charged with offences inside the Martial Law area with a view to their being brought to trial inside the area or before the Special Tribunal.

Even if Mr. Batty was technically wrong in acting in his capacity of Special Magistrate, I think the defect would only be an irregularity, as his act would have been perfectly legal if he had acted as Sub-Divisional Magistrate. When a Magistrate, who is vested with more than one power, under one of which only he has power to order a remand, purports to act in the exercise of another power which gives him no authority to do so, the case is one of irregularity which can be cured by the amendment of the order where there is no prejudice to the accused. It is not shown that the accused would be in a better position if Mr. Batty had issued the order in his capacity of Sub-Divisional Magistrate.

In cases like the present when the arrest itself is not illegal and the offences are non-bailable I do not think the High Court will be exercising a proper discretion in directing the issue of a writ and directing the accused to be brought before it. Even assuming that the remand is irregular there is nothing to prevent the Police from arresting the accused the moment after his release is ordered and taking him before the nearest Magistrate and getting a remand. If it is brought to the notice of the Court that the Magistrate ordering the remand ought to have acted in one capacity rather than in another the proper course will be for the High Court to direct the Magistrate to remand the accused according to law.

There is also another reason why I do not think I ought to interfere at this stage. While the case was being argued the Government constituted the Special Tribunal before which the petitioner would be sent for trial. Section 6, clause 1 of Ordinance III of 1921 dispenses with the committal of the accused for trial and all that has to be done is for petitioner to be taken before it for trial. He can apply for bail to the Tribunal as it has all the powers of a Court of Session having original jurisdiction and as appeals from the Tribunal lie to the High Court he can move this Court if bail is wrongly refused. He has, therefore, an adequate remedy. I dismiss the petition for a *habeas corpus*.

The petition for the issue of a writ of *certiorari* is not pressed and is dismissed.

I do not think that I ought, at this stage and on the scanty materials before me, to direct the release of the petitioner on bail and I accordingly dismiss the petition without prejudice to his applying later on, if he is so advised.

M. C. P.

Petitions dismissed

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 279 OF 1922.
June 28, 1922.
Present:—Mr. Justice Walsh and
Mr. Justice Ryves.
KOHNA RAM—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Practice—Criminal revision—Case referred by Sessions Judge for enhancement of sentence—Application by accused thereafter on the merits, whether barred—Alternative charges—Complainant, whether can alter election.

The mere fact that a reference has been made to the High Court by a Sessions Judge for enhancement of sentence, has not the effect of depriving the accused of the right to apply to the High Court in revision.

It is contrary to public policy and to the recognised principles of the administration of the Criminal Law that when a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, to hold that it is open to a complainant to alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction.

Criminal revision from an order of the Sessions Judge, Saharanpur.

Mr. *Saila Nath Mukerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.

WALSH, J.—In our opinion this application must succeed. The fact that the matter has been in one form before another Judge of this Court is irrelevant. It was referred to this Court by the Sessions Judge for enhancement of sentence. A learned Judge of this Court looked into the matter and came to the conclusion that there was no ground for issuing notice. It would amount to a denial of justice to accept the argument of the Assistant Government Advocate that a reference by a Sessions Judge which this Court may or may not see fit in its discretion to entertain, resulted in depriving a convicted person of the right to apply to this Court in revision. It by no means follows from this view that any accused person has the right to come in revision more than once. At any rate he would come with little hope of success. The mere fact that he had failed on his first application to raise the point which he relied upon in his second, would give a discretionary power not to entertain the second application at all.

On the second point I hold a very clear view, without going into the authorities at all which have been discussed in a very able judgment by the Sessions Judge who has taken a very clear view of the matter, that there is one fact in this case which marks it off from any case which has been cited in argument. The charge might have been made against the accused under section 182 or section 211, but it seems to me to be contrary to public policy and to the recognised principles of the administration of the Criminal Law that when a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, to hold that it is open to a complainant to alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction. He should have thought of that before. A useful test to my mind is to assume that the charge under section 182 had been permitted to proceed to judgment; if it had resulted in a conviction which was subsequently set aside for want of sanction, or, on the other hand, in an acquittal also for want of sanction, it seems to me that under section 403, Criminal Procedure Code, that fact would have been an answer to a subsequent charge under section 211. The point may seem technical but a question of principle is involved, and, however right the conviction in this case may have been on the merits, I think the only course is to entertain this application and quash the conviction. The conviction is, therefore, set aside. The fine, if paid, must be refunded.

RYVES, J.—I agree.

BY THE COURT.—We accept the application in revision and quash the conviction. The fine, if paid, must be refunded.

W. C. A. *Conviction quashed*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 143 OF 1921.

June 21, 1922.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

ABDUL LATIF USMAN—DEFENDANT—APPELLANT

versus

HAJI TAR MAHOMED—PLAINTIFF—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (7)—Sanction to prosecute—Judge of High Court exercising Original Civil Jurisdiction, refusing to grant sanction—Appeal, forum of.

A Judge of a High Court sitting in the exercise of Original Civil Jurisdiction is a Court subject to the Appellate Jurisdiction of that High Court, so where a Judge in the exercise of such jurisdiction grants, or refuses to grant, sanction to prosecute, an appeal lies by virtue of clause (7) of section 195 of the Criminal Procedure Code, to the same High Court, on the Appellate Side.

Per *Shah, C. J. Quære*:—Whether an order refusing to grant sanction to prosecute under section 195, Criminal Procedure Code, is a judgment within the meaning of clause 15 of the Bombay High Court Letters Patent.

Appeal from the order of Mr. Justice Kanga.

Mr. *Velinkar*, for the Appellant.

Mr. *Coltman*, for the Respondent.

JUDGMENT.

SHAH, AG. C. J.—This is an appeal from the order of Mr. Justice Kanga refusing to grant sanction which was applied for by the defendant in Suit No 2600 of 1920. The sanction to prosecute was asked for in respect of a letter dated 16th October 1920 (Exhibit E), which was said to have been forged and also in respect of a statement made by respondent No. 1 as regards the settlement of the July shipment which was a matter in dispute between the parties. It is not necessary, for the purpose of this appeal, to state in detail the facts relating to the suit. The suit was decided on the 9th August 1920, when it was conceded by the plaintiffs that there was a settlement in respect of the July shipment.

An objection has been taken on behalf of the respondents that no appeal lies because the subordinate Court contemplated by section 195, Criminal Procedure Code, is a Court other than a High Court and that, therefore, there could be no appeal under that section from the order of a Judge of the same Court. It seems to me, however, that the preliminary objection must be disallowed. Sub-section (7) of section 195 provides that, for the purpose of this section, every Court shall be deemed to be subordinate only to the Court to which appeals from the judgment of that Court ordinarily lie. In the present case there could be no doubt that under clause 15 of the Letters Patent appeals would ordinary lie from the judgments of a single Judge exercising Original Civil Jurisdiction to this Court, that is, the Court of Appeal on the Original Side. It is true that, generally speaking, the subordinate Court contemplated by section 195, Criminal Procedure Code, is a Court different from the Court to which the appeals would ordinarily lie. But, having regard to the words of the section, it seems to me clear that, for the purpose of section 195, the Court from whose order the present appeal is preferred is a Court from whose judgment an appeal would ordinarily lie to this Court and, therefore, the present appeal asking us to grant the sanction and to revoke the order refusing to grant the sanction is competent. It may be, though it has not been suggested, that sub-section (7) really provides for the three classes of cases mentioned in clauses (*a*), (*b*) and (*c*) of that sub-section. I do not think, however, that those specific provisions are restrictive of the general rule contained in that sub-section defining subordination for the purpose of section 195. It is not necessary for the purpose of this case to decide, whether, apart from section 195, an appeal would be competent under clause 15 of the Letters Patent. As at present advised, I doubt whether an order refusing to grant a sanction to prosecute under section 195, Criminal Procedure Code, is a judgment within the meaning of clause 15. I base my decision on the preliminary objection upon the terms of section 195, Criminal Procedure Code.

* * * *

I desire to add that we have treated the proceedings as having been taken under section 195 of the Code of Criminal Procedure: if the learned Judge considered the matter under section 476, Criminal Procedure Code, it is clear that there would be no appeal. The Rule *nisi* obtained by the appellants in the Trial Court does not in

TILOKI RAI v. EMPEROR.

terms refer to section 195. This aspect of the case was not referred to in the argument, and as both parties treated the case as falling under section 195, Criminal Procedure Code, we have dealt with it on that footing.

CRUMP, J.—As to the merits of this case I do not find it necessary to add anything to the judgment just delivered. But, so far as it concerns the question about our jurisdiction to hear this appeal, I should like to say this much. Clause (6) of section 195 of the Code of Criminal Procedure lays down a general rule as to appeals. In a case where a sanction has been granted by any authority, such sanction can be revoked or granted by any authority to which the authority giving or refusing it is subordinate. Clause (7) lays down a special rule as regards Courts, and the test of subordination for the purpose of that clause is whether an appeal ordinarily lies from the Court which granted the sanction to the Court which is asked to revoke it. Now, if that is the test, it is, I think, clear that, inasmuch as the Judge who heard this matter was sitting as a Court and inasmuch as the appeal ordinarily lies from his judgment by virtue of clause 15 of the Letters Patent to a Bench of two Judges sitting as a Court, therefore, we have here the jurisdiction conferred by clause (7) of section 195 of the Criminal Procedure Code. That being so, it is open to us to consider whether the sanction which has been refused here should or should not be granted.

Whether, apart from the provisions of the Code of Criminal Procedure, an appeal lies under clause 15 of the Letters Patent from the order refusing sanction, is a question on which I express no opinion.

W. C. A. *Appeal dismissed.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 538 OF 1920.

December 2, 1920.

Present:—Mr. Justice Jwala Prasad.

[TILOKI RAI—1ST PARTY—PETITIONER

versus

EMPEROR THROUGH BHAIRO SINGH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Proceedings under s. 144—District Magistrate, jurisdiction of, to direct substitution of proceedings under s. 145—Procedure.

A District Magistrate setting aside an order by a Subordinate Magistrate under section 144 of the Criminal Procedure Code, has no jurisdiction to direct him to substitute therefor a proceeding under section 145 of the Code. As the Superior Court, the District Magistrate can only recommend to the Magistrate concerned to draw up a proceeding under section 145, if he is satisfied that the dispute is likely to cause a breach of the peace, and it is open to the Magistrate to look into the circumstances and to find out whether, in the circumstances of the case, a proceeding under section 145 of the Code should or should not be instituted.

Rash Behari Singh v *Emperor*, 39 Ind. Cas. 328; 1 P. L. W. 258; 18 Cr. L. J. 488, *Kailash Chandra Pal* v. *Kunja Behari Poddar*, 24 C. 391; 1 C. W. N. 393; 12 Ind. Dec. (N. S.) 928, *Sahdeb Singh* v. *Jumon Jolaha*, 44 Ind. Cas. 336; 4 P. L. W. 195; 19 Cr. L. J. 320, referred to.

Application for revision against the Order of the District Magistrate, Bhagalpur, dated the 5th October 1920.

Mr. *G. C. Pal*, for the Petitioner.

Messrs. *A. B. Mukerjee* and *H. P. Sinha*, for the Opposite Party.

JUDGMENT.—This is an application against an order of the District Magistrate of Bhagalpur, dated the 5th October 1920, setting aside an order under section 144 of the Code of Criminal Procedure passed by the Deputy Magistrate of the District, and directing that "section 145, Criminal Procedure Code, order may be substituted for it (section 144, Criminal Procedure Code) by the Sub-Divisional Officer."

Both the parties purport to have purchased the land in dispute from one Bandu Mandar, the 1st party, by a *kabala* dated the 5th January 1920, and the 2nd party by three *kabalas* with respect to different portions of the land, dated 12th November 1919, 2nd January 1920 and the 27th January 1920. The 1st party informed the Police as well as complained to the Magistrate of an interference by the 2nd party in the cultivation of the land in question. The matter was referred to the Police and the Sub-Inspector of Police reported in favour of the 1st party and prayed for orders under sections 107 and 144 of the Code of Criminal Procedure on the ground that there was a serious danger to the breach of the peace.

On the 25th August 1920 the Magistrate issued a notice under section 144 of the Code of Criminal Procedure against the 2nd party. However, on the 4th of September the Magistrate overruled the objection of the 2nd party and refused to revoke the order under section 144 of the Code passed

on the 25th August. Aggrieved by this order, the 2nd party moved the District Magistrate.

The District Magistrate held that as the dispute was regarding land, the title and possession of either side being not clear from the record, it was a fit case for a proceeding under section 145 of the Code of Criminal Procedure. He accordingly set aside the order under section 144, and directed a proceeding under section 145 to be substituted for it by the Sub-Divisional Officer.

The view taken by the District Magistrate that this was a fit case for a proceeding under section 145 is perfectly sound. A mere statement of the case as detailed above is sufficient to indicate that the possession over the property is disputed, both parties claiming the land on the strength of recent sale-deeds from the original holder The order of the District Magistrate under section 145 is, therefore, unimpeachable and, as a matter of fact, Mr. Pal concedes that.

Mr. Pal, however, disputes the validity of the order made by the District Magistrate directing the Sub-Divisional Officer to substitute 145 proceeding for the 144 proceeding. He supports his contention by referring to the cases of *Rash Behari Singh* v. *Emperor* (1) and *Kailash Chandra Pal* v. *Kunja Behari Poddar* (2). Mr. Mukerjee, appearing on behalf of the Opposite Party (2nd Party), replies to the contention by citing the case of *Sahdeb Singh* v. *Jumon Jolaha* (3). I have considered these authorities. It appears to me plain that section 145 of the Code of Criminal Procedure requires the Magistrate instituting the proceeding to satisfy himself upon the material before him as to the existence of a dispute likely to cause a breach of the peace. In this view the superior Court can only recommend to the Magistrate concerned to draw up the proceeding if he is satisfied that the dispute is likely to cause a breach of the peace. The order of the District Magistrate directing the Sub-Divisional Officer to substitute 145 proceeding for 144 is certainly wrong. The Sub-Divisional Officer, however, on the 29th October already drew up a proceeding under section 145. In that proceeding he distinctly refers to the Police report of the 24th August as disclosing materials for his being satisfied as to the existence of a dispute likely to disturb the public peace. The order under section 144 having been set aside, the case was sent back to him. It was certainly open to the Magistrate to look into the circumstances and to find out whether, in the circumstances of the case, a proceeding under section 145 of the Code should or should not be instituted. He has done so and there is material on the record to justify his action. As a matter of fact, the 1st party itself moved the Authorities, both the Police and the Magistrate, for an intervention in order to prevent a serious breach of the peace. It is not denied even at this stage that there is an existence of such a dispute and from the nature of the dispute there is certainly a danger to the imminent breash of the peace. Under such circumstances, I do not think that the proceeding now drawn up by the Deputy Magistrate should be set aside. It must proceed in assordance with law.

The result is that the application is rejected.

W. C. A. *Rule discharged.*

(1) 39 Ind. Cas. 328; 1 P. L. W. 258; 18 Cr. L. J. 488.

(2) 24 C. 391; 1 C. W. N. 393; 12 Ind. Dec. (N. S.) 928.

(3) 44 Ind. Cas. 336; 4 P. L. W. 195; 19 Cr. L. J. 320.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 255 OF 1922.

June 23, 1922.

Present:—Mr Justice Ryves.

GOPI KHATIK—APPLICATION

versus

EMPEROR—OPPOSITE PARTY.

Sureties—Magistrate, duty of—Police report, acting on, illegal.

A Magistrate ought not to reject sureties on the report of the Police : when sureties are offered, it is the duty of the Magistrate to accept them, unless he is satisfied that they are not proper persons.

Criminal revision from an order of the District Magistrate, Azamgarh.

Mr. *Nehal Chand Vaish*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In revision, I do not think I am entitled to question the order itself, but it seems to me that the learned Magistrate is wrong in rejecting the sureties on the report of the Police. It has been laid down in this Court for many years that when sureties are offered, it is the duty of the

Court to accept them, unless the Court itself is satisfied that they are not proper persons. With these remarks I order the record to be returned. The application is rejected.

W. C. A. *Application rejected.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 88-B OF 1922.

July 21, 1922.

Present:—Mr. Prideaux, A. J. C.

MIRABAX—ACCUSED—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. XVIII, rr. 5, 6—Provisions about interpretations—Directory—Deposition interpreted by reader, Judge and Pleader not attending—Prosecution for perjury—Validity—Charge for perjury—Exact words in deposition not used—Irregularity whether curable—Criminal Procedure Code (Act V of 1898), s. 537.

The provisions of O. XVIII, rr. 5 and 6 of the Civil Procedure Code are directory and non-compliance with them does not render the deposition inadmissible at a subsequent trial of the deponent for perjury. [p. 37, col. 2.]

Elahi Baksha Kazi v. *Emperor*, 45 Ind. Cas. 258; 45 C. 825; 27 C. L. J. 377; 22 C. W. N. 646; 19 Cr. L. J. 498, followed.

Nalluri Chenchiah, In re, 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296; 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 356; 20 Cr. L. J. 379, *Kamatchinathan Chetty* v. *Emperor*, 28 M. 308; 2 Cr. L. J. 758, *Mohendra Nath Misser* v. *Emperor*, 12 C. W. N. 845; 8 Cr. L. J. 116, *Emperor* v. *Jagat Ram*, 47 Ind. Cas. 872; 28 P. R. 1918 Cr.; 19 Cr. L. J. 972; 39 P. W. R. 1918 Cr.; 16 P. L. R. 1919, *Kahn Singh* v *Empress*, 25 P. R. 1890 Cr., *Imam Din* v. *Niamat Ullah*, 58 Ind. Cas. 830; 1 L. 361; 21 Cr. L. J. 830; 10 P. W. R. 1920 Cr., referred to.

If the deposition has not been read over to the witness in the presence of the Presiding Judge, it does not prove itself under section 80 of the Evidence Act, but it may be proved in some other way. The Judge who recorded it can prove it or the accused can admit it, section 91 of the Evidence Act merely excluding the oral contents of a deposition but not making it inadmissible in evidence. [p. 37, col. 2.]

If a deposition has been interpreted by the Reader working in the same room as the Judge, even though the Judge and the Pleaders for the parties did not attend to the interpretation, there has been sufficient compliance for all purposes with the provisions of O. XVIII, r. 5 of the Civil Procedure Code and a deposition so interpreted proves itself under the provisions of section 80 of the Evidence Act. [p. 37, col. 2; p. 38, col. 1.]

The failure to enter in a charge for perjury under section 193 Indian Penal Code the actual words used in a deposition is at the most an irregularity cured by section 537 of the Code of the Criminal Procedure. [p. 37, col. 1.]

Revision against an order of the Sessions Judge, Akola, dated the 30th May 1922, in Criminal Appeal No. 102 of 1922.

Mr. *A. V. Khare*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The facts found in this case are these. One Gani, a minor, by his next friend sued for possession of certain houses at Khamgaon in occupation of one Nura who was alleged to be plaintiff's lessee.

Nura claimed the houses as his own. The plaintiff produced an account-book said to contain entries of the payment of rent by Nura in that person's handwriting, including an entry for the sum of Rs. 22-8-0. The applicant, Mirabax, was cited as a witness for the plaintiff and examined on the 4th February 1921. Referring to this entry of Rs. 22-8-0 he stated on affirmation :—

"About 2 years ago there was a contract of lease between the plaintiff's mother and the defendant when the defendant agreed to pay Rs. 5 as rent per month. The defendant paid Rs. 22-8-0 to plaintiff's mother in my presence. The defendant made an entry in the account-book. I did not read that entry and so I do not know what he wrote there."

Later he stated : "The entry of Rs. 22-8-0 and the matter in front of them are not in my handwriting, I sometimes make the entries in this account-book. (After an examination of the book) I do not find any entry in my handwriting."

As a matter of fact the entry regarding the payment of Rs. 22-8-0 was in Mirabax's handwriting. Nura then applied for sanction to prosecute Mirabax for perjury and sanction was given. The applicant was tried and convicted. The charge in the case runs : "That you on or about the 4th day of February, 1921, at Khamgaon, stated in evidence that the entry (Exhibit P-4) was in the handwriting of complainant which statement you knew to be false." The conviction under section 193 has been affirmed, the sentence being reduced.

In this Court it is contended that accused was confused when giving his evidence and did not understand the question put him. This was the defence put forward at the

trial where accused stated that the entry was in his own handwriting. There is no force in the contention urged, the remainder of the accused's statement shows that he knew what he was saying when he deposed that the entry of Rs. 22 8-0 was in Nura's handwriting. The statement forming the basis for the prosecution is admittedly false, and was false to the applicant's knowledge. It is pressed that the charge in the case is defective, not giving the accused sufficient notice of the case he had to meet, but, in my opinion, it is sufficiently clear. Accused could not have been misled in any way and the failure to enter in the charge the actual words used in the deposition is at most an irregularity cured by section 537 of the Code of Criminal Procedure.

Much of the argument in this Court has been on the question whether the deposition on which the conviction rests was interpreted to the accused after he had made it. It is contended that, unless it is established that it was read over and interpreted to the accused shortly after it was recorded so as to give him the opportunity of correcting it, the conviction cannot stand. It has been held that where the deposition of a witness is not read over and interpreted to him before it is signed by him he cannot be prosecuted for perjury on such deposition under section 193 of the Indian Penal Code, the omission to interpret and read over the deposition to the witness being not a mere irregularity but renders the record inadmissible in proof of the deposition under section 91 of the Evidence Act. In *Nalluri Chenchiah, In re* (1), where the deposition was read over by the Court Clerk in a place where neither the Judge or Vakil were present, the requirements of the law were held not complied with: *Kamatchinathan Chetty* v. *Emperor* (2). This case being followed in *Mohendra Nath Misser* v. *Emperor* (3).

On the other hand, it has been held that an accused person may be convicted of the offence of having given false evidence before a Civil Court, notwithstanding that the Court has made no note in writing to the effect that the evidence has been read out to the deponent, for, in the absence of evidence that the deposition was not read out, the Magistrate ought to assume that the Judge of the Civil Court complied with the provisions of O. XVIII, r. 5 of the Code of Civil Procedure. In *Emperor* v. *Jagat Ram* (4) and in *Kahn Singh* v. *Empress* (5) it was decided that the statement as a witness made by an accused being tried for perjury is a fact in issue and may be proved by oral evidence whether the deposition was read over to the witness or not. I am aware of the decision in *Imam Din* v. *Niamat Ullah* (6) that where the statement has not been read out, secondary evidence cannot be admitted in the trial to prove the making of the statement, but it seems to me, following *Elahi Baksha Kazi* v. *Emperor* (7), that the provisions of O. XVIII, rr 5 and 6 of the Civil Procedure Code, are directory, and non-compliance with them does not render the deposition inadmissible at a subsequent trial of the deponent for perjury. If the deposition has not been read over to the witness in the presence of the Presiding Judge, it does not prove itself under section 80 of the Evidence Act, but it may be proved in some other way. The Judge who recorded it can prove it or the accused can admit it, section 91 of the Evidence Act merely excludes the oral contents of a deposition but does not make it inadmissible in evidence. In the present case the statement was recorded in English and signed by the Judge and he testifies to it having been interpreted by his clerk to the applicant. The clerk being in the same room but at some distance: the Judge was at the time working. The Reader to the Munsif corroborates this testimony. The object of interpreting his deposition to a witness is to give him the opportunity of making corrections he deems necessary therein, and the irregularity in this case, if there is one, consists in the Judge and Pleaders not attending to the interpretation, but this procedure which is common in subordinate

(1) 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296; 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 356; 20 Cr. L. J. 379.

(2) 28 M. 308; 2 Cr. L. J. 756.

(3) 12 C. W. N. 845; 8 Cr. L. J. 116.

(4) 47 Ind. Cas. 872; 28 P. R. 1918 Cr.; 19 Cr. L. J. 972; 39 P. W. R. 1918 Cr.; 15 P. L. R. 1919.

(5) 25 P. R. 1890 Cr.

(6) 58 Ind. Cas. 830; 1 L. 361; 21 Cr. L. J. 830; 10 P. W. R. 1920 Cr.

(7) 45 Ind. Cas. 259; 45 C. 825; 27 C. L. J. 377; 22 C. W. N. 646; 19 Cr. L. J. 498.

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Courts seems to me a sufficient compliance for all purposes with the provisions of O. XVIII, r. 5, of the Civil Procedure Code. A deposition so interpreted proves itself under the provisions of section 80 of the Evidence Act. It is not as if the applicant denies the accuracy of the recorded deposition. He admits it and admits it is wrong. The defence is that it was made by mistake. It has been correctly held that applicant as a witness speaking on affirmation in a civil case deliberately made a false statement knowing the same to be false. He has been rightly convicted. I dismiss this application. The applicant has been released on bail. He will surrender himself on the 26th July to the District Magistrate, Baldana.

G. R. D.

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 747 OF 1921.

(CRIMINAL REVISION PETITION No. 612 OF 1921)

February 16, 1922.

Present:— Mr. Justice Kumaraswami Sastri.

RAJATHAMMAL—PETITIONER

versus

RAJAMANIKKAM PILLAY—COMPLAINANT RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 522—Criminal force essential to confer jurisdiction—Appellate Court, finding of, that force not used—Possession, order for, reversal of.

The use of criminal force is an essential ingredient to give Criminal Courts jurisdiction to act under section 522 of the Criminal Procedure Code. Where, therefore, an Appellate Court reverses a conviction on the ground that no force was used, it ought also to reverse the order awarding possession, and to restore the parties to their original positions

Batakala Pottiavadu, In re, 26 M. 49; 2 Weir 675; 12 M. L. J. 447, relied upon

Biswesvar Singh v. *Bhola Nath Pathak*, 22 Ind. Cas. 1006; 16 Cr. L. J. 222; 18 C. W. N. 1147, followed.

Petition, under sections 4 5 and 439, Criminal Procedure Code, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Chidambaram, dated the 25th August 1921, in Criminal Appeal No. 64 of 1921.

AZIZ MANDAL v. GIRISH CHANDRA CHOUDHURY.

Mr. *V. Krishnamachariar*, for the Petitioner.

Mr. *J. C. Adam* (Public Prosecutor), for the Crown.

Dr. *S. Swaminathan*, for the Complainant.

ORDER.—The Appellate Court reversed the conviction and has found that no criminal force was used. It ought to have reversed the order directing possession to be given, as the essential ingredient, namely, the use of criminal force, is wanting to give Criminal Courts jurisdiction to act under section 522. I need only refer to *Batakala Pottiavadu, In re* (1). If possession has been given, it is the duty of the Court to restore the parties to the position in which they were before possession was wrongly given. Vide *Biswesswar Singh* v. *Bhola Nath Pathak* (2).

The petitioner will be restored to possession.

M. C. P.

Petition allowed.

(1) 26 M. 49; 2 Weir 675; 12 M. L. J. 447.

(2) 22 Ind. Cas. 1006; 15 Cr. L. J. 222; 18 C. W. N. 1147.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 237 OF 1922.

May 10, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

Shaikh AZIZ MANDAL—ACCUSED—PETITIONER

versus

GIRISH CHANDRA CHOUDHURY—COMPLAINANT—OPPOSITE PARTY.

Local inspection—Magistrate, power of, to view the locus in quo for understanding evidence taken.

It is legitimate for a Magistrate trying a case to make a local inspection at the request of the parties and in the presence of their Pleaders for the purpose of enabling him to understand the evidence which had been taken in the case. [p. 39, col. 2; p. 40, col. 1.]

FACTS appear from the judgment.

Babu *Benode Lal Mookerjee* (with him Babu *Purna Chandra Chandra*), for the Petitioner.—I attack the judgment of the learned District Magistrate on the ground that he erred in law in not trying the case *de novo* and so he failed to exercise the jurisdiction vested in him

by law. The learned Sub Deputy Magistrate had gone through the case to a certain extent inasmuch as several witnesses were examined and cross examined before him. When the case was transferred to Mr. Peters there should have been a fresh trial from start to finish. Mr. P. Sen clearly says, "He prays for a *de novo* trial," I submit that is sufficient for the purpose. The accused was not required to apply to Mr. Peters again. But, however, an application was, as a matter of fact, made. The non-compliance by the learned Magistrate with my prayer for a fresh trial has vitiated the entire proceedings.

Further, the learned Magistrate inspected the locality of occurrence and I submit that his judgment must have been influenced by the impression he received at the time of the local inspection.

Refers to *Sobh Nath Singh* v. *Emperor* (1), *Habbon Shaikh* v. *Emperor* (2), and section 350, Criminal Procedure Code.

Babu *Debendra Narain Bhattcharya*, for the Opposite Party, was not called upon.

JUDGMENT.

SANDERSON, C. J.—This Rule called upon the District Magistrate to show cause why the conviction and sentence of the petitioner should not be set aside on the first and fifth grounds in the petition.

The first ground was that the learned Deputy Magistrate erred in not trying the case *de novo* and thereby failed to exercise a jurisdiction vested in him by law.

The Magistrate who tried the case was Mr. A. P. Peters. The case had, in the first instance, been before Mr. S. C. Das Gupta, a Sub-Deputy Magistrate, and on the 1st April 1921 the complainant and four prosecution witnesses were examined. The case was then adjourned to 12th April 1921, for recording the accused's statement. On the 14th April 1921, Mr. S. C. Das Gupta recorded the statement of the accused, charge was framed and three prosecution witnesses were cross examined and the case was adjourned to the 3rd May 1921. Then, apparently, there were several adjournments, and on the 25th of June 1921 the Sub-Divisional Officer, Mr. P. Sen, made the following order:—"To my file, as Babu S. C. Das Gupta has been transferred. The accused prays for a *de novo* trial. Summon all the prosecution witnesses and defence witnesses."

Then, on the 22nd July 1921, Mr. P. Sen, transferred the case to Mr. A. P. Peters, a Deputy Magistrate, and on the 2nd September 1921, the complainant and the prosecution witness No. 4 were cross-examined.

Now, the first ground, as I have already stated, alleges that the Magistrate who tried the case, ought to have tried the case *de novo*. I am not satisfied that any application was made to Mr. Peters to have the witnesses, who had already been examined, other than the complainant and P. W. No. 4, re called into the witness box to be examined again and cross-examined. On the 2nd September 1921, the complainant and one of the prosecution witnesses were, in fact, cross-examined; and, to my mind, it is clear from the petition that all the witnesses for the prosecution and defence were in Court, and I am satisfied that if the learned gentleman appearing for the defence had asked the learned Magistrate that any one of the witnesses, who had already been examined, should be put into the witness box again for the purpose of further examination and cross examination, such a course would have been adopted. There is a general allegation in the petition to this effect, that the petitioner's prayer for a *de novo* trial was not acceded to by the learned Magistrate. A bare statement of that kind makes little impression on my mind. It is a general allegation without any date or without any specific allegation as to the date when and the person to whom the application was made or what the order was in respect of it and, as I have already said, it carries little weight. The result is that, with regard to the first ground, I am not satisfied that the Magistrate refused to allow the examination or cross examination of any of the witnesses, who had been examined on the previous occasion. So that, in my judgment, there is no substance in the first ground.

The fifth ground was, that the learned Magistrate's judgment must have been influenced by the impressions he received at the time of the local inspection and, as such, the judgment ought to be arrested. After the evidence in the case had been finished

(1) 12 C. W. N. 138; 6 Cr. L. J. 431.
(2) 5 Ind. Cas. 365; 14 C. W. N. 422 at p. 432; 11 C. L. J. 335; 37 C. 340; 11 Cr. L. J. 121.

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the learned Magistrate viewed the *locus in quo* at the request of both parties and, as I understand, in the presence of the Pleaders who were representing the respective parties. Having read the judgment, I am satisfied that the Magistrate made and used this inspection solely for the purpose of enabling him to understand the evidence which had already been given and which was legitimate for him to do. Consequently, in my judgment, there is no foundation for the Rule in respect of the fifth ground in the petition.

For these reasons, in my judgment, the Rule should be discharged.

PANTON, J.—I agree.

R. N.

Rule discharged.

PATNA HIGH COURT.

CRIMINAL REVISION No. 66 OF 1921.

February 22, 1921.

Present:—Mr. Justice Jawala Prasad.

GAINU PANDAY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 426—Mischief—Removing fruit from trees—Essential to be established—Bona fide dispute between contending parties—Magistrate, jurisdiction of, to take cognizance.

In order to invest a Magistrate with jurisdiction to summon a person charged with having committed the offence of mischief under section 426 of the Penal Code by removing the fruits of certain trees, it is essential for the complainant to make out a *prima facie* case in his petition of complaint or, in his statement on oath, of any deterioration caused by the accused in the value or utility of the fruit, and unless such deterioration is made out there can be no conviction for the offence of mischief. [p. 40, col. 2.]

A Magistrate has no jurisdiction to take cognizance of a case of mischief where there is a *bona fide* dispute between the contending parties with regard to the right in, and possession of, the property, the subject-matter of the charge. [p. 41, col. 1.]

Application against an order passed by the Sub-Divisional Magistrate of Araria.

Messrs. *P. C. Manuk* and *Rai T. N. Sahay*, for the Petitioner.

JUDGMENT.—The petitioner in this case was convicted by the Sub-Deputy Magistrate of Araria for an offence under section 426, Indian Penal Code. The charge is in respect of 100 jack fruits said to have been removed by the accused from the trees standing on plot No. 1219. The petitioner was sentenced to pay a fine of Rs. 25. He appealed to the District Magistrate of Purnea, who, by his order of the 18th December 1920, dismissed the appeal. The petitioner has, therefore, come to this Court in revision.

It appears to me that the conviction of the petitioner under section 426, Indian Penal Code, cannot stand. Neither in the complaint petition, nor in the statement on oath recorded on the back of it has any offence under section 426 been disclosed. It is not stated that the fruits in question were plucked when they were not fit for plucking. The case, if any, upon the complaint petition and on the oath was that of removal of the fruits from the trees and, therefore, the offence was one under section 379, and not under section 426, Indian Penal Code. In order to give jurisdiction to the Magistrate to summon the accused under section 426, Indian Penal Code, for mischief, it was essential for complainant to make out a *prima facie* case in his petition or in his statement on oath of any deterioration having been caused by the accused in the value or utility of the fruits, and unless such a deterioration was made out, there was no offence disclosed under section 426 for causing mischief. Again, it was apparent on the statement on oath of the accused, which alone was the foundation for the cognizance to be taken by the Magistrate, that the accused was raising a *bona fide* claim of right to the fruits in question by reason of the purchase of the holding upon which the trees stood at a Civil Court auction sale. The Trial Court, as well as the lower Appellate Court, accepted the delivery of possession given by the Civil Court in favour of the landlord through whom the accused claimed. That delivery had taken place in or about the year 1910. The accused, holding under a registered *patta* granted by the landlord to the auction-purchaser of the holding, had every right to believe that the fruit trees belonged to the landlord and consequently to him by virtue of the aforesaid settlement. The Survey Record of Rights so strongly relied upon by the Magistrate

far from helping the prosecution supports the case of the defence. Assuming that the complainant was an under-tenant, the land on which the trees are said to be standing was admittedly sub-let to Kulu, one of the accused who was not summoned but was examined as a defence witness No. 6. The complainant relies upon a reservation with respect to the trees. No documentary evidence of a settlement excluding the trees has been produced. The summary of the evidence set forth in the judgment of the Magistrate clearly shows that the case of the complainant as regards having reserved to himself the trees, depends entirely upon the oral evidence. If that is so, apart from the accused disputing the truth of the alleged sub-lease, there was nothing to apprise the accused of the existence of a settlement in favour of Kulu excluding the trees in question. They were, therefore, entitled to believe that the trees also were settled with Kulu, and that they were not in the possession directly of Sunderdeo, the complainant. A mere reading of the judgment of the Sub-Divisional Magistrate, who has at more than one place dealt with the disputed rights in the case, makes it clear that there was at least a *bona fide* dispute with regard to the right in and possession of the contending parties, which ousted the jurisdiction of the Magistrate altogether from taking cognizance of the case.

It is needless to pursue the matter further. It will be sufficient to refer to the two cases decided by this Court, namely, *Talebar Chowdhry* v. *Emperor* (1) and *Bhim Bahadur Singh* v. *Emperor* (2). The judgments in those cases delivered by me would have been re-written for this case by simply changing the names of the parties and substituting "jack fruits" for "crops." If the Magistrate had those cases before him, perhaps he would have come to the conclusion that neither the facts in this case disclosed the offence under section 426, nor had he any jurisdiction to try the case inasmuch as the accused were entitled to raise a *bona fide* dispute of title. I would, therefore, recommend those cases to the Magistrate for him to read as a supplement to the present judgment and for his guidance in cases of this nature.

The application is allowed. The conviction of, and the sentence passed on, the petitioner by the Magistrate are set aside. The fine, if already realised, will be refunded.

W. C. A.

Rule made absolute.

(1) 40 Ind. Cas. 750; 2 P. L. W. 49; 18 Cr. L. J. 750.
(2) 55 Ind. Cas. 854; 1 P. L. T. 121; 2 U. P. L. R. (Pat.) 53; 21 Cr. L. J. 374; (1922) Pat. 10.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 303 OF 1922.

June 16, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

KHIALI AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 421—Appeal through Jail Authorities summarily rejected—Appeal subsequently through Counsel, whether entertainable.

An order dismissing an appeal under section 421 of the Criminal Procedure Code is a final order, therefore, where a petition of appeal by a prisoner in Jail is received through the Superintendent of the Jail and is summarily rejected, he is not entitled to be heard upon a petition of appeal presented subsequently on his behalf by Counsel. [p. 43, col. 1]

Queen-Empress v. *Bhimappa*, 19 B. 732; 10 Ind. Dec. (N. S.) 480, followed.

Emperor v. *Bhawani Dihal*, A. W. N. (1906) 303; 3 A. L. J. 693; 4 Cr. L. J. 373 and *Hulai* v. *Emperor*, 36 Ind. Cas. 133; 3 O. L. J. 326; 17 Cr. L. J. 453, referred to.

Criminal appeal from an order of the Additional Sessions Judge, Aligarh.

Mr. *Sital Prasad Ghose*, for the Appellant.

Mr. *Shankar Saran* (Government Pleader) for the Crown.

JUDGMENT.—On the 4th of April 1922 the Court of the Additional Sessions Judge at Aligarh, sitting at Etah, convicted two men, Khiali and Hulasi, on a charge under section 395 of the Indian Penal Code, and passed upon them substantial sentences of imprisonment and fines. On the 12th of April 1922 both Khiali and Hulasi caused to be prepared in the Jail, in which they were confined, petitions of appeal against their convictions and the sentences passed upon them. These petitions of appeal reached this Court on the 15th of April 1922. Having been examined and reported upon by

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a ministerial officer of this Court, they were laid before a Judge of this Court on the 20th of April 1922. On the day following, the Judge in question, dealing with the petitions of appeal under section 421 of the Code of Criminal Procedure, dismissed both the appeals of Khiali and Hulasi summarily.

On the 1st of May 1922 Counsel, having been instructed on behalf of Khiali and Hulasi, brought for presentation to this Court a petition of appeal, which was submitted to a ministerial officer of this Court for report. In the report thereupon prepared, attention was drawn to the fact that petitions of appeal from Khiali and Hulasi had been received, through the Superintendent of the Jail, and summarily dismissed by a Judge of this Court Counsel for Khiali and Hulasi seems to have taken a little time to consider his position, but finally presented a fresh petition of appeal on the 8th of May 1922. The Judge, before whom this petition was presented, passed an order dated the 10th of May 1922, in which he referred to a previous decision of this Court and directed that the petition of appeal should be laid before a Bench of two Judges for consideration.

We are asked expressly to determine the question whether the second petition of appeal, on behalf of Khiali and Hulasi, is entertainable in view of the order of the 21st of April 1922 summarily dismissing the petitions of appeal received through the Superintendent of the Jail.

The earlier case of this Court is that of *Emperor* v. *Bhawani Dihal* (1). The facts of that case are clearly distinguishable from those now before us. A petition of appeal had been received by a Sessions Judge, through the Superintendent of the Jail in which the appellant was confined, and while that petition was still pending and undisposed of in the Sessions Court, the same appellant presented a second petition of appeal through Counsel. Apparently, overlooking this fact, the Sessions Judge, first of all, summarily dismissed the petition which had been received through the Superintendent of the Jail and then proceeded further, on the strength of this order, to dismiss the petition filed through Counsel without having even offered the Counsel concerned an opportunity of arguing the same. A learned Judge of this Court held that this procedure was illegal and, setting aside the order of dismissal, directed the Sessions Judge to re-admit the appeal of that particular convict and to dispose of it according to law after hearing Counsel. The point of that decision obviously is that, when once a petition of appeal has been filed through Counsel under section 419 of the Code of Criminal Procedure it is improper to dismiss the appeal summarily at all, and an order summarily dismissing an appeal while there is a petition presented through Counsel pending and undisposed of on the file of the Court, would be, nonetheless, an improper order, because it happened that another petition of appeal in the same matter from the same convict had been received through the Superintendent of the Jail. In the case now before us, the order summarily dismissing the petitions of appeal presented on behalf of Khiali and Hulasi through the Superintendent of the Jail in which they were confined was a valid and proper order, there being on the file of this Court on that day no petition of appeal other than the two petitions received through the Superintendent of the Jail. The right of appeal allowed to Khiali and Hulasi against their conviction by the Sessions Judge and sentences passed upon them has, therefore, been fully exercised according to law and their appeals have been disposed of by a proper and valid order of this Court before the petition of appeal with which we are now dealing was ever presented to the Court at all? The objection is not to the presentation of more than one petition of appeal by or on behalf of the same convict, but to the obtaining from this Court of more than one judicial determination upon the question raised by the appeal. In our opinion this application is not entertainable.

We have been referred in argument to one case, which has not found its way into any of the authorised reports, but which certainly is an authority in favour of these appellants. The case is that of *Hulai* v. *Emperor* (2). In that case Mr Justice Lindsay, then Judicial Commissioner of Oudh, had before him the order of a Sessions Judge dismissing an appeal

(1) A. W. N. (1906) 303; 3 A. L. J. 693; 4 Cr. L. J. 373.

(2) 36 Ind. Cas. 133; 3 O. L. J. 328; 17 Cr. L. J. 453.

which had been presented through Counsel, on the ground that a previous petition of appeal in the same matter received through the Superintendent of the Jail had been summarily dismissed. Mr. Lindsay set aside the order of the Sessions Judge for reasons stated in the report. He, there, refers to the case of *Emperor* v. *Bhawani Dihal* (1), but does not note the distinction in the facts to which we have referred. As regards the reference which Mr. Lindsay makes regarding his recollection of a previous decision of the same Court, we believe the facts to be that the learned Judge of the Oudh Court, who had previously summarily dismissed an appeal, found it possible under the circumstances to review and set aside his own order, before the appeal presented through Counsel was heard or permitted to be argued. There is no such question arising in the present case and we need not consider under what circumstances, if any, it would be possible for a Judge of this Court to re-consider a final judgment of his own delivered in a criminal matter. There is one case in the authorised Law Reports which is entirely in accordance with the view which we ourselves are disposed to take, and that is the case of *Queen-Empress* v. *Bhimappa* (3). It was, there, distinctly held that an order dismissing an appeal, under section 421 of the Code of Criminal Procedure, was a final order, not open to review by the Court which passed the same, and that a Sessions Judge had acted without jurisdiction when, having re-considered a question of limitation, he proceeded to hear and decide in a different sense an appeal which he had previously dismissed. In our opinion the appellants, Khiali and Hulasi, are not entitled to be heard upon a petition of appeal presented after their original petitions of appeal, received through the Superintendent of the Jail, had been finally disposed of according to law by the order of a Judge of this Court. We reject this petition of appeal accordingly.

W. C. A.

Appeal rejected.

(3) 19 B. 732; 10 Ind. Dec. (N. S.) 490.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1254 OF 1919.

January 17, 1920.

Present.—Mr. Justice Abdul Raoof.

JAGAT SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Security for good behaviour—Powers when to be used.

The powers conferred by section 110, Criminal Procedure Code, ought to be exercised very sparingly and in those cases only where the evidence is very clear and precise. Evidence of general repute, or that the person proceeded against has a bad character, without any specific instances, is not sufficient to justify an order against him under section 110, nor would the fact that on three occasions the last one being sixteen years ago—he has been required to furnish security. [p. 44, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the District Magistrate, Gujranwala, dated the 17th July 1919, affirming that of the Magistrate, First Class, Sheikhupura, District Gujranwala, dated the 17th May 1919.

Mr. *Ganpat Rai*, for the Petitioner.

JUDGMENT.—These are four petitions of revision filed by Jagat Ram, the father, and his three sons Wadhwa Singh, Udham Singh and Jagir Singh. An order was made against all these four to execute bonds for being of good behaviour for the sum of Rs. 500 and to find sureties for the same amount. The evidence given against them is partly of general repute and partly relating to certain instances of suspicion arising against their conduct. As against Jagat Singh there was also this evidence that on three previous occasions in 1888, 1894 and 1902 he was called upon to give security under section 110. No action appears to have been taken against him since the year 1902 under section 110. The evidence for the prosecution, if believed, goes to establish the following facts. That at most on three occasions there had been some suspicion against the accused persons.

The rest of the evidence is only as to the general repute. It is stated by the witnesses that the petitioners are of bad character and that they are habitual thieves. It is not shown by the evidence that they were ever found in possession of a stolen property or apprehended while committing theft. The evidence against the petitioners

consists of witnesses who may legitimately be described as official witnesses. The powers under section 110 of the Criminal Procedure Code are to be exercised very sparingly and in only those cases where the evidence is very clear and precise. It was never intended by the Legislature to provide a means of punishment by enacting section 110.

As regards the sons of Jagat Singh, beyond mere suspicion nothing substantial has been established. As regards Jagat Singh there is certainly this evidence that on three previous occasions action was taken against him under section 110, but ever since 1902 nothing inculpating has been found against him. Sixteen years is a sufficient time for reform and it does appear that Jagat Singh has reformed himself. Twenty-one witnesses were called on behalf of the accused persons to show that the petitioners bear good character. On behalf of the petitioners it has been contended that the District Magistrate has not taken into consideration the evidence for the defence. I cannot say that the Magistrate has not considered the evidence for the defence, but I must say that his judgment is not as satisfactory as it ought to have been. Having regard to all the circumstances of the case I do not think that an order for security should have been made under section 110 in this case. I, therefore, set it aside.

W. C. A.

Revision accepted.

PATNA HIGH COURT.

CRIMINAL REVISION No. 341 OF 1922.

June 20, 1922.

Present:—Mr. Justice Adami.

HIRA MAHTON AND OTHERS—PETITIONERS

versus

RAJKUMAR MAHTON AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 145, 148—Costs in proceedings under s. 145—Jurisdiction.

In awarding costs in proceedings under section 145, Criminal Procedure Code, a Magistrate is restricted to the amount awarded as Pleader's fees (if any) and costs for witnesses; any order about costs passed arbitrarily is without jurisdiction and must be set aside.

Jhaman Mahton v. *Thakuri Mahton*, 57 Ind. Cas. 449; 1 P. L. T. 369; 21 Cr. L. J. 625; 3 U. P. L. R. (Pat.) 192 and *Udoy Narain Chakravarty* v. *Satish Chandra Chattaraj*, 14 C. W. N. lxxiii (73) *notes*, referred to.

Application against an order passed by the Sub-Divisional Magistrate, Barh, dated the 10th April 1922.

Mr. *G. C. Pal*, for the Petitioners.

Messrs. *B. N. Mitter* and *Shiveshwar Dayal*, for the Respondents.

JUDGMENT.—The only question which arises in this application is in regard to an order for payment of costs. The Magistrate in finding possession in favour of the opposite party in proceedings under section 145, Criminal Procedure Code, directed the petitioners to pay costs of Rs. 100. It is urged that this order is without jurisdiction inasmuch as under section 148, Criminal Procedure Code, the Magistrate could only include in the costs awarded the Pleader's fees and the costs for witnesses. The Magistrate has not mentioned how the sum of Rs. 100 was computed or that he has made any inquiry as to what the actual Pleader's fees and the costs of the witnesses were.

It has been decided by a Judge of this Court (Sultan Ahmad, J.) in *Jhaman Mahton* v. *Thakuri Mahton* (1) that an order such as the present one is without jurisdiction and must be set aside, and he based his finding on the case of *Udoy Narain Chakravarty* v. *Satish Chandra Chattaraj* (2). There is an unreported case of this Court (*Girdhari Singh* v. *Bhalu Gope*, Criminal Revision No. 300 of 1922) in which Sir John Bucknill, J., has set aside an order similar to the present one and directed that the case should be remanded to the Magistrate for determination of the costs according to law. It is quite clear, therefore, that the Magistrate could not in a case like this arbitrarily decide what the amount of costs to be paid should be. He must confine the costs to Pleader's fees and the costs of witnesses.

The order, therefore, directing Rs. 100 to be paid as costs must be set aside and the case must be remanded to the Magistrate for an assessment of costs according to law.

(1) 57 Ind. Cas. 449; 1 P. L. T. 369; 21 Cr. L. J. 625; 2 U. P. L. R. (Pat.) 192.

(2) 14 C. W. N. lxxiii (73) *notes*.

The application is, therefore, allowed to the extent mentioned above.

N. K. & N. H.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 281 OF 1921.

January 19, 1922.

Present:—Mr. Hallifax, A. J. C.

GANGA PRASAD—APPLICANT

versus

SHYAMLAL—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 476—Sanction to prosecute—Perjury—Forgery—Duty of Court—Sanction to private persons.

It is the duty of every Court to take action of its own motion in every apparent case of forgery or perjury which is committed before it, or is brought to its notice, and to institute proceedings in all such cases if there is a reasonable probability of the prosecution resulting in a conviction. [p. 45, col. 2.]

Shioshankarpuri v. *Emperor*, 27 Ind. Cas. 545; 10 N. L. R. 177; 16 Cr. L. J. 161, and *Abdul Husen* v. *Emperor*, 22 Ind. Cas. 177; 9 N. L. R. 184; 15 Cr. L. J. 33, referred to.

If a Court holds that a case is a proper one for prosecution but that a sanction to prosecute should not be granted to a private person, it is its duty to take action under section 476 of the Criminal Procedure Code. [p. 45, col. 2.]

If a sanction has been granted to a private person it is too late to substitute official agency for the prosecution by means of a complaint under section 476 of the Act. [p. 46, col. 1.]

Revision of the order of the District Judge, Raipur, dated the 24th October 1921, in Miscellaneous Civil Case No. 14 of 1921.

Mr. *M. Y. Shareef*, for the Applicant.

Mr. *G. H. Pradhan*, for the Non-Applicant.

JUDGMENT.—The main ground on which this application is based is the contention that the final decision of the Civil Court under section 11 of the Oaths Act, 1873, that the money claimed was due to the plaintiff, included an equally conclusive finding that the interpolation of the word *ham* in the document was not a forgery. This is certainly incorrect, but, whatever finding was conclusive in that suit, it is so only "as against the person who offered to be bound" by the special oath, that is to say, Shyamlal. It is not binding against the rest of the community who are as much entitled as ever to have Ganga Prasad convicted and punished if he has committed forgery. It is further contended that, at least, that matter makes Shyamlal not a proper person to seek for sanction to prosecute and to conduct the prosecution. If it were so, the question would not be whether the prosecution should be stopped or not but whether it should be conducted by Shyamlal or by official agency. It is the duty of every Court to take action of its own motion in every apparent case of forgery or perjury which is committed before it or is brought to its notice, and to institute proceedings in all such cases if there is a reasonable probability of the prosecution resulting in a conviction, and if the Courts did their duty in this respect there would be no room left for applications from private persons for sanction to prosecute, or, at least, none for any applications which could possibly succeed.

2. In this case, therefore, if sanction to prosecute ought not to be granted to Shyamlal, the Court, having held that it is a proper case for prosecution, would be bound to take action under section 476 of the Criminal Prosedure Code. I am strongly inclined to accept the view that sanction should not have been granted to Shyamlal or any private person, but that the Court should have taken action itself under section 476, even after the making of Shyamlal's application and though it had neglected to do so before. This opinion is based not on any particular circumstances in this case but on the general principles that the Court is bound to take action itself in every proper case and neglects its duty if it leaves it to be performed by private persons who may be interested, and that

prosecution by a private person opens the door to blackmail and also to the acquittal of a guilty person or the conviction of an innocent one through the production of false evidence against him. These principles are, I understand, likely to be accepted in the amendment of the Criminal Procedure Code by the Legislature in the near future. I do not, however, think it necessary at this stage to consider by what agency Ganga Prasad should be prosecuted. If he is to be prosecuted at all, it must be by Shyamlal to whom sanction to do so has already been accorded. It is too late to substitute official agency for his by means of a complaint made under section 476 of the Criminal Procedure Code.

3. In *Shioshankarpuri* v. *Emperor* (1), and *Abdul Husen* v. *Emperor* (2). I have endeavoured to make it clear that the matter of reasonable probability of the prosecution ending in a conviction is practically the only matter which a Court has to consider in proceedings under section 195 or section 476 of the Criminal Procedure Code. In this case I need say no more at this stage than that such a reasonable probablity appears to me to exist. The application for cancellation of the sanction granted by the Court of the District Judge is, therefore, rejected.

Application rejected.

W. C. A.

(1) 27 Ind. Cas. 545; 10 N. L. R. 177; 16 Cr. L. J. 161.

(2) 22 Ind. Cas. 177; 9 N. L. R. 184; 15 Cr. L. J. 33.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1073 OF 1921.

January 14, 1922

Present:—Mr. Justice Harrison.

PRABH DIAL—COMPLAINANT—PETITIONER,

versus

GURDIT SINGH AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Application by person not party to suit.

No Court should entertain an application for sanction to prosecute made under section 195 of the Code of Criminal Procedure by a person, not a public servant, who was not a party to the suit out of which the proceedings have arisen.

Chandra Kant Ghose, In the matter of, 3 C. W. N. 3, relied upon.

Ram Prosad Malla v. *Raghubar Malla*, 4 Ind Cas. 6; 37 C. 13; 13 C. W. N. 1038; 10 Cr. L. J. 454, *Queen-Empress* v. *Subbaraya Pillai*, 18 M. 487; 2 Weir 165; 6 Ind. Dec. (N. S.) 690, distinguished.

Petition, under sections 349/195, Criminal Procedure Code, for revision of an order of the District Judge, Jhelum, dated the 13th June 1912, affirming that of the Senior Subordinate Judge, Jhelum, dated the 28th September 1920.

Mr. *Nanak Chand*, for the Petitioner.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—There was litigation between *Musammat* Bhagwanti and *Musammat* Sham Piari against Gurdit Singh and others concerning the estate of one Daulat Singh, and after it had concluded, Prabh Dial, *Mukhtar* of the plaintiffs, applied for permission under section 195, Criminal Procedure Code, to prosecute the defendants under section 193, Indian Penal Code, etc. The permission was refused by the Senior Subordinate Judge who had tried the case. Prabh Dial presented an appeal to the District Judge of Jhelum in which he was not shown as a *Mukhtar* and filed no power-of-attorney. The appeal was dismissed and he now applies for revision urging that it is established by *Ram Prosad Malla* v. *Raghubar Malla* (1) and *Queen-Empress* v. *Subbaraya Pillai* (2) that it is not necessary for a person making such an application to have been a party to the previous litigation. Neither of these rulings goes so

(1) 4 Ind. Cas. 6; 37 C. 13; 13 W. N. N. 1038; 10 Cr. L. J. 454.

(2) 18 M. 487; 2 Weir 165; 6 Ind. Dec. (N. S.) 690.

far as to lay down this general proposition. All that they say, modifying if at all *Chandra Kant Ghose, In the matter of* (3), is (to quote from the Calcutta ruling) that it would be an astounding proposition that sanction to prosecute for an offence against public justice should be withheld from a public officer as such. *Chandra Kant Ghose, In the matter of* (3) states that it is quite clear that no Court should tolerate any application to prosecute made by persons who are not parties to the case. Although, therefore, it has been established that a public servant as such is not to be treated as a third party, it has nowhere been laid down that anybody can make such an application. Apart from this, however, the so called appeal was, in my opinion, rightly dismissed by the District Judge, inasmuch as there was no appeal before him. Counsel for the petitioner concedes that only a party can appeal and Prabh Dial in his private capacity was not a party to the previous proceedings. I, therefore, find that there is no reason for interference with the order of the District Judge, which is perfectly correct.

I dismiss the application for revision.

Z. K.

Application dismissed.

(3) 3 C. W. N. 3.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 282 OF 1921.

March 2, 1922.

Present:—Mr. Batten, J.C.

RAMRATAN—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Cattle Trespass Act (I of 1871)—Penal Code (Act XLV of 1860), ss 23, 379—Seizure and detention of cattle doing damage, whether offence—"Wrongful loss," meaning of.

Where an animal is found doing damage to a person's field, it is no offence for that person to seize and detain it for less than twenty-four hours, instead of taking it to a cattle-pound and to restore it to the owner on receipt of compensation which does not exceed the amount the owner would have to pay if the animal had been impounded, as such detention, being authorised by the Cattle Trespass Act, would not amount to causing "wrongful loss" to the owner, within the meaning of section 23 of the Penal Code. [p. 48. cols. 1 & 2.]

Criminal revision against an order of the Sessions Judge, Nimar, dated the 22nd September 1921, in Criminal Appeal No. 49 of 1921.

Mr. *J. C. Ghosh*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—It is necessary for the disposal of these revision applications to see exactly what are the facts that are proved and to distinguish between them and the facts that were alleged by the prosecution but not proved.

It was alleged by the prosecution that an unauthorised cattle-pound had been opened in the village Gandhwa by non-co-operators in opposition to the Government pound and that this cattle pound was kept by Chunnilal. In pursuance of this, Ramratan seized a cow belonging to Amarchandsa and took it to the unauthorised pound kept by Chunnilal. Amarchandsa recovered his cow from the unauthorised pound by paying 4 annas to Ramratan. Ramratan has been convicted of theft and Chunnilal of abetment of theft.

The learned Standing Counsel concedes that there is no case at all against Chunnilal. There is no evidence that Chunnilal had opened an unauthorised pound. There is no evidence that Chunnilal was aware that Ramratan had put Amarchandsa's cow in his *bada* which is not immediately adjoining Chunilal's house. There is no relevant evidence at all that an unauthorised pound had been opened by any one or that Chunnilal had any connection with the seizing of the cow by Ramratan or with the impounding of it in his *bada*. There being no evidence at all against Chunilal he must be acquitted.

The facts established by the evidence are simple. Ramratan found Amarchandsa's cow trespassing in his field. Amarchandsa himself says he went to inspect the alleged damage to Ramratan's field and found some *tilli* and *tuar* damaged. In face of this the remark of the Sessions Judge that he is unable to say that the cow caused any

damage as the crops must have hardly come up is unjustified. Ramratan seized the cow in the evening and put it in the *bada*. P. W. No. 2, one of the *malguzars*, says that he asked Ramratan why this cow and others were put in the *bada*, and Ramratan replied that he would either warn the owners of the cattle or impound them the next morning. Next morning Amarchandsa saw his cow in the *bada* and asked Ramratan to release it. Ramratan agreed to do so if Amarchandsa paid him 4 annas as compensation for the damage caused. Amarchandsa paid the 4 annas and Ramratan gave up the cow. These are the only facts proved.

The first Court held that Ramratan seized the cow dishonestly, apparently because wrongful loss was caused to Amarchandsa. The Sessions Judge took a different view. He said: "It appears to me that where an unauthorised pound is opened to deprive the authorised pound of its revenue and not merely to recover damages for damage done to crops, wrongful loss is caused and the impounding of cattle in such a pound with such intention amounts to theft." In other words, the Sessions Judge held that the wrongful loss was suffered by the District Council but overlooked the fact that there was no evidence of an unauthorised pound being opened. It may be mentioned that 4 annas is the pound fee charged by the authorised pound, so that Amarchandsa did not have to pay anything more than if his cow had been impounded in the District Council pound.

We have next to see whether any offence has been committed by Ramratan on the above facts. The case of *Ratoo Sheik* v. *King-Emperor* (1) has not been fully reported, but the learned Judges held that, under the circumstances of the case, the accused had committed no criminal offence. The facts were that the accused and others set up a private pound and appointed a person who looked after their fields and seized cattle which damaged their crops and then kept them confined in the pound until they were released by their owners on payment of fines. *Prima facie* it does not appear that it is an offence lawfully to seize a cow doing damage in a field, to detain the cow less than 24 hours and, instead of taking the cow to the pound, to give it back to the owner on receipt of compensation not more than what the owner of the cow would have had to pay if it had been impounded. Section 22, Cattle Trespass Act, fully provides the remedy open to a person whose cattle have been illegally seized or illegally detained. Here the cow was legally seized and was not illegally detained for more than 24 hours. In *Aradhun Mundul* v. *Myan Khan* (2) the accused illegally seized cattle and instead of taking them to the nearest pound drove them to a distant pound. It was held that the accused could not be charged with theft as it was not intended to cause wrongful loss to the owners of the cattle. With reference to the term of section 23, Indian Penal Code, the cow was not kept wrongfully out of the possession of its owner since Ramratan was legally entitled under the Cattle Trespass Act to keep it in his own custody for 24 hours before lodging it in the pound. There can be no doubt that there would have been no prosecution in this case except for the alleged institution of an unlawful pound, and, as no such institution has been proved, we must deal with the facts as they are. Ramratan did nothing illegal and has committed no offence.

I set aside the convictions of both the applicants and acquit them. The fines, if paid, must be refunded.

W. C. A.

Convictions set aside

(1) 14 C. W. N. ccxxxviii (238) *notes*.

(2) 24 W. R. 7 Cr.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 262 OF 1922.

July 3, 1922.

Present :—Mr. Justice Harrison.

KANHAYA LAL AND ANOTHER, PROPRIETORS OF THE FIRM KNOWN AS KANHAYA LAL-SUNDAR LAL—JUDGMENT-DEBTORS—APPELLANTS

versus

FIRM KNOWN AS RAM GOPAL-RAM SARUP, THROUGH CHAMAN LAL, AGENT—DECREE-HOLDER—RESPONDENT.

Appeal—Execution, order refusing stay of—Appeal, if competent.

No appeal lies from an order refusing to stay execution.

Rajendra Kishore Choudhury v. *Mothura Mohan Choudhury*, 55 Ind Cas. 228; 25 C. W. N. 555, followed.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Gurgaon, dated the 25th February 1921.

Lala *Rama Nand*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—This is an appeal from an order refusing to stay execution. It has been decided in *Rajendra Kishore Choudhury* v. *Mothura Mohan Choudhury* (1) that no such appeal lies. I dismiss it with costs.

R. N.

Appeal dismissed.

(1) 55 Ind Cas. 228; 25 C. W. N. 555.

LOWER BURMA CHIEF COURT.

FULL BENCH.

CIVIL REFERENCE No. 2 OF 1921.

August 29, 1921.

Present:—Mr. Justice Robinson, Chief Judge, Mr. Justice Maung Kin, Mr. Justice Pratt, Mr. Justice Heald and Mr. Justice Duckworth.

MAUNG SIN AND ANOTHER—APPELLANTS

versus

MRS. KIRKWOOD *alias* MA THEIN AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Inheritance—Succession—"Orasa," *meaning and position of*—Orasa *son or daughter, rights of*—*Children of* orasas, *rights of.*

Per *Robinson, C. J., Maung Kin, J., Heald, J., and Duckworth, J.*—(1) In a Burman Buddhist family consisting of both sons and daughters, any child can acquire the full status of Orasa prior to the death of either parent ; [p. 64, col. 1.]

(2) in such a family where the eldest child is a daughter no son can become Orasa ; [p. 64, col. 1.]

(3) in such a family the question which child is the Orasa can be decided before the death of either parent; [p. 64, col. 1.]

(4) in such a family there cannot be two Orasas; [p. 64, col. 1.]

(5) sons are not to be preferred to daughters as Orasa, unless the son is the eldest born; [p. 64, col. 1.]

(6) in such a family where the eldest born child is the son he is the Orasa, and if he predeceases his parents, his children have a right to preferential treatment in the division of the estate. If the eldest son dies before he becomes competent to take his father's place, a younger son, being fully qualified, may become Orasa, and, if that son predeceases his parents, his children have a right to the same preferential treatment. If the eldest born child is a daughter and she predeceases her parents, after becoming competent to take her mother's place, her children have a right to the same preferential treatment. But it is doubtful whether another daughter, younger than a son, can ever take the place of the eldest born daughter, who is not competent, or dies before becoming able to take her mother's place; [p. 64, col. 1.]

(7) the eldest child, being a daughter, can claim on the death of her mother a quarter share as Orasa, and if she then dies before her father without having got the share her children have a right to preferential treatment. [p. 64, col. 1.]

Per *Maung Kin, J*—It is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family. And this eldest born son, who is entitled to a quarter share, is called an Orasa [p 77, col. 2.]

The eldest born legitimate daughter has the right to claim a quarter share on the death of her mother whether she co-exists with sons or not, and the eldest born child is the Orasa, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son he can only make the claim from the mother, on the ground that he steps into his deceased father's place; similarly, if a daughter, she can only claim as one who takes the place of her mother. It is clear also that there cannot be two Orasas, a male and a female, in the same family, because an Orasa is either the eldest born or the one who supersedes the eldest born. [p. 62, col. 1.]

The eldest born child—male or female—is the child through whom his or her children may claim a preferential right in the estate of their grandparents. [p. 63, col. 1.]

Per *Heald, J.*—The word *auratha* is commonly used to mean the eldest child, whether son or

daughter, and if the eldest child, being a son, is competent on the father's death to take the father's place in the family, or, being a daughter is competent on the mother's death to take the mother's place then he or she is *auratha*, and on the father's or mother's death is entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate, his or her children are entitled to share equally in the estate with the younger brothers and sisters of the deceased. [p. 74, col. 2.]

(1) The eldest-born child who is competent to take the place of the father or mother acquires the status of *auratha* on becoming so competent and can acquire that status before the death of either parent. [p. 84, col. 1]

(2) If the eldest-born child is a daughter and reaches an age at which she is competent to take her mother's place, no son can become *auratha* either before or after his father's death. [p. 84, col. 1.]

(3) The status of *auratha* in no way depends on the death of either parent. The eldest-born competent child is *auratha* in any case. [p. 84, col. 1]

(4) There can never be two *aurathas* in a family. If a son or daughter dies after acquiring the status of *auratha*, there is no *auratha* in the family. [p. 84, col. 1.]

(5) Sons are not as such preferred to daughters as *auratha*. If the eldest-born child is a son and is competent he is *auratha*. If the eldest-born child is a daughter and is competent she is *auratha*. [p. 84, col. 1.]

(6) In a family where the eldest born child is a daughter and is competent, there can be no *auratha* son and there can be no son whose children have a right to preferential treatment in the division of the parents' estate. [p. 84, col. 1.]

(7) If the eldest-born child is a daughter and is competent she is *auratha* and as *auratha* can on her mother's death claim from her father a quarter share of the estate. If she dies before becoming entitled to that share, her children have a right to preferential treatment in the division of the estate. [p. 84, col. 1]

Per *Duckworth, J*.—"*Auratha*" (a very loosely used term), means nothing more than "eldest legitimate issue, male or female." The term has been much misused, since it does not necessarily follow that the child who is *auratha* whilst both parents are alive, will be the child, who can obtain a one-fourth share on the death of *one* parent. This depends on the sex of the parent who dies first. The *auratha* then is the eldest child, irrespective of sex, legally begotten, who is of age and competent. [p. 84, col. 2.]

If a son is not the first born child, he can never be *auratha*, unless the eldest child dies before reaching majority or competency, and then only when the eldest child is a male It is very doubtful whether another can become *auratha* in place of the deceased eldest daughter. There is some authority for a brother succeeding a brother, but not for the converse case,—and then only in relation to the one-fourth share [p 85, col. 1.]

Per *Pratt, J*.—(1) In a family consisting of both sons and daughters a child can attain the full status of Orasa prior to the death of its parents, in so far that, if he or she predeceases his parents, his or her children may be entitled to the preferential treatment prescribed in section 15, Book X of the *Manugye*. [p. 67, col. 1.]

(2) In such a family where the eldest child is a daughter no son can become Orasa until his father dies, subject to the proviso that the eldest daughter attained her majority before her death. [p 67, col. 1.]

(3) The question as to which is the Orasa can be decided, so far only as the right of representation is concerned [p. 67, col. 2.]

(4) In such a family there cannot be two Orasa children in the sense of children whose offspring would, in the event of their parents' death, be entitled to claim an equal share with their younger uncles and aunts [p. 67, col. 2.]

But it is conceivable that where the Orasa eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as Orasa for the purpose of claiming one-fourth of the estate from his mother. It is to be noted that Orasa is here used in two distinct senses. [p. 67, col. 2.]

(5) Sons are not always preferred to daughters as '*orasa*'. [p 67, col. 2.]

(6) In such a family when the eldest child is a daughter there cannot be an Orasa son, who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as Orasa. [p. 67, col. 2.]

(7) The eldest child, being a daughter, can transmit to her children a right to preferential treatment in the division of the estate, and there is authority for holding that on her mother predeceasing her father she can claim a quarter share as Orasa. [p. 67, col. 2.]

Po Zan v. *Maung Nyo*, 20 Ind. Cas 827; 7 L. B. R. 27; 6 Bur L T. 105, *Ma Mya Thu* v. *Maung Po Thin*, P. J. L. B. 585; Chan Toon's L. C. Vol. II, p 61, *Ma Nan Gyaw* v. *Maung Shwe Ket*, 10 Bur. L. R. 234, *Maung San Dwa* v. *Ma Min Tha*, Chan Toon's L. C. Vol. II, p. 207, *Po Hman* v *Maung Tin*, 29 Ind. Cas. 756; 8 L. B. R. 114; 8 Bur. L. T. 140, *Ma Saw Ngwe* v. *Ma Thein Yin*, 1 L. B. R. 198, *Ma Thin* v. *Ma Nyein E*, 8 Ind. Cas. 594; 3 Bur. L T. 6, overruled.

Mi Min Din v. *Mi Hle*, U. B. R. (1904-08), II, Buddhist Law, Inheritance, p. 10, dissented from.

Tun Myaing v. *Ba Tun*, 2 L. B. R. 292, *Mi The O.* v. *Mi Swe*, 2 Ind. Cas. 82; U. B. R. (1914) II, 46, *Nga Lu Daw* v *Mi Mo Yi*, 31 Ind Cas. 87; U. B. R. (1915) II, 66 at p. 72, *Mi Kin Lat* v. *Nga Ba So*, U. B. R (1907-08), II, Buddhist Law, Divorce 3, *Ma Ba We* v. *Mi Sa U*, 2 L. B. R. 174 at p. 182, *Maung Hme* v. *Ma Sein*, 45 Ind. Cas. 952; 9 L. B. R. 191; 11 Bur L T. 236, *Ma Lay* v. *Tun Shwe*, 51 Ind. Cas. 538· 10 L. B. R. 10; 12 Bur. L. T. 75, *Ma Me* v. *Ma Myit*, P. J. L. B. 48; Chan Toon's L. C. Vol. I, p. 275, *Maung Seik Kaung* v. *Maung Po Nyein*, 1 L. B. R. 23; Chan Toon's L. C. Vol. II, p. 67, *Ma Thin* v. *Ma Wa Yon*, 2 L. B. R. 255 (F. B.), *Tha Tu* v. *Maung Bya*, 4 L. B. R. 181, *Ma Ein Thu* v. *Maung Hla Dun*, 15 Ind. Cas. 360; 5 Bur. L. T. 73, *Ma Kyi Kyi* v. *Ma Thein*, 3 L B. R. 8, *Mi Saung* v. *Mi Kun*, Chan Toon's L. C. Vol. I, p 198 at p. 204; S. J. L. B. 115 at p. 120, *Ma Me* v. *Ma*

MAUNG SIN *v.* MRS. KIRKWOOD.

Myit, Chan Toon's L. C. Vol. I, p. 275; P. J. L. B. 48, *Ma Mya Thu* v. *Maung Po Thin*, Chan Toon's L. C. Vol. II, p 61: P. J. L. B. 885, *Anleathan* v. *Mi Tha Ta U*, Chan Toon's L. C. Vol. II, p. 65, P. J. L. B. 625, *Ma Saw Ngwe* v. *Ma Thein Yin*, Chan Toon's L. C. Vol. II, p. 210, *Ma Gun Bon* v. *Maung Po Kyue*, U. B. R. (1897-01). II, 66, *Po Sein* v. *Po Min*, 3 L. B. R. 45, *Ma Su* v. *Ma Tin*, 18 Ind. Cas. 468; 6 L. B. R. 77; 5 Bur. L. T. 231, *Ma Nhin Bwin* v. *U Shwe Gon*, 23 Ind. Cas. 433; 8 L. B. R. 1: 7 Bur. L. T. 103: 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121: 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; (1914) M. W. N. 449; 41 I. A. 121 (P. C.), *Ma Thi* v. *Ma Nu*, S. J. L. B 70, *Maung Po Lat* v *Mi Po Le*, S. J. L. B. 212, *Ma On* v. *Ko Shwe O*, S. J. L. B. 378, *Maung Sa So* v. *Mi Han*, U. B. R.(1892-96)II, 171, *Ma Min Tha* v. *Ma Naw* U. B. R.(1892-96) II, 581, *Maung Pan* v. *Ma Hnyi*, U. B. R. (1897-01) II, 104, *Maung Hmu* v. *Maung Po Thin*, 1 L. B. R. 50, *Ma Hnin Gaing* v. *Ma Tha Li*, 10 Ind. Cas. 778; 4 Bur. L. T. 74, *Mi Saw Myin* v. *Mi Shwe Thin*, 15 Ind. Cas 919; U. B. R. (1912) I, 125, *Ma Thit* v. *Maung Tun Tha*, 30 Ind. Cas. 638; 8 Bur. L T. 138, *Maung Ka Gu* v. *Ma Hnin Ngwe*, 29 Ind. Cas. 706; 8 Bur. L. T. 196, *Ngi E* v. *Nga Aung Thein*, 28 Ind. Cas. 804; U. B. R.(1914)II, 37, *Mi Hlaing* v. *Mi Thi*, 23 Ind. Cas. 806: U. B. R. (1914) II, 40, *Maung Shwe Po* v. *Maung Bein*, 27 Ind. Cas. 632; 8 L. B. R. 115; 8 Bur. L. T. 25, *Maung Tun Tha* v. *Ma Thit*, 33 Ind. Cas. 803; 9 L. B. R. 56; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 2 M. L. T. 97: 21 C. W. N. 527; 44 C. 379; 26 C. L. J. 169; 10 Bur. L. T. 135; 44 I. A. 42 (P. C.), *Maung Kyi Hlaing* v. *Ma Htu*, 30 Ind. Cas 640; 8 L. B. R. 189; 8 Bur. L. T. 154, *Ma Sein Ton* v. *Ma Son*, 30 Ind. Cas. 588; 8 L. B. R. 501: 8 Bur. L. T. 203, *Chan Tha* v. *Mi Ma Pyu*, 33 Ind Cas. 127; 9 Bur. L. T. 95, referred to.

Reference made in first civil appeal against the judgment passed by the District Judge, Hanthawaddy.

FACTS appear from the following Order of Reference made by Robinson, C. J., and Mr. Justice Duckworth to a Full Bench under section 11 of the Lower Burma Courts Act:—

ROBINSON, C. J.—(*May* 2, 1921).—Plaintiffs are the children of Po Cho who was the eldest son of U Baw and Daw Hmo. Their eldest child was Ma Nyein Aung. Po Cho grew up and worked with his father managing the family property. He took a more prominent part in this filial duty than most sons probably do. He was of age and fully competent to succeed his father as head of the family and he satisfied all those conditions which lead to the special recognition of a child as the Orasa. In ordinary parlance he would, no doubt, be the child spoken of as the Orasa of the family. He died, however, some thirteen days before his father.

Ma Nyein Aung was the eldest child of the family and it is not denied that she was of age and competent in every way to take her mother's place. She survived both her parents.

Plaintiffs claim to be entitled to a one-fourth share in the estate by reason of the fact that their father was the Orasa child. If he was not, they would only be entitled to a one-sixteenth share.

So long as both parents were alive, it is agreed that Po Cho and Ma Nyein Aung were each presumptively the Orasa, and on behalf of the defendants it is argued that the question as to which of these two children would eventually be the Orasa depended on which of the two parents died first. Daw Hmo died first and on her death it is said Ma Nyein Aung became the Orasa and Po Cho lost all chances of gaining that status. His children would, however, not be entitled to more than one-sixteenth, as on Daw Hmo's death he lost even his presumptive status, and he would only have ranked as a younger child, even if he had survived his father.

On the other hand, it is urged that Po Cho having reached full age and satisfied all the conditions required for an Orasa, he actually held that status, and this long before Daw Hmo died; and once an Orasa, always an Orasa. There cannot be more than one Orasa in a family and once there was a fully qualified Orasa, that status did not devolve on any other child. It is urged that it was impossible to hold that the question who was the Orasa was a matter of chance, to be decided according as one or other of the parents predeceased the other. It was also urged that a son, if competent, always took precedence over an elder daughter.

The *Dhammathats* clearly recognize the possibility of a child who has reached full status of Orasa predeceasing his or her parents by making provision for

preferential treatment of that child's children. Reference may be made to the *Dhamma* and *Manugye* in section 162 of the Digest. Both clearly refer to an Orasa son and the former applies a similar rule in the case of females. This provision the *Manugye* omits, and it may, therefore, be argued that the *Dhamma* was referring to a family having daughters only. The full status of Orasa can, however, apparently be achieved before the death of either parent. If that is so, it may considerably affect the other questions that arise in this case. Counsel for both sides urge that there cannot be two Orasas in one family, but they use the argument to suit their own cases. It may be that in such a family as this, the question as to whether Po Cho or Ma Nyein Aung was to be treated as the Orasa could not be definitely decided until one or other of the parents died. Or it may be that the true view is that in such a family, the son ousts the daughter from the position, so that no question as to Ma Nyein Aung could arise. It seems clear that once a son has achieved the status, the fact that he predeceases his parents or his father does not permit of a younger son succeeding to that position.

There are many and difficult questions arising in the case and the state of the decisions as to one or more of them is to leave these questions in considerable doubt. The *Dhammathats* are confused and contradictory and it appears almost impossible to reconcile them. It may be that those dealing with daughters as Orasas were intended to refer only to families in which there were daughters alone. The exact meaning to be assigned to the words "*tha*" and '*thami*" must be considered and it will also be necessary to consider the exact meaning to be given to the word "Orasa" when the child predeceases and when he or she survives the parents.

I have, I think, written enough to indicate the questions that arise and the great difficulty there must be in coming to a decision. The matters involved are of the greatest importance to Burman Buddhists and some or all of them are constantly arising. It is, I therefore think, necessary to refer the following questions to a Full Bench:—

1. In a family consisting of both sons and daughters, can any child acquire the full status of Orasa prior to the death of either parent?

2. If so, in such a family where the eldest child is a daughter, can any son become Orasa until his father dies?

3. In such a family, can the question which child is the Orasa be decided before the death of either parent?

4. Can there be in such a family two Orasas?

5. Are sons always to be preferred to daughters as Orasa?

6. In such a family, can there be an Orasa son who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate?

7. If so, can the eldest child, being a daughter, on her mother predeceasing her father, claim a quarter share as Orasa or transmit to her children a right to preferential treatment in the division of the estate?

DUCKWORTH, J.—(*May* 2, 1921).—For the purpose of this appeal the following facts will suffice:—

Daw Hmo predeceased her husband U Baw. U Baw died some years later *viz*, on the 28th December 1907. Their eldest son (not their eldest child) Maung Po Cho died on the 13th December 1907, or some twelve days prior to his father. He was about 40 when he died.

Their eldest child was a daughter, Ma Nyein Aung, who died after both her parents. The plaintiffs-respondents are the issue of Maung Po Cho, and the appellants-defendants are the younger son and daughter of Daw Hmo and U Baw.

The plaintiffs prayed for a quarter share in the estate as representing Maung Po Cho, who they claim was the "Orasa" son of U Baw and Daw Hmo.

On the other hand, it is contended that the Orasa was Ma Nyein Aung as being the eldest competent child and daughter of Daw Hmo and U Baw—the former having predeceased the latter. The real question in this appeal is, which was the Orasa—Ma Nyein Aung or Maung Po Cho? The learned Judge of the District Court, follow-

ing the cases of *Maung Po Hman* v. *Maung Tin* (1), *Po Zan* v. *Maung Nyo* (2) and *Tun Maung* v. *Ba Tun* (3), decided, with apparent reluctance, in favour of plaintiffs, *viz.*, that Maung Po Cho was the Orasa son, and that by right of representation the plaintiffs were entitled to a quarter share.

Maung Thein Maung, on behalf of the appellants, relied upon sections 30 to 33 and section 163 of U Gaung's Digest, sections 155 to 159 of the *Attathankepa Dhammathat*, and to the views expressed by Messrs. Tha Gywe and May Oung in their published works. Mr. Lentaigne relied chiefly upon the decision in the case of *Po Hman* v. *Maung Tin* (1) already referred to. Ma Nyein Aung was admittedly an adult at her mother's death, and Po Cho was an adult and had admittedly assisted his father in his work right up to the time of his (Po Cho's) death. It is clear that both of them were competent to be the Orasa. it is not denied that if Maung Po Cho was the Orasa, the plaintiffs' share is one-quarter and that it is only one-sixteenth if Ma Nyein Aung was the Orasa daughter. In Lower Burma, the last and most decisive case on the subject is that of *Po Hman* v. *Maung Tin* (1). Here the mother died first, but it was held that Po Hman ousted the elder daughter from the position of Orasa as soon as he reached competent age. In *Po Zan* v. *Maung Nyo* (2) it was the father who died first—so, in any case, the decision was correct, but it was tacitly assumed that the result would have been the same, even if the mother had died first. Section 150 of the Digest was quoted to show that sons are preferred to daughters, but section 49 was not referred to. This latter section seems to deal with them on equal terms, at any rate, in regard to their family duties. There is, I think, little doubt that there can be only one real Orasa in each family, but, in order to reach the status of an Orasa, a person must attain majority and be competent, *see* the case of *Tun Myaing* v. *Ba Tun* (3). If these conditions are fulfilled, the Orasa can pass on his rights to his heirs, if he dies. If the person is incompetent or dies before attaining majority, then no doubt his rights devolve. In the case of *Ma Mya Thu* v. *Maung Po Thin* (4) the father died first, so, of course, the son was preferred to elder daughters. Section 163 of the Digest shows that the eldest child's heirs, when she is a daughter, recieve preferential treatment. The *Dhammathats* undoubtedly contemplate a female being Orasa. Of course, section 163 is not applicable if there is or has been an Orasa son, but if there is an Orasa daughter I fail to see why at her death the position of Orasa should pass to the younger brother or sister, [*Tun Myaing* v. *Ba Tun* (3)] or why in her lifetime a younger brother on reaching competent age should be able to oust her from her position. In my opinion it is quite clear from the majority of the *Dhammathats* quoted in sections 30, 31 and 33 of the Digest that, in a family composed of sons and daughters, until one of the parents dies, there is, technically speaking, no Orasa, though the eldest son is usually so styled, and that, if the father dies first, the eldest son, if competent and a major, automatically becomes Orasa, whereas if the mother dies before the father, the eldest competent daughter, if a major, occupies that position—in either case as taking the place of the father or mother in the family. If the eldest son or daughter, as the case may be, has reached competent age and then predeceased his or her parents, leaving issue behind, there is then no Orasa at all, but the said issue receives preferantial treatment. The point seems to me to be that none of the Lower Burma rulings has really dealt with the question of the eldest child's rights when that child is a daughter and the family consits of both daughters and sons, and the mother predeceasses the father. What appears to me to be the correct law was suggested by MacColl, A. J. C., in the case of *Mi The O* v. *Mi Swe* (5) and in *Nga Lu Daw* v. *Mi Mo Yi* (6). This is, with some

(1) 29 Ind. Cas. 756; 8 L. B. R. 113; 8 Bur. L. T. 140.
(2) 20 Ind, Cas. 327; 7 L. B. R. 27; 6 Bur. L. T. 105.
(3) 2 L. B. R. 292.
(4) P. J. L. B. 585; Chan Toon's L. C. Vol. II, L. 61.
(5) 28 Ind. Cas. 821: U. B. R. (1914) II, 48.
(6) 31 Ind. Cas. 87; U. B. R. (1915), II, 56 at p. 72.

slight difference, what I have already stated above. It appears, moreover, to have been the view taken by Mr. Chan Toon in his Principles of Buddhist Law, page 103. The eldest daughter or son, as the case may be, obtains the Orasa share or one-quarter as a right—the former on the mother predeceasing the father and the latter on the father predeceasing the mother (Digest, sections 30, 31 and 33). This, of course, is only so when the daughter or son was competent to fill the position of the deceased parent. The *deciding factor* as to whether the privilege falls to a female or a male *is the sex of the parent who dies first.* For instance, if the mother dies first there would be no object in giving a quarter share to the eldest son because his father is still alive. In this connection sections 155 and 156 of the *Attathankepa* must be considered—they bear out the view now taken. The authority of this *Dhammathat* is questioned by the unknown author of the introduction thereto, but, in my opinion, it carries great weight. It was compiled by the late Kin Wun Mingyi, U Gaung, C. S. I., a learned Minister of the Burmese Kings, who had a vast knowledge of Burmese Buddhist Law, as applied amongst his people. Its value has been recognized by the British Courts, both in Lower and Upper Burma. Sir George Shaw in the case of *Mi Kin Lot* v. *Nga Ba So* (7) made some observations which show his respect for it. Sir Herbert White, C. J., in the case of *Ma Ba We* v. *Mi Sa U* (8) expressed his satisfaction with its authority, and Sir Daniel Twomey in the case of *Maung Hme* v. *Ma Sein* (9) and again in *Ma Lay* v. *Tun Shwe* (10) laid great stress upon it. The *Yozathat*, the first *Dhammathat* quoted in sections 44, 45 of the Digest, supports this view in the first portion set out. The remarks in the case of *Ma Me* v. *Ma Myit* (11) that the eldest daughter only succeeds as Orasa where there are no sons were mere *obiter dicta* as the decision of the point was unnecessary.

In the case of *Maung Seik Kaung* v. *Maung Po Nyein* (12) it seems to me that the real point was dimly foreseen, but it was thought that the *Dhammathats* did not clearly enunciate the principle that the daughter could claim a quarter share from her father on her mother's decease although there were indications of it. It was, however, admitted that some of the *Dhammathats* gave the quarter or Orasa share to the eldest child, and that only occasional passages put the daughter in an inferior position to the son. In that case too, the mother died before the father and the son was claiming against his father on the latter's re-marriage. The references made in the ruling to sections 155 to 159 *Attathankepa Dhammathat* are vitiated by the fact that the younger "sons and daughters" are mentioned in the Burmese Script, whereas in the English translation they are collectively referred to as younger children. The learned Judge also seems to me to have misinterpreted sections 32 and 33 of the Digest and, though he referred to it, did not bear in his mind section 3, Book X of the *Manugye*. In the case of *Ma Thin* v. *Ma Wa Yon* (13) the converse case was discussed, but the question now raised was not decided. The Vilasa, section 33 of the Digest, page 84, Volume I, entirely favours the position which I now take up. In the case of *Tun Myaing* v. *Ba Tun* (3) Birks, J., said: "It is settled law that on the death of one parent it is only the eldest child (not son) that can claim a quarter share during the lifetime of the surviving parent." The case of *Tha Tu* v. *Maung Bya* (14) does not materially assist us. In that case, as reported, there were no sons but five daughters, and the eldest was naturally given her quarter share. The case of *Lo Zan* v. *Maung Nyo* (2) implies that the Texts in section 163 of the Digest apply exclusively to families consisting of daughters only, but the view adopted in the case

(7) U. B. R. (1902-06), II, Buddhist Law, Divorce p. 3.
(8) 2 L. B. R. 174 at p. 182.
(9) 46 Ind. Cas. 953; 9 L. B. R. 191; 11 Bur. L. T. 236.
(10) 51 Ind. Cas. 588; 10 L. B. R. 10; 12 Bur. L. T 75.
(11) P. J. L. B. 48; Chan Toon's L. C. Vol. I, p. 275

(12) 1 L. B. R. 23; Chan Toon's L. C. Vol. II, p. 67.
(13) 2 L. B. R. 255 (F. B.).
(14) 4 L. B. R. 181.

of *Ma Ein Thu* v. *Maung Hla Dun* (15) is distinctly opposed to this implication, and the view taken in this last case is supported by section 15, Book X of the *Manugye*. Section 150 of the Digest referred to in *Po Zan's case* (2) does indeed appear to place daughters in an inferior position to sons, even though the son may be the youngest child, but it seems to me that the superiority of the son has been judicially recognized only in cases where the father died first, excepting in the case of *Maung Po Hman* v. *Maung Tin* (1) already referred to.

With some hesitation I venture to think that the decisions of this Court in *Po Zan's case* (2) and in *Maung Po Hman's case* (1) are erroneous. In the latter case, if Mi Shwa Ein died after she had attained majority and was competent, then she was the Orasa and on her death the position of Orasa remained unfilled [see *Tun Myaing* v. *Ba Tun* (3)]. If *Po Zan's case* (2) is correct, section 163 of the Digest may become a dead letter, because there could be no Orasa daughter in a family consisting of both sons and daughters, unless there should be no competent son.

As against the view that sons should be preferred to daughters, I would set the universal practice of equal division of inheritance between sons and daughters—a practice followed not only by the Courts of this country, but also by the villagers themselves. The view in question arose, I think, owing to a misunderstanding. Sections 155 to 159 of the *Attathankepa* were misunderstood owing to an inadequate translation, as pointed out above, and sections 2 and 3, Book X, *Manugye*, were not read together as a whole, nor were sections 4 and 5. The case of *Ma Nan Gyaw* v. *Maung Shue Ket* (16), relied on in this appeal, is of little real usefulness, inasmuch as the learned Judge who decided it dealt with none of the texts applicable and the principle, that where there are sons, a daughter, though the eldest child, is not entitled to claim a quarter share on the mother's death, was deduced from cases which did not cover the real issue. *Tha Tu* v. *Maung Bya* (14) is quoted by Mr. May Oung at page 221 of his work on Buddhist Law as favouring the eldest daughter who has also the eldest child obtaining her quarter share on her mother's death where the family consisted of three daughters and two sons. Upon reading the judgment, however, I am not sure that his remark, that the head-note is wrong, is correct, as Hartnoll, J. (now Sir Henry Hartnoll), clearly stated at page 182 that the mother died leaving five daughters. Nevertheless, that view and the view which I venture to take is supported by *Manugye* and the *Attathankepa* as well as the *Wagaru Dhammathat*, which, so far as is known, is the earliest of all, although it is true that the latter does not give the Orasa (whether male or female) a full quarter share.

The *Dhammathatkyaw* gives the Orasa daughter her full quarter share and the younger children, male and female, have to wait till the father dies before they get anything. The *Vinicchaya*—an important *Dhammathat*—upholds the quarter share of the Orasa. The most modern work, the *Attathankepa*, has already been discussed. It remains to be said that in the present case Maung Po Cho predeceased his father and that, in my opinion, he was never Orasa, for I consider that Ma Nyein Aung held that position all along. Taking the view which I do, supported, as it is, by such Burmese Jurisconsults as Messrs. May Oung and Tha Gywe in their published works, I am aware that I am going counter to the previous decisions of this Court, but I think that the whole question requires careful re consideration by a Full Bench of this Court, in the light of what I have set out in this order.

I have now had the advantage of seeing the questions propounded for reference by the learned Chief Judge, and I concur in referring those questions to a Full Bench.

Mr. *Thein Maung*, for the Appellants.

Mr. *J. A. Maung Gyi*, for Respondent No. 1.

Mr. *May Oung*—(*Amicus Curiæ*).

OPINION OF THE FULL BENCH.

MAUNG KIN, J.—The following questions have been referred:—

1. In a family consisting of both sons and daughters, can any child acquire the full status of Orasa prior to the death of either parent?

2. If so, in such a family where the eldest child is a daughter, can any son become Orasa until his father dies?

(15) 15 Ind. Cas. 360; 5 Bur. L. T. 73.

(16) 10 Bur. L. R. 234.

3. In such a family can the question which child is the Orasa be decided before the death of either parent?

4. Can there be in such a family two Orasas?

5. Are sons always to be preferred to daughters as Orasas?

6. In such a family can there be an Orasa son who predeceasing his parents can transmit to his children a right to preferential treatment in the division of the estate?

7. If so, can the eldest child, being a daughter, on her mother predeceasing her father, claim a quarter share as Orasa or transmit to her children a right to preferential treatment in the division of the estate?

The facts of the case are:—

Daw Hmo predeceased her husband U Baw, who died some years later, *viz*, on the 28th December 1907. Their eldest son (not their eldest child) Maung Po Cho died on the 13th December 1907, or some twelve days prior to his father. He was about 40 when he died. Their eldest child was a daughter, Ma Nyein Aung, who died after both her parents. The plaintiffs are the issue of Maung Po Cho and the defendants are the younger son and daughter of Daw Hmo and U Baw.

Thus U Baw and Daw Hmo had four children.

Had they all survived both their parents, they would all have shared equally in the estate of their parents in accordance with the ruling of *Ma Kyi Kyi* v. *Ma Thein* (17). In that case the rules of distribution of the parental estate between the children of the same parents on the death of both the parents were jettisoned as being so hopelessly conflicting as to be difficult to reconcile and the rule of equal distribution was introduced as being equitable and in accordance with the practice of the people.

The plaintiffs claim a quarter share in the estate as representing Maung Po Cho whom they claim to be the Orasa son of U Baw and Daw Hmo.

As I understand it, the claim is to represent their father who predeceased U Baw and survived Daw Hmo and, bearing in mind the ruling in *Ma Kyi Kyi's case* (17), they put their claim as being for what their father would have got had he survived both his parents, because their uncle's share would be the same. The claim is really under section 15 of the *Manugye*, that is to say, a claim to a share equal to that of their youngest uncle. And if the distribution was to be made according to the *Dhammathats* their claim would have been less than one quarter. So it is clear that this is not a case of devolution of the share which the Orasa son or daughter may be entitled to claim on the death of one of the parents. The right claimable would be the right to represent the parent as fully as the *Dhammathats* allow.

I shall now proceed to consider the question who is an "Orasa" child.

The word is a Pali word. In the Burmese form it is *auratha* and in its Romanized form it is "Orasa." It means legitimate, own son. *See* Childer's Pali Dictionary. The word is used in this sense in the *Dhammathats* as distinguished from other kinds of children entitled to inherit, such as, *heittima*, *keittiaja*, *kittima*, *pubbhaka*, and *appatittha*. *See* section 16 of U Gaung's Digest, Volume I. The distinction between an *auratha* (a child born in lawful wedlock), a *kittima* and an *appatittha* is clearly drawn in sections 190, 191 and 192 of the same Digest. Reference may also be made in this connection to sections 198 and 199 of the same Digest.

And we have now been accustomed for a considerable time to the use of the term "Orasa" as meaning the legitimate child who is entitled to claim a quarter share in the parental estate on the death of one of the parents. There is no doubt some of the *Dhammathat* writers use the term "Orasa" baldly, *e. g.*, "Let the Orasa take a quarter of the estate," whereas some are careful to indicate which child is meant by "Orasa," while others do not call the child by that term at all but declare that the son or daughter who planned and worked with the parents and who continues the family is the one entitled to have preferential treatment in regard to inheritance.

In the texts collected in section 30 of the Digest which deals with "Partition between mother and son on the death of the father," the son who is given a preferential right (whether to certain specified property or a quarter of the parental estate either to himself solely or to be divided with his

(17) 3 L. B. R. 8.

brothers) is called *jetthaputta* in the following *Dhammathats* :—

Pyu—*jettho*, *puttosa*=The eldest, if a son, or the first born child, if a son.

According to Childer's *jettho* means chief, best, eldest.

Vilasa—The eldest child who is a son or first born child who is a son.

Waru—Eldest or first born Orasa.

Dhammathatkaw, *Rasi* } same as *Vilasa*.

Konda same as *Pyu*.

Kyetyo—First born son or daughter.

He is termed *Thagyi* in the following *Dhammathats* :—

Manukye, *Amwebon* and *Dhamma*. *Thagyi* means eldest son.

The term *Thagyi auratha* is used in the following *Dhammathats* :—

Vannana, *Warulinga* and *Cittara*.

"*Auratha* among sons" occurs in *Warulinga*.

Tha or *auratha* is used in the following :—

Kunjalinga, *Manuyin*, *Kunja*.

"Son known to the officials" is used by *Kyannet*. This means a recognised son, such as son born in lawful wedlock.

The expression 'if the son takes the place of the father' is used in *Vicchedani*.

The son who bears the father's burden or responsibilities is used in the following *Dhammathats* :—

Mano, *Kainga*, *Myingun*, *Khandaw*, *Tejo*, *Vannadhamma*, *Manuvanna*.

In the rest of the *Dhammathats*, namely, *Viniccaya*, *Pakasani*, *Rajabala*, *Manu*, *Panam*, *Dayajja*, and *Dhammasatta* the word '*tha*' son is used.

The earliest of these *Dhammathats* are *Pyu* (89, B. E.), *Vilasa* (455 B. E.), *Waru* (643 B. E.). These use the term '*Thau-u*.' Then came *Manukye* and *Dhamma* (both 1114 B. E.), which use the term '*Thagyi*.' Then in 1126 B. E., came *Vannana* which uses the expression '*Thagyi auratha*.' Then came *Manuyin* (1129 B. E.) in which *auratha* or *Tha auratha* is used. In 1129 B. E. *Rasi* was published and the term '*Tha-u-yaukya*' is used in it notwithstanding the fact of the term '*Thagyi*,' '*Thagyi auratha*' and '*auratha*' having been used in the meantime by some of the other *Dhammathats*. In 1143 B.E. *Sonda* which uses the term '*Tha-u*' '*Thagyi auratha*,' appeared. In 1165 B. E. *Kunjalinga* was published. It gives the rules of partition between mother and son on the death of the father and says that if the son is *auratha* he shall get one quarter and the mother three-fourths.

Of the above *Dhammathats* in which the term '*jetthaputta*' occurs reasons are given for the preferential treatment in the following :—

Pyu—The son continues the family.

Vilasa—Because the parents obtained *at the commencement of their wedded life* by their earnest prayer.....

.....he helps in the acquisition of property.....he succeeds to the father's office and continues the family.

Dhammathatkyaw, *Rasi*, *Kyetyo* } same as *Vilasa*.

All the *Dhammathats* mentioned in section 30 of the Digest when considered as a whole, lead to the inference that *it is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family.* It appears that the *Dhammathats* take it for granted that the son, if competent to do so, will take his father's place and continue the family but "whether this duty is a mere moral obligation or can be enforced at law is at present undetermined so far as decisions go." Per Jardine, J.C., in *Mi Saung* v. *Mi Kun* (18). *And this eldest born son, who is entitled to a quarter share, is by later Dhammathats called an* Orasa.

According to section 62 of the Digest this eldest born son may be superseded by, and the position he might have enjoyed may go to, a younger son who fulfils the conditions, while he does not.

It may be argued that what is material is the fulfilling of the conditions and not the order in which the sons are born, so that even where the eldest born is a daughter a son who fulfils the conditions would be entitled to the quarter share from the mother on the death of the father.

In my judgment the argument is not sustainable. It can only be founded on the *Dhammathats* noticed above which do not call the son entitled to the share by any description, such as *Tha u-thagyi*, *thagyi auratha*, or *auratha* but which describe him only as the son who bears the father's burden or responsibilities. It appears to me that these

(18) Chan Toon's L. C. Vol. I, p. 192 at p. 204; S. J. L. B. 115 at p. 120.

Dhammathats put the matter in a comprehensive form, because, whether the claim is made by the eldest born son or by a younger son, the conditions must be fulfilled. These *Dhammathats* do not, in my opinion, contradict the proposition that the eldest born son, if competent, can claim the share from the mother and if not competent, he will be superseded by another son who is competent, but that if the eldest born is not a son, the right to a quarter share does not exist in favour of a son, though he may be the eldest of the sons. I have deduced this by a consideration of the *Dhammathats* alone.

I get the following results:—In dealing with the right of the child who is given a preferential right—

(1) earlier *Dhammathats* call him "*Tha-u*" and the right is given him because he fulfils the conditions as to which the leading *Dhammathats* are in substantial agreement;

(2) later *Dhammathats* such as, *Manukye* and *Amuebon* call him "*Thagyi*;"

(3) other *Dhammathats* of later dates call him "*Thagyi auratha*;"

(4) still later *Dhammathats* call him merely *auratha*;

(5) there are some *Dhammathats* which do not call him by any description but speak of him merely as a son who bears the father's burden, their authors probably thinking that it is unnecessary to state the rule in detail, because the fulfilment of the condition is the essential thing.

Read all these *Dhammathats* together and the conclusion will be reached that those which speak of the son who bears the father's burden do not appear to contradict the others. Because they were not read in the way I suggest, did Sir George Shaw go wrong in *Mi Min Din* v. *Mi Hle* (19) when he held that the eldest born son means the eldest son, not necessarily the eldest child.

There is another ruling which appears to me to be contrary to my view. That is in *Ma Ein Thu* v. *Maung Hla Dun* (15) in which it had to be ascertained whether the second child, a daughter, was the Orasa for the purpose of section 163 of the Digest. It was not certain whether the eldest child who predeceased its parents in its infancy was a son or a daughter. Twomey, J., held that if it was a daughter the eldest surviving daughter would be *auratha*. This view is perfectly correct. But the learned Judge observed that the fact that the eldest child was a son would make no difference. He appears to have thought that the fact was a negligible quantity as he stated:—At any rate I see no reason to think that they (the texts in section 163) do not apply to a family where the only children arriving at maturity were two daughters and the only other child a son who died in infancy. No texts are cited in support of this second view propounded by the learned Judge.

The next question for consideration is the right of a daughter to a quarter share. Section 33 of the Digest which deals with the partition between father and daughter on the death of the mother has to be considered. Although the number of *Dhammathats* which gives the eldest born daughter the right to claim a quarter share from the father is smaller than that of the *Dhammathats* which give the son the right to claim this share from the mother, yet the important *Dhammathats*, *viz.*, *Manukye*, *Vilasa*, *Dhammathatkyaw* and *Amwebon* declare the right in her favour and it is well-known that the case law on the subject is to the same effect.

It is, therefore, correct to hold that the eldest born legitimate daughter is the Orasa who has the right to claim a quarter share from the father on the death of the mother.

It has, however, been contended that the eldest born daughter will be ousted from her position as in Orasa, if there is a son.

In *Mi Saung* v. *Mi Kun* (18) Mr. (afterwards Sir John) Jardine, J. C., observed:—

"Under certain circumstances the eldest daughter, at least when there is no son competent to assume the parental duty, takes the paraphernalia of the deceased mother, * * * These rights are additional to the fractional share of the inheritance, which on the death of one parent the eldest son or the eldest daughter is entitled to demand from the surviving parent."

(19) U. B. R. (1901-06), II, Buddhist Law, Inheritance, p. 11.

The learned Judge cited no authority for limiting the eldest daughter's rights to the case where there are no sons. This ruling was followed by Mr. Hosking, J. C., in *Ma Me* v. *Ma Myit* (11) and again there were no reasons forthcoming.

In *Ma Mya Thu* v. *Maung Po Thin* (4) it was laid down by Mr. Birks, J. C., that where there are both sons and daughters the eldest son is preferred to any daughter. Now in that case the father had died and the claim was made by the youngest son (who was also the youngest child) where the eldest born was a daughter and the third child, a boy, had died in infancy. It was taken for granted that had he not died in infancy the third child would, if competent to take his father's place, have been the Orasa entitled to claim the quarter share from the mother. But the texts cited by the learned Judge show that it is the eldest-born son who was under certain circumstances, entitled to the share and that, if he does not fulfil the conditions, a younger son, being competent, will step into the position. If in that case the younger son had stepped into the position of the eldest-born son, then there would be no doubt the decision was correct. The case was one where the father had died and the eldest daughter could not have claimed to be the Orasa for the purpose of claiming a quarter share.

In *Anleathan* v. *Mi Tha Ta U* (20) the eldest daughter sued her mother and her brothers for a quarter share. It was held by Mr. Birks, J. C., that the plaintiff could not claim the share while there were sons. It was, however, unnecessary to take the existences of younger sons into consideration, because the case was one in which the eldest daughter could not represent her deceased father. Sections 156, 157 and 158 of the *Attasankhepa Vannana Dhammathat* were cited as being in conformity with the principle enunciated in *Ma Mya Thu's case* (4) which was relied on.

In *Maung San Dwa* v. *Ma Min Tha* (21) a sixth child, a son, was held to be entitled to demand a quarter share from the mother on the death of the father, though there were two sons elder than the plaintiff. Fox, J., followed *Ma Mya Thu's case* (4). It was contended by Mr. Hla Baw that the son entitled to claim the share is the eldest-born son on the ground that in section 63 of the *Manu Vannana Dhammathat* and in the extracts from the *Vilasa* and *Dhammathatkyaw* given under sections 32 and 34 of the Digest, the term used, when referring to the son who should get a larger share than the other children is "*Tha-u*" or first born son. The learned Judge disposed of the contention thus: "These terms are, however, not universally used; in section 5 of Book X of the *Manukye*, which section directly bears upon the present case, the terms used are "*Tha-gyee*" which I take to mean the *chief son* who would naturally be the eldest of them, unless afflicted with any of the diseases or defects enumerated in section 38 of the same book. Mr. Justice Birk's judgment was based upon a general view of the text bearing upon the question, and I see no sufficient reason for doubting its correctness." In this case also the claim was made against the mother and if the claimant was entitled to supersede one of his two elder brothers, there would be nothing to say against the decision. But, with great respect, the learned Judge erred in thinking that there was any difference in meaning between the terms "*Tha-u*" and "*Tha-gyi.*" The very fact that the *Dhammathats* speak of the possibility of the *Thagyi* being superseded by a younger son shows that *Thagyi* is the same as *Tha-u*. "*Thagyi*" has been rendered as "big son" by Advocates to suit their own cases. *Thagyi* is the abbreviated form of *Tha-akyi*, which must mean the eldest son. I have not come across in any of the *Dhammathats* any expression which is equivalent to the English expression, "eldest surviving son."

In *Maung Seik Kaung* v. *Maung Po Nyein* (12) a Bench of two Judges of this Court, after referring to sections 155, 157, 159 of the *Attasankhepa Vananna Dhammathat*, came to the conclusion that the rules in those sections proceed on the principle of the son getting a portion if his father dies, and the daughter if her mother dies; but that the case of both daughters and sons is not distinctly provided for. The learned Judges

(20) Chan Toon's L. C. Vol. II, p. 65; P. J. L. B. 625.
(21) Chan Toon's L. C. Vol. II, p. 207.

do not appear to have referred to the original texts. In section 155 the existence of younger sons and daughters is clearly contemplated because it says that the *kanitha* (younger) sons and daughters shall not demand inheritance until the mother dies. In section 156 which gives the *auratha* share to the daughter on the death of the mother it is declared that the *kanitha* sons and daughters shall not claim inheritance until the father dies. So that in both the cases of father and mother predeceasing his or her consort, the existence of younger sons and daughters is not lost sight of and the law as regards them is declared. As *Attasankhepa* is looked upon only as an exposition of expert opinion, we shall now turn to the older *Dhammathats* and ascertain whether this expert opinion is justified. In section 30 of the Digest :—

Dhammathat kyaw speaks of *nauktha* in referring to the other children. No doubt *tha* there is used in the sense of children. The term in this connection means later children.

Manugye gives three shares to the mother and *tha thaminge*, younger sons and daughters.

Sonta says that to the *thange thaminge*, younger sons and daughters, however, suitable shares should be given.

Amuebon } say that the three parts should
Dhamma }

go to the mother and the younger brothers and sisters.

The other *Dhammathats* are silent on the point. Of the *Dhammathats* collected in section 33 of the Digest—*Dhammathatkyaw* mentions younger sons and daughters, and *Rasi* and *Kyetyo* speak of those sons and daughters other than the eldest daughter. In the extracts given in section 31 of the Digest—*Vilasa* contemplates the existence of other children as it says 'It is only the eldest who should get.'

These materials are sufficient as showing that sections 30 and 33 of the Digest contain rules as regards the eldest child's quarter share where there are sons as well as daughters and justify the expert opinion contained in *Attansankhepa*. The author of that work was also the author of the Digest. During the regime of the last two Burmese Kings and for many years after the Annexation until his death U Gaung was the greatest living authority on Burmese Law and Literature and I think his opinion may be accepted even without the materials pointed out above.

To my mind from the very fact that the *Dhammathats* speak of the eldest as having the right to claim the quarter share, it is implied that there must be other children.

The contention that the case of both sons and daughters is not provided for cannot, therefore, be accepted.

It has, however, been urged that, as the *Dhammathats* look upon the son as being superior to the daughter, the eldest-born daughter cannot be allowed to claim the quarter share, where there are sons. Among others, sections 140 and 150 have been referred to in support of the contention. These sections and the others contain rules of distribution after both the parents are dead. These are the rules which this Court has disregarded in *Ma Kyi Kyi's case* (17). They do certainly show that the son is regarded as superior to the daughter. But they do not give him, unless he is the eldest born, any greater share than the eldest of the daughters. For if the eldest is a daughter and there is a son younger than she is, that son, instead of getting a smaller share in accordance with the order of the births of the children, gets a share equal to the eldest daughter, and, in my judgment, wherever, in these rules, the word *auratha* is used, it is used to indicate the eldest child but not with reference to the right to claim a quarter share from the surviving parent. When both the parents are dead the question is not who is the eldest-born but who is eldest of the surviving children and all the surviving children will get their fractional shares, larger or smaller, according to the priority of birth.

In section 140 of the Digest :—

Myingun says that a woman may not say, 'I am the *auratha*.'

Vicchedani says :—"Even if she is the eldest sister, she is not the *auratha*."

In section 150—

Rasi says :—"If a son is born after the daughter, let them both have equal shares." A woman shall not say, "I am the *auratha*."

Ottara says that although a son is the youngest among children of whom the others are daughters, he shall not be called a

younger child, let him take the elder's place, the place of the father.

Kyannet says that although a son is born after a daugher, the son is more excellent than the daughter.

In my opinion, when it is stated that the woman may not say, "I am the *auratha*," it only means that she may not claim the largest share in the estate or, in other words, she may not demand the eldest child's share.

When *Ottara* says that the son will take the father's place, it does not mean that he is given a superior status. It only means that he gets his father's personal belongings His elder sister is also allowed to take her mother's personal belongings. And his share in the residue is equal to that of his eldest or elder sister, as the case may be.

I am, therefore, of opinion that Hartnoll, J., in *Po Zan* v. *Maung Nyo* (2) and Birks, J.C., in *Ma Mya Thu* v. *Maung Po Thin* (4) were not justified in holding that the son is *preferred* to any daughter. It appears to me that though the eldest daughter is prevented from claiming the Orasa share, *i. e*, the largest share, there is nothing to indicate that the eldest son, her younger brother, becomes the Orasa and takes the largest share.

There is an additional reason why these rules of distribution of inheritance after both the parents are dead do not apply to cases where the eldest daughter claims a quarter share from her surviving parent, the father. It is that the claim is allowed her under very special circumstances and as a reward for her past assistance in the acquisition of property and the possibility (which the law givers expected in the times they lived) of her taking her mother's place and continuing the family and controlling the younger children as her mother had done in her lifetime. In the extract from *Dhammathatkyaw* which is given in section 62 of the Digest we find the principle "The eldest brother is in the position of the father, the eldest sister in the position of the mother." This is in the mouth of every Burman and it is clear from the fact of the principle being recorded in that *Dhammathat* word for word the same as it exists in the mouth of the people that it is a well-recognised principle. And so far as my experience goes the principle has never been taken to mean that in the case of the eldest daughter, only her younger sisters give her the position of their mother. The younger brothers also respect her as they had their deceased mother. This happy state of things exists to-day and long may it continue.

Another point is that even if those rules of distribution among all the children are applicable to the question of the eldest daughter's right to a quarter on the death of her mother, the younger son cannot take her place, he can only prevent her from claiming the right. Then in that case there would be no Orasa at all, a position which the *Dhammathats* can hardly be held to have contemplated.

In my judgment it is really unnecessary to go into the question of the applicability of these rules because it is perfectly clear, as shown above, that the *Dhammathats* in giving a quarter to the eldest child have in view the case of there being both sons and daughters in the family.

Among the Burmese Buddhists equality of the sexes is recognized in the *Dhammathats* with occasional aberrations to the effect that the male is superior to the females. But when we come to consider what superior rights are given to the man, we find that his rights are hardly superior to the woman's. Although they borrowed their laws from the Hindu Institutes of Manu, the Burmese carefully refrained from adopting the sex inequalities of the Hindu Law. For instance, in Hindu Law the term *aurasa* was applied originally only to the legitimate son. Next the Rishis evolved him into a son of a very superior type, namely, the son begotten by a man on a wife of the same caste who was espoused in an approved form of marriage with religious rites, was a virgin at the time of her marriage and had not passed through the marriage ceremony or a part of it with another man. Sarkar's Hindu Law of Adoption, 2nd Edition, page 57. This was done on spiritual grounds. In Hindu Law a daughter is not called an *aurasa* and is not allowed to confer spiritual benefits on her father as the *aurasa* son is.

The Burmese borrowed the word *aurasa* and Burmanized it as *auratha* but gave their own meaning to it suitable to the conditions of family life which they approved. Thus they called a child (son or daughter) born in

lawful wedlock an *auratha* child, putting the son and daughter generally on an equal footing.

I am, therefore, of opinion that it is wrong to state, as in *Po Zan* v. *Maung Nyo* (2), that the younger child, a son, being competent to assume the duties of an Orasa must be preferred to his eldest sister, even though she happened to be the eldest born. The case of *Maung Po Hman* v. *Maung Tin* (1) followed the last case cited herein without any discussion of the texts and I must respectfully dissent from it in so far as it holds that the eldest-born daughter is ousted from her position by her younger brother.

In the result I would hold that *the eldest born legitimate daugther has the right to claim a quarter share on the death of her mother whether she co-exists with sons or not, and that the eldest-born child is the Orasa, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son he can only make the claim from the mother, on the ground that he steps into his deceased father' place; similarly, if a daugher, she can only claim as one who takes the place of her mother. It is clear also that there cannot be two Orasas, a male and a female, in the same family, because an Orasa is either the eldest born or the one who supersedes the eldest born.*

If this view is correct, there will be no difficulty in construing section 15 of the *Manugye* and sections 162 and 163 of the Digest. The child who is the Orasa will be the child whose children, being out-of-time grand-children, will get a larger share in the estate of their grand parents than the issue of their uncle and aunts. They will under the present law [*Ma Kyi Kyi's case* (17)] get the share which their deceased parent would have got, had he or she survived his or her own parents. That deceased parent will be the eldest-born son or daughter.

In section 15 of the *Manukye* and sections 162 and 163 of the Digest words similar to those noticed above as occurring in the extracts given in section 30 of the Digest are found:—

Vilasa.—Thagyi anratha.
Myingun.—Thagyi.
Manukye.—Thagyi auratha.
Viniccaya.—Thagyi preceded by the Pali word *jettho.*

Manu	}	Thagyi.
Kyannet		
Kungya	}	Akogyi, eldest brother.
Vicchedani		
Cittara		
Kyetyo		

Vicchedani prefixes *jettho* to *Akogyi.*

The above are in section 162.

In section 163 we find:—

Viniccaya, Manuvannana, Sorada prefixing *jettha* to "*Thamigyi*" and "*Hnamagyi*" eldest sister.

So that with reference to the texts in the sections now under consideration it must be held that the eldest-born child is the one spoken of.

Section 15 contains three paragraphs, of which the first is for the "*Thagyi auratha*" and the second for the "*Thamigyi.*" It has been contended, as Counsel for the respondent in *Ma Saw Ngwe* v. *Ma Thein Yin* (22) did, that these two paragraphs are not mutually exclusive, and that at least for the purpose of claiming the larger share in favour of the out-of-time grand-children there can be two eldest children, eldest son and eldest daughter. I am unable to accept this contention. There are reasons why it should not be accepted, namely, (1) the official translation of section 212 of *Attasankhepa* is not correct. Therefore, the texts indicate alternative cases. I am not in favour of Mr. May Oung's translation which is given in his book at page 248. (2) Though the *Dhammathatkyaw* and *Chittara* in sections 162 and 163 of Digest mention both the eldest son and eldest daughter in the same breath, as it were, it does not indicate that the two cases are not mutually exclusive.

In support of the argument that the first two clauses of section 15 of the *Manukye* are not alternatives the case of *Mi Min Din* v. *Mi Hle* (19), (an Upper Burma case), has been cited. In that case Sir George Shaw, J. C., decided that under section 15 of the *Manukye*, there may be two Orasa children, and dissented from *Ma Saw Ngwe* v. *Ma Thein Yin* (22). Referring to that case, the learned Judicial Commissioner said: "It was held that there cannot be two Orasa children (that is an Orasa son and an Orasa

(22) Chan, Toon's L. C. Vol. II, p. 210.

daughter) in the same family. This decision was apparently based on section 212 of the *Attasankhepa*. The published English translation of that work seems to imply that there is either an Orasa son or an Orasa daughter, but not both at the same time. The Burmese is not so uncompromising, and is perhaps open to another construction, but, however this may be, I think there can be no doubt that the numerous passages of the *Dhammathats* dealing with partition among several sons and daughters refer to the special position and privileges of the eldest (or Orasa) son, and of the eldest daughter as co-existing, *cf.* sections 153 to 161 of the *Kinwun Mingyi's* Digest. There is nothing in sections 162 and 163 of that work which deals respectively with the case of the eldest or Orasa son and the eldest daughter dying before the parents—the text is directly in point in the present case—to show that they are mutually exclusive." If Sir George Shaw's decision is correct, then in the present case both Ma Nyein Aung and Maung Po Cho would be the eldest children whose own children will get preferential treatment under section 15 of the *Manukye* or under sections 162 and 163 of the Digest. I have already expressed my view that the published translation of section 212 of the *Attasankhepa* is correct, and that it indicates that the first two clauses are mutually exclusive.

As regards the other ground also of Sir George Shaw's decision, I respectfully differ from him. Sections 153—161 of the Digest do not show the position and privileges of the eldest son and the eldest daughter to be co existing under all circumstances. They are co-existing only in the case where the eldest son is younger than the eldest daughter. Where the eldest son is older than the eldest daughter, the son gets a larger share. In my opinion sections 153—161 of the Digest do not help us on the question whether there can be simultaneously an eldest son and an eldest daughter through whom special treatment may be claimed in regard to the inheritance of the grand-parents. I think *the eldest-born child—male or female—is the child through whom his or her children may claim a preferential right in the estate of their grand parents.* It would be absurd to allow two Orasas—a male and a female—for the purposes of the sections now under consideration, because their children would then take away altogether one half share of the estate. This, I think, is an absurd and illogical position, for the younger children will then have only the estate of their mother, namely, one-half, to inherit in. They would be deprived of their inheritance in the estate of their father. A child is entitled to inheritance in the estate of both its parents.

I have pointed out above that the eldest born daughter's right to take her deceased mother's place in the lifetime of her father is not ousted by a son born after her. That view is against the proposition that only where there are daughters the eldest daughter had that right. I have also shown above that the eldest son or daughter within the first two paragraphs of section 15, and sections 162 and 163 of the Digest is the same child who is entitled to preferential treatment on the death of one of the parents as contemplated by the extracts in sections 30, 31, 34 and 33 of the Digest. The view taken by Sir George Shaw in *Mi Min Din's case* (19) has been dissented from by Mr. McColl, A. J. C., in the unreported case of *Tha Dun* v. *Waing Gyi*, [Second Civil Appeal No. 302 of 1909 of the Upper Burma Judicial Commissioner's Court.] Mr. Tha Gywe refers to that case in his Conflict of Authority in Buddhist Law, Volume II, at page 53. In that case the eldest born child was a daughter, the second and third were sons of U Tu and Ma Kin. Waing Gyi was the son of the eldest daughter who had survived her father but not her mother. The plaintiff claimed a one third share in the estate of the grandparents on the ground that he was the son of the Orasa daughter. It was contended for the defence that the plaintiff's mother was not the Orasa, as she had brothers, and that the eldest competent son should be preferred to any daughter. Mr. McColl held that the plaintiff's claim was good, and he said that there was nothing to suggest that families consisting of daughters only are referred to.

In *Ma Ein Thu's case* (15) above cited Twomey, J., said that the texts stated in section 163 give the issue of the eldest daughter a share equal to that of the youngest of its aunts, and that there seems to be no authority for holding that these texts apply exclusively to families consisting

of daughters only, and, as I said before, he treated the fact that there was an eldest born son who died in infancy as being negligible.

With these observations I will now proceed to answer the questions referred.

I answer—

Question No. 1.—In the affirmative.

Question No. 2.—Where the eldest child is a daughter no son can become Orasa.

Question No. 3.—In the affirmative.

Question No. 4.—In the negative.

Question No. 5.—In the negative, unless the son is the eldest born.

As regards Question No. 6, I may say that the word "transmit" is not quite a happy term. The eldest born son is the Orasa. If he predeceased his parents, his children will have a right to preferential treatment as laid down in the first paragraph of section 15 of the *Manukye*, or section 192 of the Digest. If the eldest born son died before he became competent to take his father's place, a younger son, being fully qualified, may become Orasa, and, if that son had predeceased his parents, his children will have a right to the same preferential treatment. But, if the eldest born child was a daughter and predeceased her parents after she had become competent to take her mother's place, her children will have a right to the same preferential treatment. It is doubtful whether another daughter younger than a son can ever take the place of the eldest born daughter who is not competent, or died before she became able to take her mother's place.

As regards Question No. 7, my answer is—the eldest child being a daughter can claim on the death of her mother a quarter share as Orasa, and, if she then died before her father without having got the share, her children will have a right to preferential treatment contemplated by section 15 of the *Manukye* and sections 162 and 163 of the Digest and, if she then died after her father but before she had claimed her distributive share in the estate, her right of inheritance will devolve upon her children. The same would be the case of the issue of any other child who died after its right of inheritance became vested in it. Supposing the eldest born child died after it became entitled to claim a quarter share under the circumstances of the case, the question may arise whether his children will be entitled to claim the quarter share from their surviving grand-parent. This question does not arise here and need not be answered. But, if the eldest born, though it might have claimed the quarter share from the surviving parent, did not and survived that parent, then the child will no longer be entitled to claim the quarter share but will have to share with the other children and may in that case get more or less than the quarter share it might have claimed.

PRATT, J.—It is, perhaps, a matter for regret that the terms of this reference were drafted quite so broadly and were not confined more closely to the problems of the particular case from which it arose.

It appears necessary to summarise the facts briefly. Plaintiffs were the children of Maung Po Cho, eldest son of U Baw and Daw Hmo. Defendants were the younger son and daughter of U Baw and Daw Hmo.

Daw Hmo died before her husband U Baw and Maung Po Cho predeceased his father. Ma Nyein Aung, the eldest child of the family, survived both her parents.

Plaintiffs claimed one-fourth of the estate of their grand-parents, *ure representations*, on the ground that their father, Po Cho, was the Orasa child.

The District Court, relying on *Po Hman* v. *Maung Tin* (1), *Po Zun* v. *Maung Nyo* (2) and *Tun Maung* v. *Ba Tun* (3), held that Po Cho was the Orasa child of his parents, and that his children were entitled to the share of a younger uncle, *i.e.*, one-fourth in this particular instance.

The specific problem, therefore, is whether, where the eldest child of the family is a daughter, and survives both her parents, the children of the eldest son, who was competent to inherit and had attained his majority, are entitled to take the share of a younger uncle on the ground that their father was the Orasa son.

The term 'Orasa' originally meant nothing more than born in lawful wedlock but was usually applied in the *Dhammathats* to the eldest legitimate child in particular. In the *Manukye* (quoted in section 16 of the *Kinwun Mingyi's* Digest) children born of a union contracted by parental authority are designated 'Orasa.'

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The word has, however, frequently been used in the rulings of the Courts, in a special sense, of the child who takes the place of a parent on his or her death and is entitled to claim a one-fourth share of the estate from the surviving parent, and has been more particularly applied to the son in this connection.

I do not think there is any doubt that it is this specialised use of the term Orasa and the double sense in which it has been applied, that has inadvertently been the cause of some conflict in the rulings of the Courts.

It is necessary to distinguish carefully between the right of the child or children of the eldest child to take *jure representationis* a share equal to that of the younger uncle or aunt on division of the parental estate and the right of the eldest son or daughter to take the place of the parent of the same sex on his or her decease and to claim one-fourth of the joint estate from the surviving parent.

Had U Baw predeceased his wife and his son, Po Cho, survived him, it seems clear that Po Cho would have been considered the Orasa son and have been held entitled to claim a one-fourth share of the estate from his mother on his father's death, but it does not necessarily follow that where he predeceased his father, his children can claim a larger share than other grand-children on the ground that their father was the Orasa son.

The term Orasa, when applied to the eldest child whose child or children are entitled to a larger share of the inheritance by right of representation, is to my mind ordinarily being used in a different sense to that in which it is applied to the son or daughter entitled to claim a one-fourth share of the estate from the survivor on the death of one of the parents.

The law on the question is laid down in Book X, section 15 of the *Manukye*, which, following the accepted translation, runs as follows:—

"If the eldest son (*tha-gyi*) dies before his father and mother the law of inheritance between his son and his son's uncle and aunts is this. Because in case of the death of the father and mother, the eldest son, being the *auratha*, is called father, let his son and his (*i.e.*, the eldest son's) younger brother share alike. If the eldest daughter (*thamigyi*) die before the father and mother, this is the law for the partition of the inheritance between her daughter, and her daughter's uncle and aunts. Let the daughter of the eldest daughter and her (the eldest daughter's) younger sister share alike, because the eldest daughter, when grown up, stands in the place of her mother."

It will be noticed that the term *auratha* or 'Orasa' is applied here only to the eldest son and not to the eldest daughter and appears to be used in the sense of the legitimate son competent to inherit. In the passage as translated above it will be seen that it is quite possible that both the eldest son and the eldest daughter might predecease their parents, in which case it might be inferred that the children of both would be entitled to the advantage of the right of representation and to a share equal to that of the surviving uncles and aunts. A reference to the other authorities on the subject leaves, however, little doubt that it was not intended that this should be so.

The solution propounded by my learned brother Maung Kin obviates this difficulty. After an exhaustive examination of the *Dhammathats* and rulings he comes to the conclusion that it is only the child of the eldest child, whether son or daughter, who is entitled to share with the younger uncle or aunt.

If '*thagyi*' in section 15 is taken to mean the eldest son, being the eldest born child, and '*thamigyi*' the eldest daughter being the eldest child, then the passage is clear and decisive and there can be no doubt that where the eldest child is a daughter, the children of the eldest son, not being the eldest child who predeceases his parents, are not more favoured than other grand-children.

This is in accordance with the view taken by Tha Gywe in his Conflict of Authority in Buddhist Law where the question is very fully discussed and the reasons for the conclusion reached stated clearly and convincingly. He used the term Orasa in the sense of the eldest child simply in this connection. Conflict of Authority, Volume II, page 37.

As, however, the rulings on the point are not unanimous it is desirable to refer to some of the leading cases,

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In the Upper Burma case *Ma Gun Bon* v. *Maung Po Kywe* (23) Burgess, J. C., laid down in 1897, after an exhaustive examination of the authorities, that if the eldest son or daughter die before the parents, the children are given the share of a younger brother or sister, on account of the superior claims of the *auratha* heir.

It is important to note that it is only the children of the eldest child, whether son or daughter, who are here held to be entitled to the right of representation. *Auratha* appears to be used in the sense of the 'eldest legitimate' child.

The principle involved was laid down very clearly by a Bench of this Court in *Ma Saw Ngwe* v. *Ma Thein Yin* (24) in these words:—

"Among grand children whose parents have predeceased their grand-parents, the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child."

In the present reference we are not, however, concerned with the question as to whether it is the eldest child only of the eldest child, or the children collectively, who rank with the surviving uncles and aunts.

The case of *Tun Myaing* v. *Ba Tun* (3) does not assist materially, as the question there for consideration was the position of the Orasa son only and the devolution of his status. The principles involved were again enunciated by Sir Herbert White, C. J., in *Po Sein* v. *Po Min* (25). "If the Orasa son or daughter predeceases his or her parents, his or her eldest son, or his or her children together receive the same share as their youngest uncle or aunt. But this is strictly confined, in all the texts, to the children of the Orasa or eldest son or daughter. In my opinion, the rule relates to the Orasa son or daughter, strictly so-called. There is no indication that it has any reference to the eldest surviving son or daughter, unless he or she is technically the Orasa."

The cases of *Ma Ein Thu* v. *Maung Hla Dun* (15) and *Ma Su* v. *Ma Tin* (26) extend the rule as to the Orasa somewhat further and lay down that if the eldest child die before attaining majority, he or she never becomes the Orasa and the next child if competent becomes the Orasa, but they do not materially vary the established rule that the eldest child or children of the eldest child rank with the younger uncles and aunts. It will be observed that in their cases as in many others there is a tendency to read a special meaning into the word Orasa, which is not part of its strict connotation.

Up to this point there had been a practical consensus of authorities that the children of the eldest legitimate child only, usually termed the Orasa, were entitled to the right of representation but in *Po Zan* v. *Maung Nyo* (2) the son of the eldest daughter was held not to be entitled to share equally with the sole surviving son on the ground that the son was the Orasa and that the texts set out in sections 162 and 163 of the Digest giving the child or children of the eldest daughter special treatment do not apply where there is an Orasa son.

After careful consideration of the *Dhammathats* and previous rulings on this subject, I feel no doubt that here Hartnoll, J., was confusing the Orasa or eldest child, whether son or daughter, whose children are entitled to rank with the younger uncles and aunts on the death of both parents by right or representation as laid down in Chapter XV, Book X of the *Manugya*, with the Orasa son, who is entitled to claim a one-fourth share on the death of his mother.

The point is well brought out in Tha Gywe's 'Conflict of Authority' [Conflict of Authority on Budhist Law, Volume II, page 51], and I agree with his opinion that plaintiff's mother in the case under comment was the Orasa or eldest daughter and her son was entitled to a share equal to that of his uncle.

The rule laid down in *Po Zan's case* (2) was followed in *Maung Po Hman* v. *Maung Tin* (1) under similar circumstances and here again I think the learned Judges were led to a mistaken conclusion through confusing the claim of the Orasa child to a one-fourth share of the inheritance from the surviving parent with the rights of the children of the eldest legitimate or Orasa

(23) U. B. R. (1897-01), II, 66.
(24) 1 L. B. R. 198.
(25) 3 L. B. R. 45.
(26) 18 Ind. Cas. 466; 6 L. B. R. 77; 5 Bur. L. T. 291.

child to rank with the younger uncles or aunts on the death of both parents.

I am in entire accord with the view taken by McColl, A. J. C., of the Judicial Commissioner's Court in the Upper Burma case of *Tha Dun* v. *Waing Gyi*, Second Civil Appeal No. 302 of 1909 of the Upper Burma Judicial Commissioner's Court.

My experience of the actual practice among the Burmese is that it is the children of the eldest child, irrespective of sex, who are considered to be entitled to preferential treatment and that, so far as the right of representation is concerned, the children of the eldest child are never ousted by a son who is not the eldest born, merely because the eldest child happened to predecease the parent of the same sex.

The rule laid down in *Ma Gun Bon* v. *Maung Po Kywe* (23) and *Po Sein* v. *Po Min* (25), that it is only the children of the eldest child, whether son or daughter, who are entitled to rank with the surviving uncles or aunts, is in accordance with the weight of the *Dhammathats*.

My conclusion, therefore, is that in section 15, Book X of the *Manugye* the words "*Tha gyi*" and "*Tha-mi-gyi*" mean the eldest son or daughter, being the eldest child, and the two paragraphs relate to the alternative cases in which a son or a daughter respectively is the eldest-born legitimate child.

The *Manugye* being clear and unambiguous its authority is incontrovertible.

I do not see my way to answer the reference without regard to the facts of the case from which it arose.

My answer would be:—

(1) In a family consisting of both sons and daughters a child can attain the full status of Orasa prior to the death of its parents, in so far that, if he or she predeceases his parents his or her children may be entitled to the preferential treatment prescribed in section 15, Book X of the *Manugye*.

(2) In such a family where the eldest child is a daughter no son can become Orasa until his father dies, subject to the proviso that the eldest daughter attained her majority before her death.

(3) The question as to which is the Orasa can be decided, so far only as the right of representation is concerned.

(4) In such a family there cannot be two Orasa children in the sense of children whose offspring would, in the event of their parent's death, be entitled to claim an equal share with their younger uncles and aunts.

But it is conceivable that where the Orasa eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as Orasa for the purpose of claiming one-fourth of the estate from his mother. It is to be noted that Orasa is here used in two distinct senses.

(5) It follows from my answers to the previous questions that sons are not always preferred to daughters as 'Orasa.'

(6) In such a family when the eldest child is a daughter there cannot be an Orasa son, who predeceasing his parents can transmit to his children a right to preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as Orasa.

(7) The eldest child, being a daughter, can transmit to her children a right to preferential treatment in the division of the estate, and there is authority for holding that on her mother predeceasing her father she can claim a quarter share as Orasa. I do not, however, consider the determination of the latter point is necessary for the purposes of the present reference.

HEALD, J.—Maung Baw and Ma Hmo had four children, namely, Ma Nyein Aung, Po Cho, Maung Sin and Ma Nga Ma. Ma Hmo died first, then Po Cho, then Maung Baw and then Nyein Aung. After the death of Ma Nyein Aung, Po Cho's children sued the other surviving heirs, including Maung Sin and Ma Nga Ma, to recover one-fourth share of the estate of Maung Baw and Ma Hmo on the ground that Po Cho was *auratha* and that, therefore, they as his children would be entitled to one-fourth of the estate.

The Trial Court found that Po Cho was *auratha* and that his children were entitled to a quarter share of the estate.

Maung Sin and Ma Nga Ma appealed and the Appellate Bench of this Court has

referred to a Full Bench the following questions:—

(1) In a family consisting of both sons and daughters can any child acquire the status of *auratha* prior to the death of either parent?

(2) If so, in such a family where the eldest child is a daughter can any son become *auratha* before his father dies?

(3) In such a family can the question which child is *auratha* be decided before the death of either parent?

(4) Can there be in such a family two *aurathas*?

(5) Are sons to be preferred to daughters as *aurathas*?

(6) In such a family can there be an *auratha* son who predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate?

(7) If so, can the eldest child, being a daughter, on her mother predeceasing her father, claim a quarter share as *auratha*, or transmit to her children a right to preferential treatment in the division of the estate?

In considering these questions the first step is to make certain what is meant by the word *auratha*. It is, of course, in common use throughout the books on Hindu Law in the form of *aurasa* and, so far as I know, is there always used in the sense of a son born to a man by his married wife as distinct from the various other classes of sons recognised in Hindu Law, many of whom are not begotten by the father at all.

The Mitaksbara derives the word from "*uras*" (the breast) and says: "The issue of the breast (*uras*) is the legitimate son (*aurasa*). He is one born of a legal wife, and a son begotten by her husband on her is a true and legitimate son and is chief in rank." Stokes' Hindu Law Books, page 410.

The word is common in this sense in the Burmese Law Books, also and I need not do more than refer to the definition given in the 81st section of the 10th Book of *Manugye* which gives a list of twelve classes of children, the first of the twelve classes being "children born to a young couple given in marriage by their parents and called *auratha*." This list seems to be based either on some Hindu Law Book or on some source on which the Hindu Books also drew, since most of the Hindu Books also divide sons into twelve classes of whom *aurasa* is always first [See Mayne's Hindu Law, page 82 (7th Edition)], and the subsequent passage in *Manugye*: "Of these twelve the *auratha* only has the full right to inherit the property of the parents," also seems to have been taken either from Hindu Law or from some common source, since we find practically the same words following the mention of the twelve classes of sons in *Vivada Chintamani*, [Tagore Law Lectures, 1880, page 515, *cf.* Forshammer's Jardine Prize Essay, page 49] which says "*Manu*" and other legislators have said that notwithstanding other kinds of sons, the legitimate son alone receives the whole estate of his father.

It was natural that when the writers of the Burmese Law Books came to translate "*auratha*" they should render the word as "*tha gyi*" or "*tha-u*," that is 'big son" or "first son," and that when they adapted the rules of the ancient law to the conditions of the Burmese family they should regard the *auratha* as the "eldest" as distinct from the younger children. I say "children" rather than "sons" because even in Hindu Law the use of the word *aurasa* was not confined to sons. It was used to mean "legitimate issue" whether sons or daughters [Stokes' Hindu Law Books, page 493] and in the Burmese Law Books it is clearly used to include daughters as well as sons. In fact in section 73 of the *Wagaru* the phrase "*auratha* daughter" is actually used in the Pali, the parallel words in the Burmese text being "*thami akyi*" (the eldest daughter).

I think, therefore, that "*auratha*," as used in those passages in the *Dhammathats* which it will be necessary to consider for the purposes of the present reference, may be taken as meaning the "eldest child," that the parallel Burmese words "*tha-u*" or "*tha-kyi*" may also be taken as meaning the "eldest child" except where the context shows that they mean the "eldest child being a son," and that *auratha dita* (that is "*auratha* daughter") and "*thami u*" or "*thami akyi*" must be taken to mean the "eldest child being a daughter."

It is now necessary to review the passages in the principal *Dhammathats* which deal with the rights of the *auratha* in the sense of "eldest child," and not in the original sense of "legitimate son" as distinguished from the various inferior classes of sons, and as it will be convenient to consider them, so far as possible, in order of date, I shall take them

in the order in which they are placed by Dr. Forchammer, because he gives reasons for that order and because in certain cases there is reason to believe that the dates and order given in section 4 of the Digest are doubtful. Complete copies of many of the *Dhammathats* have not yet been printed so that in many cases all that is available is the extracts given in the Digest.

The earliest *Dhammathat* is the *Vilasa* which is said to have been written in Talaing about the end of the 12th Century. A commentary on it was written about the middle of the 17th Century and it was translated into Burmese in the latter half of the 18th Century.

The rule given in this *Dhammathat*, as I read it, is that if the eldest child is a son and has helped the parents in their business, then when the father dies he gets his father's personal and official belongings and the mother gets her personal belongings. The rest of the estate is divided into four shares of which the mother and younger children get three and the eldest son one. The eldest son gets one-fourth, however many other sons there may be ("even if there be ten sons they get one share out of the three.)"

If the eldest child is a daughter and the mother dies, the eldest daughter gets the mother's personal belongings and one-fourth of the rest of the estate. It is to be noted, however, that the description of what I have called the rest of the estate does not mention immoveable property.

If the eldest is a son and the mother dies or the eldest is a daughter and the father dies the same rule is said to apply. Apparently, therefore, according to this *Dhammathat* the eldest child, whether a son or daughter, gets one-fourth of the estate, excluding personal belongings, whichever parent dies; but one is tempted to think that in cases where the compiler of a *Dhammathat* does not state the rule expressly *in extenso* but contents himself with saying that the same rule applies, he may have been misled by a certain fondness for analogies which appears throughout the *Dhammathats* and may have been led into generalisations which, if the rules had been expressly stated, would have been seen to be unwarranted.

As for the rights of grand-children, the *Vilasa* says: "If the eldest brother dies before his parent, his son, if the son is *auratha*, shall receive as his share of his father's inheritance as much as his father's younger brothers," and again "if the eldest grand-child is *auratha*, among the deceased's children let him share equally with the younger brothers (of his father). The grand-children lower than the eldest *auratha* grand-child shall receive only one-fourth of the share of their father's younger brothers." "If the eldest sister dies before her parents, the rule is the same. If the eldest sister's child is *auratha*, let him have as his mother's share of the inheritance the same share as his aunts."

I am inclined to think that the *auratha* grand-children referred to in these passages are the children of the *auratha* child, and this, as will be seen later, is the interpretation which has been put on the rule by the Courts, but it must be admitted that that is not what the *Dhammathat* actually says. It is just possible, however, that in these passages the word *auratha* was used in its earlier sense of "legitimate."

The next important *Dhammathat* is *Wagaru* which was written in Talaing about A. D. 1300 and was translated into Pali and Burmese by Buddhaghosa the Less about A. D. 1473. Of this we have a copy written in A. D. 1707. This *Dhammathat* is called *Manusra* in *Dhammathatkyaw* (see below) and it is admittedly the basis of many of the subsequent compilations. It is important for our present purpose as showing that as early as the 15th Century the Burmese Law writers regarded "*tha-u*" or "*tha kyi*" ("first son" or "big son") and "*thami akyi*" ("big daughter") as representing the Pali *auratha*.

Sections 71 to 74 contain the following rules:—

"On the death of the father the '*auratha* first son' shall get the personal belongings of his father and of the remaining property the mother shall receive three fourths, the other one fourth share being divided between the other children and the eldest son ("*tha kyi*").

"On the death of the mother the *auratha* daughter ("*thami akyi*") shall get the personal belongings of her mother and of the remaining property the father shall receive three-fourths and the remaining one-fourth shall be divided between the eldest daughter and the rest of the family."

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On the subject of the rights of grand-children the *Wagaru* lays down no rules.

The next important *Dhammathat* seems to be the *Dhammathatkyaw* or *Kosaungchok* which is in Burmese and was compiled about A. D. 1580. It contains references to *Vilasa* and *Wagaru* (which it calls *Manusara*) and also to an older *Dhammathatkyaw*.

It gives the following rules:—

"If the father dies first, the rule for division between the mother and the *auratha* first son is as follows: If the son has been dutiful he shall get his father's personal and official belongings. The mother shall get (her own) female slaves. The rest of the estate shall be divided into four shares. The mother shall get three shares and the son one share. On the father's death the eldest son gets a share of the estate because he is the person who will carry on the father's duties. On the death of the mother the eldest daughter shall get her mother's personal belongings and one quarter of the rest of the estate. The father shall get the remaining three quarters. On the death of the father the eldest daughter, if nothing has been given to her and there is property to be divided, shall get a pair of buffaloes, ten cows, three bullocks, and one slave woman who can cook. The mother shall get the rest of the estate.

"On the death of the mother the eldest (first) son, if he has not already received anything shall get a pair of buffaloes, a pair of bullocks, ten cows and three bulls. The father shall get the rest."

As for the share of grand-children the *Dhammathatkyaw* says:—

"If the eldest brother or eldest sister dies before the parents, then if there is a first grand child by them, those grand-children shall receive half as much as their father's or mother's younger brothers and sisters," but this rule is almost certainly the result of a mere mistake, the writer having misunderstood the provision in the earlier books that the grand-children should "share equally" with their uncles and aunts.

The next important *Dhammathat* is known as *Kaingsa* or *Maharajadhammathat* and is referred to in *Manusara Khuemyin* as the fourth revision of the *Manusara*, the third being the *Wagaru*. It is in Pali and Burmese and was compiled by *Kaingsa*, otherwise called Manuraja, about A. D. 1630. It contains references to the *Dhammathatkyaw* and the "Talaing *Dhammathats*" but rests its authority not on *Manu* as the older law books did, but on the *ipse dixit* of the author himself who is called Manuraja. According to Dr. Forchammer it is the first *Dhammathat* which is distinctively Buddhistic.

It gives the following rules:—

"On the death of the father the son who is competent to bear the father's burden shall get his personal and official belongings, also his lands and house. Of the livestock and deadstock such as metals and grain he shall get one share and the mother three."

The reference to lands in this rule is unexpected, but it probably refers to lands held by the father as an appanage of his office, which are mentioned in this connection in *Vilasa*, particularly as lands are not mentioned in the following passage, which also describes the property received by the son on his father's death, but are apparently covered by the reference to the father's "office." It will be noted that all the property of which the eldest son gets a quarter share is moveable.

"On the death of the mother the mode of partition between the daughters and father is as follows: The daughter is to get her mother's personal belongings, a pair of bullocks, a pair of buffaloes, 10 cows, 20 goats, and one slave woman who can cook. The father is to get the rest of the property.

"On the death of the father the daughter is to get a married couple of slaves, a pair of bullocks and a fair portion of grain. The mother gets the rest of the property. The rule for partition between the father and sons on the death of the mother is that the son is to get a pair of buffaloes, a pair of bullocks, a pair of cows, a bull, twenty milch goats and three he-goats. The father gets the rest of the property."

From this *Dhammathat* it would appear that only the eldest son is to get one-fourth of the estate on the death of the father, and that the daughter is only to get certain specified property. So far as the Digest shows, it gives no rules as to the inheritance of grand-children.

The next important *Dhammathat* is *Manuyin* which is said to be practically a

rendering of *Wagaru* in verse with some slight additions. It refers to *Wagaru* and *Dhammathatkyaw* and follows the older *Dhammathats* and not *Kaingsa*. It was compiled about A D. 1750 and was translated into prose a few years later.

It gives the rule for partition between the *auratha* son and the mother on the death of the father as follows :—

"The son is to get his father's personal and official belongings including lands attached to his office. Of the rest of the property he gets one-fourth and his mother three-fourths.

"On the death of the mother the daughter is to get her mother's personal belongings and one pair of buffaloes and bullocks, ten cows, twenty goats and one slave woman. The father gets the rest.

"On the death of the father the daughter is to get a married couple of slaves, a pair of bullocks and buffaloes and some grain. The mother gets the rest.

"On the death of the mother the son gets two pairs of buffaloes and bullocks, one cow, twenty she goats and three he goats. The other sons shall receive small shares even if there are ten of them."

As for grand children the *Manuyin* says :—

"The son of the *auratha* shall receive as much as the youngest of his uncles."

The next *Dhammathat* is *Manugye* which was compiled in A.D. 1754. Of it Dr. Forchammer says that it is not really a Code or Digest of Law, but rather an encyclopædic record of existing laws and customs and of the rulings preserved in former *Dhammathats*, and that it does not attempt to arrange the subject-matter or to explain or reconcile contradictory passages. Like the Hindu Manu what the writer did "was simply to gather the fossil laws of a former generation and mix them indiscriminately with the laws which were current in his age. They do not harmonise with each other but present the appearance of a mechanical mixture in which the materials bear no affinity to each other." *Manugye* has nevertheless acquired a pre eminent position among the *Dhammathats*, largely because until the publication of Jardine's Notes on Buddhist Law in 1882-3 it was the only *Dhammathat* which had been translated into English. In 1859 Major Sparks said of it : "The only Burmese Code of Law which the Courts have had for their guidance is the *Dhammathat* or Burmese version of the laws of Menoo. This book is in a great measure obsolete, and is no more applicable to the decision of suits of the present day in the Courts of Pegu than are the laws of Alfred in the modern Courts of England. It contains, moreover, a vast number of contradictory statements on matters of grave importance, mingled in almost inextricable confusion with the most puerile absurdities." He admitted, however, that in spite of "the utter want of sequence in its component parts" "some points of this Code have retained their vitality, and are as familiar in the mouths of the people as household words" and he undoubtedly based his Code on it. In 1914 in the case of *Ma Nhin Bwin* v. *U Shwa Gon* (27), the Privy Council, referring to "*Manu Kyay* which for so long had been recognised as the leading guide in the Administration of Justice," said : "It is not seriously disputed that the authority of this text-book where it is clear, as among the *Dhammatahts*, is of the highest rank," and held that where there is no ambiguity in the rule of Burmese Buddhist Law as recorded in *Manugye* the other *Dhammathats* do not require to be appealed to. It is, therefore, clear that *Manugye* must now be regarded as the *Dhammathat* of pre eminent importance.

Manugye gives the following rules :—

"On the death of the father the eldest son (*tha-hyi*) gets the father's personal belongings. Of the rest of the property he gets one-quarter and the mother and the rest of the children three-quarters. On the death of the mother, the daughter gets her mother's personal belongings and the slave woman who cooks. Of the rest of the property the daughter gets one-quarter and the father three.

"On the death of the father the eldest daughter gets one female slave, two cows, two goats, a pair of buffaloes, a plot of paddy land and the seed grain. The mother and the younger daughters get the rest.

"On the death of the mother the eldest son gets one slave, one pair of buffaloes, one

(27) 23 Ind Cas. 433, 8 L. B. R. 1; 7 Bur. L. T. 105; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 204; 41 C. 887; 1 L. W. 914; (1914) M. W. N. 449; 41 I. A. 121 (P. C.).

pair of oxen, two goats and one plot of paddy land, and the father and younger children (or sons) get the rest. This rule and the last apply only when there is plenty of property."

As for the rights of grand-children the *Manugye* gives the following rules :—

"If the eldest son (*tha-kyi*) dies before both his parents, the rule for partition between his son and the uncles and aunts is as follows: If the *auratha* eldests on (*tha-kyi auratha*) dies before his parents, then because the eldest brother is regarded as the father, the eldest brother's son shall share equally with the younger brothers. If the eldest daughter (*thami-kyi*) dies before both her parents the rule of partition between the eldest daughter's daughter and her aunts is as follows:—The eldest sister's daughter shall share equally with the younger sisters, because the eldest sister is regarded as the mother."

The next three *Dhammathats* in order of date are three compiled by *Vannona Kyaw Din*, namely, *Manusara Shwe Myin*, *Manu Vannana*, cited as *Vannana* and *Vinicchayapakasani* cited as *Vinicchaya*. These were all compiled between A.D. 1770 and 1775.

Manusara Shwemyin professes to be a fifth recension of *Manusara*, the *Wagaru* and *Kaingsa* being the third and fourth recensions. It is based on *Wagaru* and *Kaingsa* but takes materials from *Manugye* also. It gives the following rules :—

"On the father's death the son gets the father's personal belongings and one-quarter of the residue because he takes his father's place. The rest goes to the mother. On the mother's death the son is to get certain cattle and the father the rest, and the father is to make suitable provision for his sons.

On the father's death the daughter is to get a married couple of slaves, certain cattle and a suitable portion of grain, and the mother is to get the rest. The daughter is not to get a quarter of the residue like the son."

I have been unable to find any definite rule in this *Dhammathat* as to the share of grand-children. Section 60 mentions grand-children after children as heirs and section 61 says that the nearer heirs shall get two shares to the more distant heirs' one. This compilation does not seem to be mentioned in the Digest.

The *Vannana* which professes to be based on all the earlier *Dhammathats*, and not only on *Wagaru*, *Kaingsa* and *Manugye* gives the following rules :—

"On the father's death the *auratha* eldest son gets his father's personal belongings, his office and his official lands, and the mother gets her personal belongings. Of the residue, animate and inanimate, the son gets a quarter and the mother three-quarters.

On the mother's death the daughter gets the mother's personal belongings and also one-fourth of the rest of the property, but lands are not expressly mentioned.

On the mother's death the eldest son gets certain cattle and the father gets the rest, but the father must make suitable provision for the younger sons.

On the father's death the daughter gets a married couple of slaves, certain cattle, a fair portion of grain, and the mother gets the rest."

As for grand-children the *Vannana*, as I read it, says that on the eldest brother's death his *auratha* son (child?) gets the same share as his father's younger brothers, and that the eldest sister's children get an equal share with the mother's younger sisters.

The *Vinicchaya* is said by Dr. Forchammer to omit many of the contradictory, equivocal and superfluous passages in *Manugye*, *Manusara*, *Shwemyin* and *Vannana*. Its date is supposed to be about A.D. 1775.

It gives the following rules :—

"Partition between mother and sons after the death of the father.

The son gets the father's horse, official equipment and sword. The mother gets the female slaves. Of the rest of the property the son gets one-fourth and the mother three-fourths.

Partition between father and daughters after the death of the mother.

The daughter gets the mother's personal ornaments and clothes. The father gets the male slaves. Of the rest of the property the daughter gets one fourth and the father three-fourths.

Partition between mother and daughters after the death of the father.

The mother takes all the property, animate and inanimate, but if the estate be large the mother should give to the daughter a suitable share.

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Partition between father and sons after the death of the mother.

The father takes all the property, but if the estate be large the father should give to the sons a fair share of the grain, one buffalo, one yoke of oxen, ten cows, ten little goats and three he-goats."

As for the shares of grand-children it contains the following rules :—

If the eldest son (*tha-kyi*) dies, his sons and daughters should share equally with his younger brothers.

If the eldest daughter (*thami-akyi*) dies, her sons and daughters should share equally with her younger sisters."

The *Vicchedani* (A. D. 1782) belongs to the same period during which there was evidently a revival of legal learning.

It contains the following rules :—

"If the father dies before the mother and the son takes the father's position, the son gets the father's elephant, pony, clothes, his official lands, and his arms. The mother gets the slave woman. Of the rest of the property, the son gets one-fourth and the mother three-fourths. Even if there are ten sons the rule is the same.

"As for the partition between the father and the daughter on the death of the mother, the daughter is to get her mother's clothes and ornaments, and also two pairs of bullocks, two pairs of buffaloes, ten cows, twenty she-goats, and one slave woman. The father gets the rest of the estate.

"As between mother and daughter on the death of the father the daughter gets a fair portion of grain, a slave, and a pair of bullocks and buffaloes. The mother gets the residue.

"As between father and son on the death of the mother, the son gets two pairs of bullocks and buffaloes, three he-goats, twenty she-goats, and one cow. The father gets all the rest. The rule applies even if there be ten sons."

As for grand-children the *Vicchedani* says :

"If the eldest brother dies before receiving the parents' inheritance, the children of that eldest brother shall share equally with the younger brothers."

No passage referring to the eldest daughter's children is cited from this *Dhammathat* in the Digest.

The only other *Dhammathat* among those cited in the Digest which seems to be regarded as important is that known as *Amwebon* or "Partition of inheritance." Its date seems to be unknown, but it evidently reproduces the rules of *Manugye* with immaterial differences in some cases as to the number of animals to be given.

No extracts from it as to the rights of grand-children are cited in the Digest.

The only other text to which it is necessary to refer is what is known as *Attasankhepa Vannana* generally cited as *Attasankhepa*. It was compiled by the "*Kinwun Mingyi*," U Gaung, who subsequently compiled the Digest, and it was first printed at the Burmese Royal Press in Mandalay in A. D. 1882, that is only some four years before the British Annexation of Upper Burma. It is said to be not, strictly speaking, a *Dhammathat*, that is a compilation giving the law as it was according to the texts, but to give instead the law as in the author's opinion it ought to be. I do not regard this criticism as entirely fair, since the author gives the original texts and then explains their meaning as he understands it, but even if it were true, it is obvious that the work is of the greatest value as representing Burmese Buddhist Law as it was interpreted and, I have no doubt, administered under the last of the Burmese Kings. The author, whom I knew personally, was an undoubted authority on Burmese Buddhist Law and its interpretation, and it cannot be denied that his work carries great weight. It is interesting for the purposes of the present reference because both when it gives the old list of the twelve classes of sons and where it gives another list of sixteen classes of sons, it puts the *auratha* first and in the latter case it defines the *auratha* as "a son born of a marraige where the parents on both sides consent and where the young couple cohabit by reason of like desires," and concludes the definition, exactly as the Hindu Law Books do, with the words "Such an *auratha* son is entitled to take the inheritance of his parents." But immediately afterwards it uses the same word *auretha* to distinguish between the "eldest" and the "younger" children, and it actually mentions the cases of families where there is no *auratha* son but only an *auratha* daughter, and where there is no *auratha* at all.

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As for the shares of the *auratha* child on the death of one of the parents, it explains the law as follows :—

"As for the partition between mother and son when the father has died, let the son get the father's personal and official belongings, and let the mother retain her personal belongings, the slave women acquired during the marriage and the dwelling house. On the rest of the property, animate and inanimate, including male slaves, let the son have one-fourth and the mother three fourths, but if there are inherited slave women, let the mother have half and the son half. This is the rule for partition between the *auratha* son and the mother. If there are younger sons and daughters, they shall have no claim to inherit while their mother is alive. They shall inherit only when the mother dies.

As for the partition between father and daughter on the death of the mother, the daughter is to get the mother's personal and official belongings, and the father shall retain his personal and official belongings, the male slaves acquired during the marriage, and the dwelling house. Of the remaining property, including female slaves, the daughter shall get one-fourth and the father three-fourths, but if there are inherited slave men, the father shall have half and the daughter half. This is the rule of partition between the *auratha* daughters and the father. If there are younger sons and daughters they shall inherit only on the father's death.

"As for the partition between father and son on the death of the mother, the father gets the whole of the property, but if there is a large estate, then let the son got a fair share of the grain, a pair of bullocks, a pair of buffaloes, a bull, two cows, twenty she-goats, three he-goats and other suitable property."

On the death of the father the rule of partition between mother and daughter is similar to that between father and son on the death of the mother.

As for the rights of grand children the *Attasankhepa* explains the law as follows:—

"If the *auratha* eldest son or eldest daughter dies, leaving children, while the parents are still alive, those children are 'out of time' grand children and cannot get their parents' full share. Let them get the same share as their youngest uncles and (or) aunts."

There is one other authority to which it may be well to refer shortly, as it is sometimes referred to as an authority on Burmese Buddhist Law, and it has already been mentioned.

In 1859 a "Civil Code of the Province of Pegu" (generally cited as "Sparks' Code") was published by Major Sparks under the authority of the Local Government. The second part of that Code deals with "Burmese Law" and it is mainly based on Dr. Richardson's translation of *Manugye* which had been published in A. D. 1847.

This Code omits any reference to the rights of the *auratha*, the rule which it gives being as follows :—

"In the division of an estate between the surviving husband or wife and children, the widow or widower shall take the dwelling house and three-fourths of the estate and the children divide the remaining one-fourth equally between them."

As authority for that rule it cites sections 2 to 5 of the 10th Book of *Manugye* but the rules there given, which have been quoted above, clearly do not support the rule.

It makes no reference to the rights of grand-children.

From the above survey of the *Dhammathats* I think that it is fairly clear that the word *auratha* is commonly used to mean the eldest child, whether son or daughter and that if the eldest child, being a son, is competent on the father's death to take the father's place in the family, or, being a daughter is competent on the mother's death to take the mother's place then he or she is *auratha*, and on the father's or mother's death is according to the *Dhammathats* entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and further that if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate, his or her children are entitled to share equally in the estate with the younger brothers and sisters of the deceased.

It may be well to justify each of these propositions separately.

It must be admitted that in Hindu Law the early legislators ignored the rights of women and excluded them altogether from inheritance. The original sources on which the Burmese *Dhammathats* were based, if not

actually Hindu Law Books, had passed through Hindu hands and taken a Hindu tinge, and undoubtedly traces of an inferior status accorded to women can be detected in almost all of them. The *Vicchedani*, when dealing with the partition between brothers and sisters after the death of both parents, actually says: "Though the eldest child be a daughter she does not reach the status of *auratha* and she must share equally with her younger brother" and one or two of the minor *Dhammathats* contain similar passages, which I have no doubt were taken from some old book and reproduced Hindu or possibly pre-Hindu ideas. But just as the *Dhammathats* when translating passages which are evidently taken direct from what may be called the Hindu Law Books use *auratha* in its original sense of "legitimate" and nevertheless when they come to apply it to Burmese Buddhist Law use it in the special sense of "an eldest born child who is competent," so although they reproduce passages which follow the Hindu Law in saying that a daughter can never be *auratha*, nevertheless when they come to the actual division of the property of the estate of a Burmese family they put the daughter practically, and in some cases entirely, in the same position as the son. Written law is eminently conservative and tends to lag far behind custom and if the law as given in the authorities on which the Burmese Law Books are based has been altered in those books, it may be taken as certain that the alteration is due to very firmly established custom and that the tendency suggested by the alteration has probably gone considerably further in custom than it has in law. The Burmese Buddhist Law Books leave no room for doubt that from the first there was a strong tendency towards equality between the sexes in matters of inheritance, and I think that the fact that this tendency appears so strongly even in the earliest of the *Dhammathats*, warrants my opinion that if the eldest child is a daughter she is in Burmese Buddhist Law to be regarded as *auratha* just as a son is, if he is the eldest child.

The question then arises whether if the eldest child dies in infancy, the next child succeeds as *auratha*. The *Dhammathats*, so far as I know, give no answer to this question, though, as I have said, the *Attasankhepa* considers the possibility of a case in which there is no *auratha* but only younger children. I think from my experience of cases under Burmese Buddhist Law for more than 20 years, that there can be no doubt that children who do not grow up are always disregarded and that the eldest child who reaches an age at which he or she would be able to take the place of the father or mother in case of death would always be regarded as *auratha*.

There can, I think, be no doubt that the *Dhammathats* which give a special share to the eldest child who is competent to take the place of father or mother contemplate a family in which the *auratha* is living in the family house and does actually take the place of the parent. Indeed I doubt whether the *Dhammathats* contemplated the *auratha's* taking away the special share unless he or she was ousted from the position of head of the family by the surviving parent's marrying again. Some of the *Dhammathats* would deprive a son or daughter who does not live with the family and take the father's or mother's place of the *auratha* child's share, *vide*, the texts cited in sections 36, 37, 40, 41 and 62 of the Digest, but I think that in this case as in certain other cases, *e. g.*, the cases of adopted and step-children, the necessity for joint living may now be considered as archaic and obsolete and may be disregarded.

I have already said that, in my opinion, the eldest child who grows up is *auratha* by right of birth, and that it makes no difference to the status of *auratha* which parent dies first. It is arguable, as indeed it is argued in this case, that on the death of the father the eldest son, though he be not the eldest child, succeeds to the father's place and that on the death of the mother the eldest daughter, though she be not the eldest child, succeeds to the mother's place, but I do not think that this view is in accordance with the meaning of the *Dhammathats* or with the facts of human nature. If, as I think established, *auratha* means the eldest child, then the question would seem to be settled by a reference to *Wagaru*, one of the earliest of the *Dhammathats*, which in this connection uses the words "*auratha* first son" of the son in the Burmese text and "*auratha* daughter" of the daughter in the Pali text, translating the Pali words

into Burmese as "eldest daughter," and to *Attasankhepa* which actually uses the word *auratha* in this connection in the case of both son and daughter. As for the facts of human nature it seems to me unlikely that in a primitive family, and the Burmese family is still primitive, the eldest child if a son would tolerate a younger sister's taking the mother's place, or if a daughter would submit to her younger brother's taking the father's place, and in each case taking a large share of the family property.

The rights of grand-children must now be considered.

If the eldest child, whether son or daughter, actually became entitled by the death of the father or mother, to the *auratha* share, his or her children would naturally succeed to that share, and the rule that, if the eldest child dies before becoming entitled, the grand-children by that child should succeed to a similar, though somewhat reduced, share is intelligible. But if there is no *auratha* till one or other of the parents has died, then the rule about the rights of grand-children seems to me to be unintelligible, and I think that it is clear that that rule must involve the assumption that a son or daughter can, as the text of *Attasankhepa* itself suggests, be *auratha* while both parents are alive, and supports my conclusion that the eldest child is *auratha* from the time when he or she becomes competent to take the place of the father or mother in case of death.

The law as expounded in the chief *Dhammathats* having thus been considered it is now necessary to consider the case law.

The earliest case seems to be that of *Ma Thi* v. *Ma Nu* (28), where in answer to an argument that it is the eldest grand-child who gets the special share it was said that "the passages quoted from the different *Dhammathats*, do not appear . . . . . to lay down any rule as to inequality of shares among grand-children . . . . . sprung from the same father." The rule of equal division has since become well-established and it may now be taken as settled law that in spite of the references in some of the *Dhammathats*, *e.g.*, *Vilasa* and *Vannana*, to the "*auratha* grand-child," the children of the *auratha* divide the special share between them equally.

The next case was that of *Mi Saung* v. *Mi Kun* (18), where the following passage occurs: "The position of the eldest sor, the *auratha* or '*thagyi*' as he is called, is superior to that of the others . . . . . In the division under section 50 (of *Manugye* 10) the *auratha* has first choice. At sections 15, 22, and elsewhere it is said he takes the father's place: this may be when the father is dead or when both parents are dead. He is superseded if deaf or blind by a younger brother under section 36; and possibly section 35 imposes on the *auratha* the burden of maintaining a brother helpless from disease. He has a duty to perform; . . . . . The *Manuwunnana* section 10 and *Manushwemyin* section 12 describe this duty as the taking up of the father's burden or responsibility; and it is when this burden is assumed that the eldest son is to get the elephant, horse, sword, goblet, betel-box, and other articles used by his father. Under certain circumstances the eldest daughter, at least when there is no son competent to assume the parental duty, takes the paraphernalia of the deceased mother, as at section 3 of Book 10 of the *Manugye*, where she takes her mother's ornaments, clothes, and the slaves who cooked her rice. These rights to paraphernalia, though expressly stated in the three *Dhammathats* above quoted, are not even mentioned in Sparks' Code. They are rights additional to the fractional share of the inheritance, which on the death of one parent the eldest son or eldest daughter is entitled to demand from the surviving parent."

After citing the section of Sparks' Code which I have already cited above the learned Judge went on to say: "The two Assessors are distinctly of opinion that this is bad law: they say they never heard of the younger children sharing in the one-quarter share given to the eldest son or of this share being chargeable with the maintenance of the younger children. They say that where the *Dhammathats* award an eldest son a quarter share, he takes it absolutely."

I have quoted these passages at length because they express the views of Sir John Jardine who was the pioneer among Judges

(28) S. J. L. B. 70.

in the field of Burmese Buddhist Law, and his opinions are entitled to great weight.

In *Maung Po Lat* v. *Mi Po Le* (29) the same learned Judge held that an only daughter has not after her father's death and before partition with her mother an interest in the estate capable of alienation.

The following passage in the judgment is relevant to the present enquiry: "While I am of opinion on the authority of many texts, my general impression of the equality sought by Buddhist Law, and what I believe to be the notion of the people, that an eldest daughter has certain rights to share in the joint property of the family . . . . . I believe that these rights of eldest children are seldom exacted." If that opinion is true, the fact might explain the omission of any reference to those rights in Sparks' Code. The learned Judge was, of course, right in holding that the eldest child if a daughter cannot on the death of her father claim partition of the estate from her mother. According to some of the *Dhammathats* she might, if there was a large estate, get certain property, but that right has, I think, become obsolete and I doubt whether any Court would now enforce it.

In *Ma On* v. *Ko Shwe O* (30) it was held that on the death of one of the parents the eldest son or daughter may claim his or her share. This statement of the law is clearly too broad, and the judgment has since been overruled on other grounds.

In *Maung Sa Ko* v. *Mi Han* (31) the learned Judicial Commissioner of Upper Burma held that an only son on his father's death has a right as against his mother to one-quarter of the estate. That is, of course, correct according to the *Dhammathats*.

In *Ma Me* v. *Ma Myit* (11) the learned Judicial Commissioner of Lower Burma held that where there is a son (by a first wife) competent to assume the parental duty an eldest daughter by a second wife cannot claim a share in her deceased father's estate during the lifetime of her mother, and said: "There are authorities for holding that the eldest son or the eldest daughter may claim one-fourth of the property during the life-time of the surviving parent, but this rule, in my opinion, means the eldest son, or the eldest daughter where there are no sons." I do not think that there is any passage in the *Dhammathats* which warrants the words "where there are no sons," and I think that the statement as it stands is incorrect. The eldest child if a competent son can claim on the death of the father, and the eldest child if a competent daughter can claim on the death of the mother. In the case under reference the claimant was not the eldest child, so her claim was bad.

In the case of *Ma Min Tha* v. *Ma Naw* (32), a younger daughter sued, while her mother was alive, to redeem property mortgaged by her mother and it was said that under Buddhist Law children have no vested interests in parental property during the life-time of either parent. The learned Judge apparently overlooked the special rights of the *auratha*, and to that extent the statement was too wide.

In the case of *Ma Mya Thu* v. *Maung Po Thin* (4) it was said that the eldest son, if competent, is the representative of his deceased father and in that capacity is entitled to one-fourth of the inheritance, that where there are both sons and daughters the eldest son is preferred to any daughter, and that the rights of the eldest son or daughter pass to the next eldest as representative of the father or mother. In that particular case the eldest-born son had died young and the only surviving child who was a younger son sued his mother on his father's death for the *auratha* son's quarter share. The proposition that the eldest son is preferred to any daughter was, therefore, merely an *obiter dictum* and the reasons given for it were not convincing. The proposition that the rights of the eldest son or daughter pass to the next eldest would, in my opinion, be correct if confined to the case where the eldest-born died young, that is, before becoming competent, or could never be competent.

In *Ma Gun Bon* v. *Maung Po Kywe* (26) the dispute was between a niece and children of a step child, but the following remarks of the learned Judicial Commissioner of Upper Burma are relevant to the matter

(29) S. J. L. B. 212.
(30) S. J. L. B. 378.
(31) U. B. R. (1892-96), II, 171.
(32) U. B. R. (1892-96), II, 581

now under consideration. "Full representation is not allowed to grand-children, and partial representation is granted grudgingly. If the eldest son or daugter die before the parents, the children are given the share of a younger brother or sister on account of the superior claims of the *auratha* heir. But the share of the children of a deceased brother or sister other than the *auratha* is reduced to a quarter of a brother or sister's share."

In *Maung Pan* v. *Ma Hnyi* (33) it was assumed that where the eldest child was a son he was *auratha*, although apparently it was the mother who died first, and it is to be noted that the daughter who succeeded him in the management of the family property on his adoption into another, family did not claim the *auratha* share.

In *Anleathan* v. *Mi Tha Ta U* (20) the learned Judge who decided *Ma Mya Thu's case* (4) said, again *obiter*, that on the death of the father an eldest daughter cannot claim a one-fourth share if there are sons, and referred to his judgment in *Ma Mya Thu's case* (4). It is, of course, true that an eldest daughter cannot claim a quarter share from her mother on the death of her father, but it would be equally true whether there were younger sons or not.

Maung Seik Kaung v. *Maung Po Nyein* (12) is the first reported case on the Buddhist Law of Inheritance decided by this Court and the first decided after the Digest was published. The texts and the earlier cases were considered and with reference to the *dictum* in *Ma Mya Thu* v. *Maung Po Thin* (4) that where there are both sons and daughters the eldest competent son is preferred to any daughter, it was said that the rules in the *Dhammathats* "seem to proceed on the principle of a son getting a portion if his father dies and the daughter if her mother dies, but the case of both daughters and sons is not distinctly provided for." The case then under consideration was a claim by the eldest son against the father on the death of the mother and the conclusion reached was couched in the following terms: "In the present case the eldest son was the eldest child, and having regard to the points just noted that it is not shown that a daughter must get a share because the deceased parent is the mother and that there is a tendency to prefer the eldest child, we are brought to the following conclusion that the son should not fail in this suit on the ground that it is a daughter who can claim and not a son. It may not be very clear from the *Dhammathats* now available that a son can claim a one-fourth share from his father when he lives separately and when the father does not marry again, though this has been held: but we do not think it open to reasonable doubt that when the father does marry again the eldest son, especially if he be the eldest child, can claim a one fourth share of the general joint estate of the parents." It is not necessary for the purposes of the present reference to consider whether or not the actual decision in that case is correct but it has been doubted. I have suggested above that one might expect the law to be that the eldest child, who being a son who has taken the place of a deceased father, or being a daughter has taken the place of a deceased mother, and who is ousted from that place by the re-marriage of the surviving parent, should be entitled to claim the special share allotted to such a son or daughter, but Burmese Buddhist Law is not always logical and the law possibly may be other than what one would expect.

The case of *Maung Hmu* v. *Maung Po Thin* (34) is only interesting because it was one in which an eldest son had previously on the death of his father sued his mother for a one-fourth share of the estate and had obtained it.

In *Maung San Dwa* v. *Ma Min Tha* (21) an eldest surviving son, who was not either the eldest son, there having been two elder brothers, or the eldest child since there were five children before him, sued the mother after the death of the father for one-fourth of the estate and it was held on the authority of *Ma Mya Thu* v. *Maung Po Thin* (4), that he was entitled to succeed. The learned Judge seems to have overlooked the fact that the correctness of the ruling in *Ma Mya Thu's case* (4) had already been doubted in the judgment in *Maung Seik Kaung* v. *Maung Po Nyein*

(33) U. B. R. (1897-01), II, 104.

(34) 1 L. B. R. 50.

(12), and as his ruling was never officially published it was probably regarded at the time as bad law, and, in my opinion, it may still be so regarded.

In *Ma Saw Ngwe* v. *Ma Thein Yin* (27) the position of grand-children was considered at some length, and it was held that "among grand-children whose parents have predeceased their grand-parents the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child." That judgment is contrary to the law as stated in *Ma Gun Bon* v. *Maung Po Kywe* (23), and was written by the same learned Judge whose decisions in *Ma Mya Thu's case* (4) and *Anleathan's case* (20) have already been questioned. It was based on a rule which occurs with some ambiguity in one or two *Dhammathats* only and I have already suggested that that rule, if it ever existed, has long been obsolete. I think, therefore, that this ruling is bad law.

In *Ma Nan Gyaw* v. *Maung Shwe Ket* (16) a Single Judge of this Court, following *Ma Mya Thu's case* (4) and *Anleathan's case* (20), held that a daughter is postponed to sons, but the ruling in that case was not officially reported and, for reasons which I have already given, was in my opinion mistaken.

The next case in order of time is the Full Bench case of *Ma Thin* v. *Ma Wa Yon* (13). It deals with the claim of an only daughter to one-fourth of the estate as against her mother *on her re-marriage*, and it decided that the claim was good. It does not of course decide that the eldest child being a daughter is entitled to get the quarter share if her mother does not re-marry, and, as I have said, I do not think that it is necessary for the purposes of the present reference to consider the law as to the effect of the re-marriage of the surviving parent.

Tun Myaing v. *Ba Tun* (3) deals with the converse case of the re-marriage of the father, but the claimant was the *auratha* son's son, and it was decided that as there were surviving sons the grand-child could not sue. The ruling is relevant to the present enquiry because it stated that "the eldest-born son (meaning possibly the eldest-born child being a son, since in that case there were no daughters) is the *auratha* by right but he does not attain the complete status as such till he attains his majority and becomes fit to assume his father's duties and responsibilities. If he dies before he attains his majority, or if he is incompetent to fulfil the prescribed conditions, his next younger brother subject to the same conditions succeeds to his position as *auratha*. If the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *auratha* remains unfilled and the next brother does not succeed to it." If this statement of the law be read as including daughters and sisters equally with sons and brothers, then I believe it to be correct.

The case of *Ma Kyi Kyi* v. *Ma Thein* (17) is relevant only as establishing the principle of equal division among children after the death of both parents, that is as abolishing as obsolete the special shares allotted by some of the *Dhammathats* to the *auratha* and other elder children on such partition. That principle has, in my opinion, rightly been applied to partition among grand-children who get a special share as children of the *auratha*.

In *Po Sein* v. *Po Min* (25) it was held by this Court: "If the Orasa son or daughter predeceases his or her parents, his or her son, or his or her children together receive the same share as their youngest uncle or aunt," and the learned Judge who wrote the judgment went on to say: "This is strictly confined, in all the texts, to the children of the Orasa or eldest son or daughter. In my opinion the rule relates to the Orasa son or daughter, strictly so-called. There is no indication that it has any reference to the eldest surviving son or daughter, unless he or she is technically the Orasa." With that statement of the law I entirely agree.

In the case of *Mi Min Din* v. *Mi Hle* (19), in Upper Burma, it was held according to the head-note that "eldest-born son" means the eldest son and not necessarily the eldest child, but it is difficult to extract any express decision to that effect from the judgment. What was decided was that a daughter of an eldest son, who was not the eldest child but whose elder sister had become a nun, was entitled to an equal share with her uncles and aunts in her grand-parents' estate on the ground that her father was *auratha*, and it was suggested that in the same family both the eldest son and the eldest daughter can claim the special share, usually called the *auratha* share,

allowed by the *Dhammathats*. With all respect for so learned an authority on Buddhist Law as Sir George Shaw, I am of opinion that that suggestion was mistaken, and that the true rule is that it is the eldest competent child, whether son or daughter, who is *auratha* and as such is, on the death of the father or mother as the case may be, entitled to the *auratha* share of the family property.

In *Thi Tu* v. *Maung Bya* (14) it was held that on the death of the mother the eldest daughter in a family of five daughters and no sons was entitled as against her father and sisters to one-fourth of the estate. That ruling was doubtless correct.

In *Ma Thin* v. *Ma Nyein E* (35), a Single Judge of this Court, following the mistaken ruling in *Ma Saw Ngwe* v. *Ma Thein Yin* (24), held that it is only the eldest representative of the eldest child who ranks with surviving uncles and aunts. That ruling was not officially reported and may, I think, be disregarded.

In *Ma Hnin Gaing* v. *Ma Tha Li* (36) a Single Judge of this Court held, following the earlier rulings, that "if the first born son dies in infancy the status of *auratha* is capable of devolving on the next eldest competent son and does so devolve when he (the next eldest competent son) attains his majority, provided that he is affected by none of the disabilities or disqualifications mentioned in the texts on the subject," and, further, that such an *auratha* son can transmit the superior rights to his issue. That ruling was not officially reported but if it be read with the addition that disqualification by reason of living separately is obsolete, I think that it is probably good law.

In *Mi Saw Myin* v. *Mi Shwe Thin* (37) it was held in Upper Burma that the *auratha* son's quarter share allotted on the death of his father is not subject to any rights of the mother but is his own absolutely, and that ruling is, in my opinion, undoubtedly correct, but the judgment does not seem to distinguish very clearly between the rights of the *auratha* son or daughter on the death of the father or mother respectively and their moral claims are obsolete rights on the death of the mother or father respectively.

The case of *Ma Ein Thu* v. *Maung Hla Dun* (15) was one in which the question of the rights of grand-children arose and it was held that where the eldest child was a son who died in infancy, the son of the next eldest child, who was a daughter and who grew up, was entitled to share equally with his mother's younger sister. That decision was, in my opinion, correct, but the judgment seems to suggest that if there had been a son surviving instead of two daughters, the son might possibly have been *auratha* to the exclusion of the elder sister and that view, I think, would be mistaken. The ruling was not, however, officially reported.

The rights of grand-children were again considered in the case of *Ma Su* v. *Ma Tin* (26) where it was held that the children of a second child who was a son (the eldest child who was also a son having died in infancy) were entitled to the *auratha* grand-children's special share. This ruling interpreted the decision in the case of *Po Sein* v. *Po Min* (25) as meaning that all the *auratha* grand children are jointly entitled to the special share and applied the principle of equal division to them. It, therefore, in effect overruled *Ma Thin* v. *Ma Nyein E* (35) and *Ma Saw Ngwe* v. *Ma Thein Yin* (24). It is to be noted that it accepts the principle that, in applying the rules of the Burmese Buddhist Law of Inheritance, children who die young may be disregarded.

In *Lo Zan* v. *Maung Nyo* (2) the rights of grand children were again in issue. The eldest-born child in that case was a daughter who died after her father but before her mother, the next child was a son who died in infancy, and the only other child a son who survived both parents. The eldest-born child's son sued his uncle for a half share of the estate, and it was held that because there was a son the eldest-born child being a daughter could not be *auratha* and that, therefore, the son of the eldest daughter though she was the eldest-born child was not entitled to the special share allotted to *auratha* grand-children. If my view that the eldest-born child who grows up and is competent is *auratha* is correct that ruling was mistaken and it certainly does not follow the

(35) 8 Ind. Cas. 594; 3 Bur. L. T. 6.
(36) 10 Ind. Cas. 778; 4 Bur. L. T. 74.
(37) 15 Ind. Cas. 919; U. B. R. (1912), I, 125.

law as set forth in *Po Sein* v. *Fo Min* (25), but it is interesting because it rejects as untenable the view that there can be two children in the same family whose children would be entitled to the special share as grand-children.

In *Ma Thit* v. *Maung Tun Tha* (38) it was held that "the right given to the eldest son of claiming a one-fourth share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay it lapses altogether." That decision, as will appear later, was overruled by the Privy Council which held that the *auratha* son's share vests on the father's death and may be claimed at any time within the period of limitation.

In *Maung Ka Gu* v. *Ma Hnin Ngwe* (39) a second son whose elder brother, the eldest-born child, had lived to the age of 25 but had died before his father, sued his mother on his father's death to recover the *auratha* son's quarter share of the estate, and it was held that because the eldest son attained the status of *auratha* before he died, the second son did not succeed to the position of *auratha* and that position remained unfilled. With that decision I entirely agree.

In *Nga E* v. *Nga Aung Thein* (40) the learned Judicial Commissioner of Upper Burma said: "I think it is clear on a perusal of the texts contained in section 30 of the Kinwun Mingyi's Digest, Volume I, that where the *Dhammathats* give the eldest son a right to one-fourth as against the mother on the death of the father they refer to the *auratha* son or, in other words, the eldest capable son. It follows that where all the sons are minors there is no *auratha* son and the right in question does not accrue."

The case of *Mi Hlaing* v. *Mi Thi* (41) was one in which an eldest child who was a daughter sued her mother for a one fourth share of the estate on the death of her father, and it was held that on the death of the father the eldest child being a daughter is not entitled to claim the one-fourth share. The learned Judicial Commissioner in that case said again that "the rules relating to the eldest son's or eldest daughter's right to one-fourth must be clearly understood in both cases to refer to the *auratha* son, *i.e.*, the eldest capable son and the *auratha* daughter, *i.e.*, the eldest capable daughter."

In *Mi The O* v. *Mi Swe* (5) the Upper Burma Court held that on the death of the father the eldest child being a daughter cannot claim the one-fourth share from her mother even though the mother marries again. That is, what one would expect the rule to be if, as I have suggested, the right to claim on the re-marriage of the surviving parent is merely the right of the *auratha* who has been ousted from the deceased parent's place to leave the family and take away the *auratha* share which vested in him or her on the death of the parent; but the question whether or not that suggestion represents the law as it is does not arise for decision on this reference.

The following passage in the case of *Nga Lu Daw* v. *Mi Mo Yi* (6) is pertinent to the present enquiry: "The eldest son is generally but not necessarily the *auratha* son. The son who in case his father dies or becomes incapacitated is competent to take his place in the family is the *auratha* son. If the eldest son be blind or otherwise incapacitated his younger brother, if competent, is the *auratha* son.....Consequently, until the eldest son reaches the age of discretion there can be no *auratha* son in the family. Again, though the eldest son cannot claim one-fourth of the estate from his father on the death of his mother he can claim that share from his mother on the death of his father because he then takes his father's place in the family.....If competent to replace his father in case of the latter's death he becomes the *auratha* son as soon as he becomes so competent and does not have to wait till his father's death to attain that position." With all this I entirely agree, and I would add that, in my opinion, similar principles apply also in the case of a daughter if she and not a son is the eldest-born.

In *Maung Po Hman* v. *Maung Tin* (1) the first born child was a daughter and there was one younger child, a son. An adopted son of the daughter claimed to share equally with the son on the ground that the daughter being the eldest born child was *auratha*. This Court, following *Po Zan* v. *Maung Nyo* (2), held that, because there was a son, no

(38) 30 Ind Cas. 613; 8 Bur. L. T. 133.
(39) 29 Ind. Cas. 706; 8 Bur. L. T. 195.
(40) 28 Ind. Cas. 804; U. B. R. (1914) II, 37.
(41) 28 Ind. Cas. 806; U. B. R. (1914) II, 41.

daughter could be *auratha*. In my opinion that decision, like the one on which it was based, was mistaken in so far as it held that younger sons oust eldest daughters, but I agree with the statement that "there is no authority for treating one son as the *auratha* entitled to claim a fourth share on the death of the father and in the same family allowing the children of an eldest son or daughter who predeceased the parents special treatment at the time of ultimate partition," and that it cannot be held "that the children of an eldest son or daughter who predeceased the parents are entitled to a preferential share except when such eldest son or daughter at the time of his or her death was the *auratha* child, *i. e.*, had attained the complete status of *auratha*."

The Full Bench case of *Maung Shwe Po* v. *Maung Pein* (42) is interesting for the purposes of the present reference only, because its suggestion that the *auratha* has an option and can either claim the one fourth share or wait till the death of both parents and come in with the other children seems to have since been overruled by the Privy Council in the case of *Maung Tun Tha* v. *Ma Thit* (43).

In *Maung Kyi Hlaing* v. *Ma Htu* (44) where the claim of an *auratha* son to a quarter share on the death of his father was contested on the ground that the quarter share could only be claimed when the mother married again, it was held that the *auratha* son can get the quarter share whether the mother marries again or not. That view is clearly in accordance with the *Dhammathats*.

In the Full Bench reference, *Ma Sein Ton* v. *Ma Son* (45), the right of an eldest daughter to get certain property on the death of her father, which right, as I have said, I believe to be obsolete, was resurrected, and it was said that, "subject to any claim by the eldest son to certain specified property and to a quarter share of the joint property and any claim by the eldest daughter to certain specified property, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her late husband as against the children of the marriage," or, as it was put by another of the learned Judges: "On the death of one parent the surviving parent inherits all their joint property: if, however, the eldest son or daughter is grown up, he or she is entitled to certain specified property of the deceased and in the case of the eldest son to a one-fourth share of the bulk of the estate." The first of these statements, which according to the head-note was the ruling of the Full Bench, clearly has a basis in the *Dhammathats* and may, I think, be taken as correct subject to the qualification that, in my opinion, the rights of both the son and the daughter to certain specified property are obsolete, but the second statement of the law is obviously too generally expressed and is, in my opinion, mistaken if it means that on the death of the mother an *auratha* daughter is not entitled to one-fourth of the joint estate.

The rights of grand-children again arose for consideration in *Chan Tha* v. *Mi Mai Pyu* (46), in which my learned brother Maung Kin, J., followed *Po Sein* v. *Po Min* (25) and *Ma Kyi Kyi* v. *Ma Thein* (17), and held that the son of an eldest child, a son who predeceased both his parents, was entitled to share equally with his father's younger brother.

The case of *Maung Tun Tha* v. *Ma Thit* (43) is important because in it the Privy Council overruled the decision of this Court in the same case [*Ma Thit* v. *Maung Tun Tha* (38)] and held that what the *auratha* son becomes entitled to on the death of his father is a definite one-fourth part of the estate and that he is entitled to claim that one fourth part within any period that is not outside the period fixed by Article 123 of the Indian Limitation Act.

According to these rulings the present state of the case-law would seem to be as follows:—

(1) When the eldest-born child is a competent son, he is on the death of his father entitled to a one-fourth share in the parent's estate and that one-fourth share vests in him from

(42) 27 Ind. Cas. 632; 8 L. B. R. 115; 8 Bur. L. T. 25.

(43) 38 Ind. Cas. 809; 9 L. B. R. 56; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 44 C. 379; 26 C. L. J. 109; 10 Bur. L. T. 178; 44 I. A. 42 (P. C.).

(44) 30 Ind. Cas. 640; 8 L. B. R. 183; 8 Bur. L. T. 154.

(45) 30 Ind. Cas. 588; 8 L. B. R. 501; 8 Bur. L. T. 208.

(43) 33 Ind. Cas. 127; 9 Bur. L. T. 95.

the date of his father's death. For the purposes of the present reference it is unnecessary to enquire whether Burmese Buddhist Law in this connection makes the distinction between "jointly acquired" and "separate" property which has been recognised in other connections, and, if so, whether the eldest-born child, if a competent son, has any right to claim a specific share in the father's or mother's separate property, but it may be noted that the rulings tend to confine the share to the "jointly acquired property" while the *Dhammathats* generally seem to make no distinction between joint and separate property.

(2) When the eldest born child is a competent daughter and there are no sons, that daughter is on the death of her mother entitled to a similar one-fourth share in the estate.

(3) When the eldest born child is a competent daughter and there are sons, as in the present case, this Court has hitherto held that the daughter is not entitled to the one-fourth share. That decision or rather course of decisions I believe to be wrong and I would overrule it. It is, in my opinion, contrary to the *Dhammathats* from *Vilasa* and *Wagaru* to *Manugye* and *Attasankhepa*, and it is based on what I consider to be an unwarrantable assumption that in the passages where the *Dhammathats* award the quarter share to a daughter they must be considering a case where there are no sons. That assumption seems to be founded on certain passages in a few *Dhammathats* which record archaic rules taken from pre-Buddhistic Law Books and is contrary to the strong tendency towards equal treatment of the sexes which is so marked a feature of the same *Dhammathats* where they disregard the ancient rules and are, therefore, almost certainly influenced by Burmese Buddhist customs. The rules in *Manugye* on this point seem clear, and there is nothing in them to suggest that in the rule giving to the eldest born child if a competent daughter the quarter share, only the case of a family in which there are no sons is considered. The *Attasankhepa*, in my opinion, makes the contrary perfectly clear, since in the passage dealing with the eldest daughter's claim it refers to younger "sons and daughters." I would, therefore, overrule the decisions to the effect that sons are preferred to daughters and would hold that where the eldest born child is a competent daughter she is *auratha* and is on the death of her mother entitled to the quarter share whether there are younger sons or not.

(4) When the eldest-born child is a competent son and the mother dies or when the eldest born child is a competent daughter and the father dies, such son or daughter cannot claim the quarter share. So far as Upper Burma is concerned the first part of this proposition is supported by *Nga Lu Daw* v. *Mi Mo Yi* (6) and the second by *Mi The O* v. *Mi Swe* (5) and *Mi Hlaing* v. *Mi Thi* (41). So far as Lower Burma is concerned the cases of *Ma Min Tha* v. *Ma Naw* (32) and *Maung Po Lat* v. *Mi Po Le* (29) may be taken as supporting the rule in respect of the daughter, but I do not think that either as regards the son or the daughter the law on this point can be regarded as having yet been definitely settled.

(5) As for the rights of grand-children it was held in *Ma Su* v. *Ma Tin* (26) that the *auratha* son's children are entitled to the special share allotted to them in the *Dhammathats* and in *Ma Ein Thu* v. *Maung Hla Dun* (15) that the *auratha* daughter's children were similarly entitled while in *Maung Po Hman* v. *Maung Tin* (1) it was said that it is the children of the *auratha* as such, whether son or daughter, who get the special share. I think, therefore, that it may now be taken as settled law that it is the children of the *auratha* as such

who are entitled to preferential treatment.

In the light of the conclusions to which the above consideration of the *Dhammathats* and the case-law has led, I would answer the questions referred as follows :—

(1) The eldest-born child who is competent to take the place of the father or mother acquires the status of *auratha* on becoming so competent and can acquire that status before the death of either parent.

(2) If the eldest-born child is a daughter and reaches an age at which she is competent to take her mother's place, no son can become *auratha* either before or after his father's death.

(3) The status of *auratha* in no way depends on the death of either parent. The eldest born competent child is *auratha* in any case.

(4) There can never be two *aurathas* in a family. If a son or daughter dies after acquiring the status of *auratha*, there is no *auratha* in the family.

(5) Sons are not as such preferred to daughters as *auratha*. If the eldest born child is a son and is competent he is *auratha*. If the eldest-born child is a daughter and is competent she is *auratha*.

(6) In a family where the eldest born child is a daughter and is competent, there can be no *auratha* son and there can be no son whose children have a right to preferential treatment in the division of the parents' estate.

(7) If the eldest-born child is a daughter and is competent she is *auratha* and as *auratha* can on her mother's death claim from her father a quarter share of the estate. If she dies before becoming entitled to that share, her children have a right to preferential treatment in the division of the estate.

DUCKWORTH, J.—I agree with the judgments of my learned brothers, Maung Kin and Heald, JJ.

Since they very largely, though on better considered and more ample grounds, arrive at the same opinion as I did in my separate Order of Reference, I need write very little more.

After weighing the *Dhammathats* quoted, and the use of the words therein, my conclusion is that "*auratha*" (a very loosely used term), means nothing more than "eldest legitimate issue, male or female." The term has been much misused, since it does not necessarily follow that the child who is *auratha*, whilst both parents are alive, will be the child who can obtain a one fourth share on the death of *one* parent. This depends on the sex of the parent who dies first. At the same time I consider that I fell into an error in my Order of Reference, when I stated that, until one parent died, there was technically no *auratha*. There is, and the *auratha* then is the eldest child, irrespective of sex, legally begotten, who is of age and competent.

I will take, as an example, the following family—

1. Daughter,
2. Son,
3. Daughter,
4. Son, all legally begotten.

The eldest issue is female. Then, whilst both parents are alive, she is, if of age and competent to take her mother's place, the *auratha*. If the mother dies first of the two parents this eldest daughter is entitled to the one fourth share, and no question then arises of a right of representation for her family, if any. If, on the other hand, the father dies first of the two parents, then the eldest daughter, though *auratha*, cannot claim the one-fourth share, which lapses, neither can the eldest son succeed as *auratha*. If the eldest daughter, after attaining majority and competency predeceases her parents, then her issue alone is entitled to preferential treatment, in comparison with the other grandchildren, when both of the parents have died. On the other hand, if the family consisted of :—

(1) Son,
(2) Daughter,
(3) Son,
(4) Daughter, all legally begotten, then, whilst both parents are alive, the eldest son, if of age and competent, would be the *auratha*, and if the father died first of the two parents, he would be entitled to the one fourth share. If the mother died first, then this eldest son

could not claim that one-fourth share, which lapses. Again, if this eldest son, after he had attained majority and competency, predeceased both parents, his issue *alone* would be entitled to preferential treatment.

This, I think, renders the position clear.

The point is that, if a son is not the first-born child, he can never be *auratha*, unless the eldest child dies before reaching majority or competency, and then only when the eldest child is a male. It is very doubtful, whether, according to the *Dhammthats* another can become *auratha* in place of the deceased eldest daughter. There is some authority for a brother succeeding a brother, but not for the converse case,—and then only in relation to the one fourth share. Here I must point out that I can find nothing in the *Dhammathats* regarding "the eldest surviving children" being recognised as *auratha*, so as to claim the one-fourth share.

Amongst the Burmese people, generally, there is no doubt that the eldest legitimate child, whether it be a son or daughter, is regarded as taking the place of the parent of the same sex, when that parent dies. The saying "*Itko gyi hlyin apa aya: Ama gyi hlyin ami aya*" is to my knowledge, in common use, especially in the old Royalist Districts of Upper Burma, such as Mandalay, Shwebo, Kyaukse, and Meiktila, and this is a very strong indication, as pointed out by Mr. May Oung on page 223 of his work on Buddhist Law, of what general popular opinion is. Moreover, this opinion was no doubt that of the late Kinwun Min Gyi, U Gaung, when he compiled the *Attathankhepa Dhammathat*, and therefore, this expression of his opinion on the subject should carry due weight, inasmuch as he was a great scholar in regard to the *Dhammathats*, and was possessed of the widest knowledge of his fellow-countrymen.

It must be borne in mind that, in dealing with Buddhist Law, which was an effort to purge and improve Hinduism, we must disabuse our minds of such ideas of the "*aurasa*" son as emanate from that Religion and Law. The position of women, as such, is entirely different under Buddhist Law, and shows a great advance on Hinduism. This alone should be sufficient to place us on our guard. It is to be noted, too, that in Burmese house-holds, the eldest daughter, when the eldest child, holds a particularly influential position.

In regard to the former opinion that the *Dhammathats* regarded the son as being superior to the daughter, it is clear that the sections referred to, more especially sections 140 and 150, deal with distributions of estate, *after both parents have passed away*, and such rules have been disregarded by this Court when it held that the estate should be distributed in equal shares. Moreover, these and other sections do not, so far as I can find, give the son a larger share than the daughter, unless he is actually the eldest-born child of the family. In this respect, I am in agreement with Maung Kin, J.'s opinion, and consider that, inasmuch as it is clear that the *Dammathats* contemplate the eldest child, when a daughter and competent, even in a family consisting of sons and daughters, being entitled to a one-fourth share on the death of the mother, the matter is concluded. In this connection too, I think that Mr. May Oung is right, when he suggests that sections 2 and 3 and sections 4 and 5 of the *Manukye* must respectively be read together. The first pair of sections then deal with what is to happen on the death of the mother and the second pair of sections with what is to take place upon the death of the father, in each case, of course, before the other parent. Further, the History of the Law on the subject, (dealt with admirably by Mr. May Oung on pages 221, 222 and 223 of his work) is clearly in favour of a female *auratha*, when the female parent dies first and the eldest issue of the marriage is a daughter.

In regard to the children of the eldest child who predeceases his or her parents, after reaching majority and competency, it seems that, according to the *Dhammathats*, only the eldest grand-child (*Mye U* or *Auratha Mye*) can, strictly speaking, obtain a preferential share, but this question is not now before us, and the cases of *Ma Kyi Kyi* v. *Ma Thein* (17) and *Ma Su* v. *Ma Tin* (26) require no discussion in this connection.

It is perfectly clear that section 163 of the Digest applies to families consisting of both sons and daughters, and Twomey, J. fully recognised this in *Ma Ein Thu's case* (15) when he remarked:—"The

texts cited in section 163 give the issue of the eldest daughter a share equal to that of the youngest of his aunts, and *there seems to be no authority for holding that these texts apply exclusively to families consisting of daughters only.*" It is to be regretted, perhaps that he overlooked this, when dealing with the case of *Maung Po Hman* v. *Maung Tin* (1). As a matter of fact, these texts, when read in the Burmese, make it clear that they do not apply solely to families consisting of daughters.

I would reply to the questions referred in the same manner as my learned brother Maung Kin, J.

ROBINSON, C. J.—I concur in the replies proposed by my brother Maung Kin.

It is, no doubt, true that the questions referred were too widely stated but this arose from several causes. The appeal was based on, and argued as involving, the position and rights of an Orasa. Plaintiffs could not claim a preferential share as being the children of the eldest child and thus the appeal centred round the question of the Orasa; whether a son always was preferred as Orasa to a daughter even when the latter was the eldest child and whether the question as to which would ultimately become the Orasa would depend on which parent died first. The authorities also were confused and the true meaning of Orasa had not been clearly understood, the term being loosely used in more than one sense. The result of this Reference will, it is hoped, clear up many points that were in doubt.

The appeal will now be put down for disposal in accordance with the findings of the Full Bench.

S. D.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2428 OF 1919.

February 10, 1922.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

SHIB CHANDRA SINGHA AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, SUDHANYA KUMAR SINGHA AND OTHERS— DEFENDANTS Nos. 1, 2, 5, 6 AND 7— APPELLANTS

versus

GOUR CHANDRA PAUL AND OTHERS— PLAINTIFF AND OTHERS— DEFENDANTS —RESPONDENTS.

Appeal, second—Finding of fact unassailable—Evidence—Burden of proof, question of, when immaterial—Attested document, mode of proof of Rule inexorable—Document used for collateral purpose, if can be proved in the ordinary way—Evidence Act (I of 1872), ss. 68, 69, 70, 71—Evidence admitted without objection, admissibility of, when can be challenged at later stage of the litigation.

A finding of an Appellate Court which is based on a consideration of the evidence in the case is unassailable in second appeal. [p. 88, col. 2 p. 89, col 1.]

The question of *onus* of proof loses its importance when both parties to a litigation have adduced evidence in support of their respective cases and the Court, on an examination of such evidence, shifts the burden of proof from one party to the other. [p. 88, col. 2.]

Krishna Kisor De v. *Nagendrabala Chaudhurani*, 66 Ind Cas. 694; 34 C. L. J. 333; 25 C. W. N. 947, followed

The strict mode prescribed in section 68 of the Evidence Act of proving an attested document applies not only to cases where the document is attempted to be enforced to prove the legal right or relation it creates, but also to a case where such document is sought to be proved for a collateral purpose [p. 89, col. 2.]

Manners v. *Paston* 1 Leach. C. C. 174, followed.

The law, as laid down in section 68 of the Evidence Act, is imperative and does not, on the face of it, admit of any relaxation except in the cases provided in sections 69, 70 and 71 of the Act. [p. 89, col. 2.]

The rigour of the English Law on which section 68 is founded has been to a certain extent lessened by the proviso as contained in section 70 of the Evidence Act. [p. 90, col. 1.]

Tofaluddi Peada v. *Mahar Ali Shaha*, 26 C. 78; 13 Ind. Dec (N. s.) 654, *Shamu Patter* v *Abdul Kadir*, 31 M. 205; 18 M. L. J. 219; 3 M. L. T. 300 and *Shamu Patter* v *Abdul Kadir*, 16 Ind Cas. 250; 35 M. 607; 16 C. W. N. 1069; 23 M. L. J. 321. 12 M. L. T. 388; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 586; 39 I. A. 218 (P. C.), referred to.

Obiter.—Where a piece of evidence not proved in the proper manner has been admitted without

objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objecton in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply. [p. 90, col. 2.]

Harek Chand v. *Bishun Chandra*, 8 C. W. N. 101, followed.

Appeal against the decree of the Additional District Judge, Noakhaly, dated the 13th of August 1919, affirming that of the Munsif, Second Court at Sudharam, dated the 19th of November 1917.

FACTS appear from the judgment.

Babu *Jitendra Kumar Sen Gupta*, for the Appellants.—The facts of the case are shortly these. One Ramsundar Pal died in 1893, leaving seven sons.—Kasinath (husband of defendant No. 4), Sambhu (father of plaintiff No. 3), Gour (plaintiff No. 1), Rajchander (plaintiff No. 2), Jaychandra (father of defendants Nos. 9 and 10), Kali and Harish and one grandson, Chandramohan (father of defendant No. 8), by a predeceased son. During Ramsunder's lifetime, the *howla* right of property No. 1 in dispute was purchased in the name of Kasinath in 1872. The superior interest of the *howla*, *viz.*, the *taluka* right was also purchased in the name of Kasinath in 1872 and since then the *howla* merged in the *taluk*. The plaintiffs brought this suit for declaration of title and recovery of possession alleging that the property standing in the name of Kasinath was the joint family property, and that after Ramsunder's death a dispute having arisen about it among the members of the joint family, there was an amicable settlement by virtue of which Kasinath retained, out of the property, a tank and ditches in his actual possession but the remaining lands were settled with his brothers, and five *jotes* were thus created. The plaintiffs' case was that the disputed land was within their *jote*, and defendant No. 4, widow of Kasinath, on the allegation that it was self-acquired property of Kasinath and on assertion that no *jote* under the *taluk* was created, executed a usufructuary mortgage of the property to defendants Nos. 1 and 2 who, upon taking the mortgage, dispossessed the plaintiffs from the disputed property. The plaintiffs also claimed 4 annas share in the superior right over the *jote* by purchase from Kasinath. The first Court held that the property in dispute was self-acquired property of Kasinath and also found that no *jote* was created under the *taluk* by Kasinath and dismissed the plaintiff's suit with regard to possession of property No. 1 in *jote* right but declared the plaintiffs' 4 annas undisputed title to the *taluka* interest obtained by them by purchase. On appeal the Judge held that the property No. 1 having been purchased in Kasinath's name while Ramsunder and his sons were living jointly, it must be presumed to be the joint property of all and defendants must show that Kasinath had separate funds from which the property was acquired. In this view the suit was decreed. The defendants in support of their case produced two mortgage-bonds executed by Kasinath and his widow showing that there was no *jote* under the *taluk*. The learned Judge held that the deeds not having been proved by attesting witnesses were not admissible in evidence. Hence the present appeal is by the defendants. My contention is that as the parties are governed by the Dayabhaga School of Hindu Law, there could be no joint family between father and son and there could be no presumption in this case that the property acquired in the name of Kasinath was the joint family property of Ramsunder and his sons. Refers to *Sarada Prosad Ray* v. *Mahanand Ray* (1), *Rama Nath Chatterjee* v. *Kusum Kamini Debi* (2). The lower Appellate Court has wrongly laid the *onus* of proof on the defendants. Next, the learned Judge was wrong in holding that the mortgage-bonds produced by us are inadmissible in evidence on the ground that no attesting witness had been examined. No objection had been taken against the admissibility in the first Court. The documents, according to plaintiff, not being *per se* inadmissible but admissible only after certain preliminaries, *i.e.*, examination of attesting witnesses were performed, the objection could not be taken except in the first Court. Refers to *Ambar Ali* v. *Lutfe Ali* (3), *Priya Nath* v. *Mahendra Kumar* [*Durga Tarini Ghose*] (4).

(1) 31 C. 448.
(2) 4 C. L. J. 56.
(3) 41 Ind. Cas. 116; 21 C. W. N. 996 at p 1001; 45 C. 159; 25 C. L J. 619.
(4) 10 Ind. Cas. 376; 14 C. L. J. 578; 16 C. W. N. 317.

Next, the documents are not even attempted to be proved for the enforcement of mortgage but for collateral purposes, *e.g.*, for proving some statements in the deeds. Though no attesting witness had been examined they are surely admissible for such purposes. Refers to *Tofaluddi Peada* v. *Mahor Ali Shaha* (5), *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madhava Menon* (6), *Gangadhar Goswami* v. *Nidhiram* (7).

[SUHRAWARDY, J.—Has the exclusion of the documents affected the case on its merits?]

It is not possible for this Court to say what effect the inclusion of the evidence would have on the mind of the learned Judge. I submit the case should be remanded. Refers to *Sumitra Kuer* v. *Ram Kair Chowbey* (8), Woodroffe's Law of Evidence, 921, 929.

Babu *Asiranjan Chatterjee*, for the Respondents.—So far as the question of the presumption of jointness is concerned, the finding is that Kasinath had no property of his own. The presumption is really one of fact and not of law. Then as regards the admissibility of the mortgage-bonds, section 68 of the Evidence Act is imperative before they could be put in evidence. I submit the positive provisions of law must be fulfilled. I submit the documents can be looked into by this Court to see whether their exclusion has affected the merits.

Babu *Jitendra Kumar Sen Gupta* replied in brief.

JUDGMENT.—This appeal arises out of a suit for the recovery of possession of certain properties described in the plaint on establishment of the plaintiff's title thereto. The facts of the cases which are rather complicated are fully set out in the judgment of the lower Appellate Court. The Court of first instance gave the plaintiffs a partial decree by declaring the *talaka* right of plaintiffs Nos. 1 and 2 in four annas share of the lands described as property No. 1 in the plaint and the *osat raiyati* title of the plaintiffs to eleven annas four *gondas* share of property No. 2 and dismissed the plaintiff's claim with regard to the rest of the properties in suit. On appeal the lower Appellate Court modified the decree of the first Court by declaring plaintiff's *tote* right under defendants Nos. 1, 2 and 4 in property No. 1 and granting them a decree for *khas* possession of that property, and in other respects upheld the decree of the first Court. Several objections have been taken to the findings of the lower Appellate Court some of which, in our opinion, do not stand scrutiny. The points that require serious consideration are: that the Court of Appeal below has erred in holding that the family being joint and Ramsunder with his seven surviving sons including Kasinath living in joint mess, the property must be said to be the joint properties of all, that the defendants must show that Kasinath had a separate fund of his own from which he acquired this property and that hence the presumption is that it was joint property of the joint Hindu family of Ramsunder and his sons. It is argued that as the family was one governed by the Dayabhaga School of the Hindu Law, such presumption ought not to have been raised and the burden cast upon the defendants to prove that the property was purchased with the funds of Kasinath, in whose name it stood. It is clear from the perusal of the judgment that the learned District Judge on an examination of the oral evidence has found that the property was purchased in the name of Kasinath, as he was the ablest and most intelligent of Ramsunder's sons, and in consideration of the facts and circumstances of the case he has demanded proof from the defendants that the property was purchased by Kasinath out of his personal fund. The question of *onus* loses its importance when both parties have adduced evidence in support of their respective cases, and the Court, on an examination of such evidence, shifts the burden of proof from one party to the other. This must be more so at the appellate stage: *Krishna Kisor Le* v. *Nogendrabala Chaudhurani* (9). The finding of the learned Judge is based on a con-

(5) 26 C. 78; 13 Ind. Dec. (N. S.) 654.
(6) 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 584.
(7) 22 C. W. N. xcvi (96) *notes*.
(8) 57 Ind. Cas. 761; 5 P. L. J. 410; 1 P. L. T. 702; (1921) Pat. 17.
(9) 66 Ind. Cas. 694; 34 C. L. J. 333; 25 C. W. N. 942.

sideration of the evidence in the case and is unassailable in second appeal.

The second point is of some importance. The Court of first instance admitted in evidence two mortgage-bonds, Exhibits A and B, without objection by the plaintiffs. These documents were executed by Kasinath and his widow, defendant No. 4, in which it is stated that the mortgagors had not created any subordinate interest or encumbered the property in suit which they mortgaged by those deeds. The documents were proved not by any attesting witness to them, but by evidence of persons who identified the signatures of the executants. The plaintiffs claim in this suit *jotes* created by Kasinath under his *taluka* right in property No. 1. It was attempted to show by these documents that sometime ago, *i.e.*, in 1900 and 1912 Kasinath and his widow made statements to the effect that they had not created any such subordinate interest in the property. Considering the circumstances under which these statements were made it is doubtful if these admissions are admissible in evidence under section 13 of the Evidence Act in favour of the persons who made them or those claiming under such persons. But in view of our decision as to the documents having been legally proved it is not necessary to discuss the matter further.

Section 59 of the Transfer of Property Act requires a mortgage-deed to be attested by two witnesses and section 68 of the Indian Evidence Act enacts as follows:—

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence." The only exception to this imperative rule is laid down in section 70 of the Evidence Act to the effect that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him. In the present case there is no proof that there is no attesting witness to these documents alive or available In these circumstances, it is evident that the provisions of section 68 of the Evidence Act have not been complied with and the documents not legally proved. It is contended for the appellant that the strict mode of proof prescribed in section 68 of the Evidence Act applies only to cases where the document is attempted to be enforced to prove the legal right or relation it creates. But in a case where such document is sought to be proved for a collateral purpose, it may be proved by the ordinary law laid down for proof of a document as a piece of evidence. We do not think we should give effect to this contention. The law, as laid down in section 68, is imperative and does not, on the face of it, admit of any relaxation except in the cases provided in sections 69, 70 and 71 of the Evidence Act. Section 68 of the Evidence Act is based on the English Law on the point which is thus stated in Taylor on Evidence, 11th Edition, page 1230, section 1843. "The general rule, which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable that it applies even to a cancelled or a burnt deed, as also to one, the execution of which is admitted by the party to it and that, too, though such admission be deliberately made, either in open Court or in a subsequent agreement or even in a sworn answer to interrogatories delivered to the party in the cause. A party in a cause, who is called as a witness by his opponent, cannot be required to prove the execution by himself of an instrument, to the validity of which attestation is requisite, so long as the attesting witness is capable of being called. So also the attesting witness must be called, though subsequently to the execution of the deed he has become blind, and the Court will not dispense with his presence on account of illness, however severe. If the indisposition of the witness be of long-standing the party requiring his evidence should have applied for power to examine him before a Commissioner or Examiner, and if he be taken suddenly ill a motion must be made to postpone the trial."

Section 1344, page 1231.—"The rule is equally applicable, whatever be the purpose for which the instrument is produced."

This statement of the law found judicial recognition in the case of *Manners* v. *Paston* (10), in which Lord Alvanley clearly laid down that the rule of law (as codified in

(10) 1 Leach, C. C. 174.

section 63 of the Indian Evidence Act) is not confined to cases where the attested instrument was the ground of action but that it applied also to cases where it was used in evidence for collateral purposes. This view is also supported by the imperative and stringent wording of section 68 which does not permit the use of the instrument as evidence for any purpose whatsoever unless and until it is proved in strict accordance with the provisions of the section. The rigour of the English Law on which the present section is founded has been to a certain extent lessened by the proviso as contained in section 70 of the Evidence Act. The enactment of this proviso, to our mind, clearly indicates that the Indian Legislature intended to provide only one exception to this inflexible rule and no other.

It has been argued on the authority of *Tofaluldi Peada* v. *Mahar Ali Shaha* (5), and other cases of this and other High Courts that a mortgage-deed though not enforceable as such has been used as evidence and proved in the ordinary way to enforce a personal covenant to pay. In all these cases the bond was not attested in accordance with section 59 of the Transfer of Property Act and hence it was not treated as a mortgage-bond, but given effect to as a simple money bond. These cases, therefore, do not support the position taken by the appellants. We have not been referred to any case where a mortgage-bond properly attested, though not proved in conformity with section 68 of the Evidence Act, was received in evidence to prove the personal obligation created thereby. For the contrary view we have the authority of the case of *Shamu Patter* v. *Abdul Kadir* (11). The case was taken to the Privy Council which affirmed the decision of the Madras High Court in *Shamu Patter* v. *Abdul Kadir* (12). The point whether such a document could be used as a bond was negatived by the Madras High Court; it was urged by Counsel for the appellant at the Bar of the Privy Council but was presumably not pressed and there is no direct finding of the Judicial Committee on this question though the dismissal of the suit indicates that in their Lordships' opinion there was no ground on which the plaintiff in that case was entitled to any relief. It is further noticeable that in that case the deed in suit was admitted by the executants and the contesting defendants in the pleadings, which fact assumes importance with reference to the next question raised before us by the appellants.

It is further argued in this connection that the plaintiffs were not competent to object to the admissibility of the mortgage-bonds in the Court of Appeal below as they were admitted without objection in the first Court. It is not clear from the judgment of the lower Appellate Court whether the documents were rejected by it *suo motu* or on the objection of the respondents. We are not unmindful of the cases in which it has been laid down that where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel none of which is available against a positive legislative enactment, does not apply. See *Harek Chand* v. *Bishun Chandra* (13). In the present case the law has laid down an inflexible rule of proof which cannot be deviated from except as provided in the Act. If the Legislature had intended to modify the stringency of the English Law so far as to make an instrument not proved in accordance with the provisions of section 68 of the Evidence Act admissible when not objected to by the other party, one would have expected a proviso to that effect similar to section 70 of the Evidence Act. In our opinion the enactment of section 70 lends considerable colour to the supposition that the Legislature desired to add no further exception to the law laying down the special method of proof of instruments required by law to be attested. We accordingly hold that the mortgage-bonds were rightly rejected by the learned Judge.

(11) 31 M. 215; 18 M. L. J. 219; 3 M. L. T. 300.

(12) 16 Ind. Cas. 260; 35 M. 607; 16 C. W. N. 1009; 2 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 566; 39 I. A. 218 (P. C.).

(13) 8 C. W. N. 101.

RAGHUNATH WAMAN v. KONDIBA BABJI.

We may observe that the bonds even if admitted would have apparently afforded evidence of the weakest character, and the Munsif who decided the case in favour of the defendants, did not even refer to them in his elaborate judgment.

The decree of the lower Appellate Court requires slight modification in that it has decreed to the plaintiffs "*khas* possession of the lands of property No. 1 in that 10 annas *ote* share." The plaintiffs claimed their *jote* right in plots Nos. 1, 2 and 3 of property No. 1 and not in the whole of that property. The plaintiff's *jote* right will, therefore, be declared in, and *khas* possession granted to them of, plots Nos. 1, 2 and 3 only of property No. 1. With this variation the decree of the Court of Appeal below is affirmed and this appeal dismissed with costs.

B. N. & N. K.

Appeal dismissed.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 9 OF 1921.

February 3, 1922.

Present:—Mr. Justice Pratt and Mr. Justice Kanga.

RAGHUNATH WAMAN MATAPURKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KONDIBA BABAJI MOKASHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Symbolical possession of rightful owner—Adverse possession, when interrupted—Partition suit—Third person in wrongful possession joined as defendant—Decree giving no relief against him—Such person, whether party to suit—Symbolical possession, whether can be given as against him—Civil Procedure Code (Act V of 1908), O. XXI, r. 36, application of.

Symbolical possession of the rightful owner can interrupt adverse possession in those cases only in which the Civil Procedure Code recognises symbolical possession. [p. 92, cols. 1 & 2.]

Radha Krishna v. *Ram Bahadur*, 43 Ind. Cas. 238; 20 Bom. L. R. 502; 16 A. L. J. 3 : 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; 27 C. L. J. 191; (1918) M. W. N. 163 P. C.), explained.

Where in a partition suit, a third person in wrongful possession of the land is also joined as a defendant but the decree of the Court gives no relief against him, the latter is not in substance a party to the suit, nor can symbolical possession be given as against him under O. XXI, r. 36 of the Civil Procedure Code. [p. 92, col. 1.]

Mahadev Sakharam v. *Janu Namji*, 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115 (F. B.), followed.

Letters Patent Appeal from an order passed by Macleod, O. J., summarily dismissing Appeal No. 716 of 1920, from the decision of the Assistant Judge at Poona, in Appeal No. 109 of 1919, confirming the decree passed by the Subordinate Judge at Haveli, in Civil Suit No. 104 of 1917.

Mr. *A. G. Desai*, for the Appellants.

Mr. *D. C. Joshi*, for Mr. *P. V. Nijsure*, for Respondent No. 2.

JUDGMENT.—This is a suit by the plaintiffs to recover possession of property, of which they claim title, from the defendants, alleging prior dispossession. Both the lower Courts have found that the plaintiffs' title to the property in suit is proved but his suit has been dismissed on the ground that he has not shown, as he should show, under Art. 142 of the Indian Limitation Act, that he was in possession within twelve years of the suit.

Now, the various proofs which the plaintiffs gave of possession are all issues of fact disposed of by the judgments of the lower Courts with the exception of one that survives in this appeal. That is, the plaintiffs claim to have obtained possession under execution proceedings which followed on a partition suit filed by their brother in 1907. In that suit the two plaintiffs were the first and second defendants and a decree for partition was made on the 11th October 1907. The plaintiffs claim that they got possession of the property in execution proceedings under that decree and that the defendants

were bound because they were made parties in that suit.

Now, the suit was a partition suit filed against the two plaintiffs by their brother and the defendants in this suit were impleaded on the ground that they were in possession and colluding to defeat the plaintiff. The suit was, therefore, in effect a suit for partition as against the present plaintiffs and a suit for ejectment as against the present defendants. The decree, however, that was made gave the relief of partition only as between the two present plaintiffs and their elder brother but no relief was given as against the present defendants. The execution proceedings were referred to the Collector on the 17th December 1910 and the Surveyor, who was the ministerial officer of the Collector to make the partition, reported that he was unable to make the partition because the present defendants claimed that they were in possession and that the land was theirs. On this report, the Subordinate Judge gave instructions to the Collector to the effect that the obstruction of the defendants would be of no avail. The matter was then again referred to the Surveyor, and before the Surveyor, on the 30th May 1911, the two plaintiffs signed an acknowledgment that they had received possession of the land in suit.

Now, the acknowledgment of the 30th May 1911 does not show that the defendants were dispossessed of the land in suit or that physical possession was given. Mr. Desai, however, contends that the transaction of that date amounted to delivery of symbolical possession and that in the recent case of *Radha Krishna* v. *Ram Bahadur* (1), the Privy Council have held that symbolical possession is sufficient to interrupt adverse possession of a person who was a party to the proceeding in which possession was ordered and given. But this judgment was given in a case where the land was in the possession of cultivating tenants and proceeds on the basis that the case was one in which symbolical possession could be given. It in no way affects the Full Bench ruling of this Court in *Mahadev Sakharam* v. *Janu Namji* (2), that symbolical possession is effective only in the cases in which the Code recognizes symbolical possession. Here if symbolical possession was given, it could only be on the assumption that defendants who were in possession were not bound by the decree: O. XXI, r. 36. If they were bound by the decree then the so-called symbolical possession was ineffective. Further, it is not a case which can be brought within the Privy Council ruling because, though they were parties to the partition suit, yet in substance the suit against them was only for ejectment and no order was passed or no decree given against them for ejectment.

On these two grounds, therefore, (1) the possession given was not symbolical possession as justified by the Code, and (2) they were not in substance parties to the suit, the case is outside the scope of the Privy Council ruling.

We, accordingly, confirm the decree of the lower Court and dismiss this appeal with costs.

Y. H.

Decree confirmed.

(1) 43 Ind. Cas. 268; 20 Bom. L. R. 502; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; 27 C. L. J. 191; (1918) M. W. N. 163 (P. C.).

(2) 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115 (F. B.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1724 OF 1916.

January 21, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

ASA NAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat ROSHNI BAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law or Custom—Alienations—Will—Aroras of Taunsa Town, District Dera Ghazi Khan—Presumption—Revocation of Will—Part of property alienated during testator's lifetime—Riwaj-i-am, *entry in, unsupported by instances, value of.*

A Will is an ambulatory document and operates only upon the property which exists at the time of the testator's death. The mere fact that the testator during his lifetime disposed of part of the property specified in the Will, would not be regarded as a revocation of the Will. [p. 93, col. 1.]

The Aroras of Taunsa, in the District of Dera Ghazi Khan, are not governed in the matter of alienations by agricultural custom. [p. 94, col. 2.]

AGA NAND v. ROSHNI BAI.

An extract from the *riwaj-i-am* containing merely an expression of opinion and unsupported by instances, cannot be raised to the dignity of a custom, unless it is followed in practice for a sufficiently long period and recognised as binding by the members of a community. [p. 93, col. 2.]

An Arora belonging to a mercantile community and residing in a town, is presumably governed by his personal law in the matter of alienation. [p. 93, col. 2.]

Motan Das v. *Musammat Morni Bai*, 26 Ind. Cas. 450; 33 P. R. 1915; 37 P. W. R. 1915; 102 P. L. R. 1915; referred to.

First appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 9th April 1916.

Dr. *Gokal Chand Narang*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, R. B., for Respondents Nos. 1 to 8.

JUDGMENT.—On the 21st September 1911, one Honda Ram, an Arora of Taunsa in the District of Dera Ghazi Khan, died leaving him surviving a widow, a predeceased son's widow, and three daughters. The dispute is as to the succession to his estate between his collaterals in the third degree on one side and the aforesaid females and some other persons on the other side. The estate consists of moveable and also immoveable property, part of which is ancestral and the rest has not been proved to be ancestral *qua* the collaterals.

Now, it is clear that the deceased had during his lifetime alienated part of the property which is the subject-matter of the dispute, and that with respect to the remaining estate he made a Will on the 10th of March 1900 devising it to his five female relatives in equal shares.

The *factum* of the testament is admitted by the learned Counsel for the collaterals, and we are unable to accept his contention that the mere fact that the testator during his lifetime disposed of part of the property specified in the Will should be regarded as an act revoking the Will. The rule of law is perfectly clear that a Will is an ambulatory document and can operate only upon the property which exists at the time of the testator's death. Further, the testament itself in this case contains an express provision (which under the law is unnecessary) that the testator had full power to deal with his property during his lifetime, and that the devisees would get only the property remaining undisposed of at the time of his death. We consider it unnecessary to labour the obvious point, and hold unhesitatingly that the plaintiffs have failed to show that the testator revoked the Will in question.

The real question in controversy between the parties is whether Honda Ram could dispose of his property (part of which was, as stated above, ancestral) by alienations *inter vivos* and by Will. Now, the deceased belonged to a mercantile community, and was a resident of Taunsa which is a town. The presumption consequently is that he was governed by his personal law in the matter of alienation, and the *onus* is heavily on the plaintiffs to establish the existence of a custom overriding the personal law in this matter. The *onus* is not in any way affected by the fact that the deceased possessed some ancestral landed estate.

Now, we may say at once that there is not a single instance on the record to support the contention that an Arora cannot dispose of his immoveable property whether ancestral or self-acquired. So far as the question of alienation is concerned, the learned Counsel for the appellants places his reliance solely upon the *riwaj-i-am* of the district, which states that Hindus like the Muhammadans recognise Wills, both verbal and written, as valid, and instances are adduced, but those of Sangarh (Taunsa Tahsil) say that a Will is binding only if it is in favour of the testator's collateral male relatives. It appears that the Hindus of Sangarh did not give expression to a custom which had been observed by them in the past, and that they were unable to cite a single instance in support thereof. The above extract from the *riwaj-i-am* contains merely an expression of their own opinion which cannot be raised to the dignity of a custom, unless it is followed in practice for a sufficiently long period and recognised as binding by the members of the community. No such proof has been adduced by the plaintiffs. On the other hand some of their own witnesses state that an Arora can dispose of his property by gift or otherwise. We do not think that the provision in the *riwaj-i-am* that a gift cannot be made in favour of a daughter in the presence of near collaterals advances the plaintiffs' case to any appreciable extent; because we are unable to hold that a sweeping provision of this kind relating to all

the Hindus was intended to govern the Hindus of high caste or trading classes residing in towns.

While the plaintiffs have not adduced a single instance showing that the Aroras have a restricted power of alienation, we find that there is a judgment of the Punjab Chief Court in *Udho Ram* v. *Musammat Bhago Bai*, Civil Appeal No. 1701 of 1916, in which a testamentary disposition of the ancestral immoveable property made by an Arora of Taursa was held to be valid, and no custom restricting the power of alienation was established. The fact that the testator owned, as in the present case, a large area of agricultural land was not regarded as a matter of much consequence. The learned Counsel for the appellants seeks to get over this ruling by pointing out that the collaterals in that case did not produce any evidence proving the exclusion of a daughter by a collateral, while the plaintiffs have in the present case adduced several instances to that effect. Now, we have carefully scrutinized these instances and find that in many cases the collaterals constituted a joint family with the father of the daughter who under the Hindu Law could not inherit the joint property; and that there are really very few instances in which it can be said that the daughters were excluded. It must, however, be remembered that in no case has a single document been produced to show the exact particulars which led to the exclusion of the daughter, and that the vague oral evidence of witnesses is not a satisfactory method of proving instances of this character. It is impossible to say what the value of the property was or whether the daughters were on good terms with the collaterals and did not wish to quarrel with them. We have in this connection perused also two judgments of the subordinate Courts in which the daughter was excluded from inheritance, but one of them, which relates to the exclusion of the daughters from succession to non-ancestral land, is obviously wrong.

Per contra, we have a Division Bench judgment of the Chief Court in *Motan Das* v. *Musammat Morni Bai* (1) in which after an examination of the relevent authorities on the subject the Court held in the matter of inheritance to the estate of an Arora, residing in the Multan Town, that the daughter was entitled to succeed in preference to the brother.

The question of the succession of a daughter has after all only a remote bearing upon the issue before us, and after a careful consideration of the evidence, to which our attention has been invited by Mr. Gokal Chand, we are not satisfied that his clients have succeeded in proving that the Aroras of Tannsa are governed in the matter of alienation by agricultural custom. We, therefore, affirm the conclusion reached by the District Judge.

Before we conclude, we must express our disapproval of the extraordinarily long time taken by the District Judge in delivering his judgment. The record shows that he heard the arguments on the 23rd June 1913, but it was not until the 9th of April 1916, that he delivered his judgment.

Further, we find that during this period the learned District Judge went so far as to dismiss the suit for default, when it is clear that on the date of dismissal his judgment was not ready, and it was, therefore, useless for the parties to come to the Court simply to be told that the judgment would be pronounced on some other date. We consider that the delay of nearly three years in writing the judgment is perfectly scandalous, and we can only hope that such dereliction of duty will not be repeated by any Judicial Officer. We dismiss the appeal with costs.

R. M. *Appeal dismissed.*

(1) 26 Ind. Cas. 450; 33 P. R, 1915; 37 P. W. R. 1915; 102 P. L R. 1915.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 59 OF 1920.

February 16, 1922.

Present :—Justice Sir Asutosh Mookerjee, KT.,
Mr. Justice Walmsley
and Mr. Justice Pearson.

BIMAN CHANDRA DUTTA—PLAINTIFF—APPELLANT

versus

PROMOTHO NATH GHOSE AND ON HIS DEATH HIS HEIRESS AND LEGAL REPRESENTATIVE, *Srimati* MRINALINI DASI—DEFENDANT—REPONDENT.

Limitation Act (IX of 1908), s. 18, Sch. I, Art. 62

BIMAN CHANDRA DUTTA v. PRCMOTHO NATH GHOSE.

—Fraud, plea of—Burden of proof—Party defrauded, right of, whether affected by lapse of time—Suit for money belonging to plaintiff received by defendant—Art. 62, application of—Appeal, second—New and inconsistent plea.

A person, who desires to invoke the aid of section 18 of the Limitation Act, must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud, it is not sufficient for the defendant to show that the plaintiff had some clues and hints which, perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud. [p. 98, col. 1.]

Nath Singh v. *Jodha Singh*, 6 A. 406; A. W. N. (1884) 140; 4 Ind. Dec. (N. S.) 67, *Narayan Sahu* v. *Mohant Damodar Das*, 16 Ind. Cas. 464; 16 C. W. N. 894, *Arjun Das* v. *Gunendra Nath*, 27 Ind Cas. 294; 18 C. W. N 1266: 20 C. L. J. 341, *Jotindra Mohun Rai* v. *Brojendra Kumar Datta*, 24 Ind. Cas. 249; 19 C. W. N 553, *Lokenath* v. *Chintamoni Tripathi*, 16 Ind. Cas. 547, followed.

Where a remedy is given on the ground of fraud, it is governed by this important principle that the right of the party defrauded is not affected by lapse of time or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. [p. 97, col. 2.]

Rolfe v. *Gregory*, (1865) 4 De G. J. & S. 576 at p. 579; 34 L. J. Ch. 274; 11 Jur. (N. S.) 98; 12 L. T. 162; 13 W. R. 355; 46 E. R. 1042; 146 R. R. 463, followed.

Bulli Coal-Mining Co v. *Osborne*, (1899) A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430; 47 W. R. 545; 15 T. L. R. 257, *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner*, 20 I. A. 1; 17 B. 341; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222 (P. C.), referred to.

The form of suit indicated by Article 62 of the Limitation Act is applicable where defendant has received money which, in justice and equity, belongs to plaintiff, under such circumstances as in law renders the receipt of it a receipt by the defendant to the plaintiff. The Article most nearly approaches the formula of money had and received by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and procedure. [p. 97, cols. 1 & 2.]

Hukum Chand Boid v. *Pirthichand*, 50 Ind. Cas. 444; 46 I. A. 52; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 632; (1919) M. W. N. 258, 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416 (P. C.), *Mahomed Wahib* v. *Mahomed Ameer*, 32 C. 527; 1 C. L. J. 167, *Raghumoni Audhikary* v. *Nilmoni Singh*, 2 C. 393; 1 Ind. Dec. (N. S.) 541 and *Sankunni Menon* v. *Govinda Menon*, 14 Ind. Cas. 254; 37 M. 381; 11 M. L. T. 325; (1912) M. W. N. 516; 22 M. L. J. 485 referred to.

A suit was brought to recover a certain sum of money deposited by the plaintiff's sister-in-law in a Bank through the defendant and withdrawn by the latter on her death. In reply to the plaintiff's allegation that it had been misappropriated by the defendant, the latter repudiated the claim as unfounded and even denied that the money belonged to the plaintiff's sister-in-law. This fact was falsified by the information obtained by the plaintiff from the Bank. The defendant at last asked for permission in the second appeal to plead that he had been guilty of fraud and that as the plaintiff had been in full possession of the material facts for more than three years prior to the suit, the suit was time-barred :

Held, that the suit was governed by Art. 62 of Schedule I to the Limitation Act and would be barred except for the provisions of section 18 of the Act, to the benefit of which the plaintiff was entitled; [p. 97, col. 1.]

(ii) that the defendant could not be allowed to set up and establish a position which would be contradictory to what had hitherto been his defence. [p. 99, col. 1.]

Letters Patent Appeal against a decree of Sir William Teunon, Kt., and Mr. Justice Newbould, dated the 16th June 1920, their Lordships differing in opinion in Appeal from Appellate Decree No. 2297 of 1917.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Choudhari* (with him Babus *Lalit Mohan Banerji* and *Apurba Charan Mukherjee*), for the Appellant.—The plaintiff is the appellant. She deposited the sale-proceeds of her ornaments in her name through her uncle Pramathanath Ghosh in Hazaribagh. The actual deposit was made on 18th December 1909. The lady died on 21st November 1910. Pronobe Kumar's sole heir was the present plaintiff. At the date of her death there was in deposit Rs. 815 only. The defendant withdrew the money on 22nd December 1910. At this time he was a minor and he obtained Letters of Administration of the lady's estate on 28th June 1913. He got all information from the Bank about the withdrawal of the money in March 1915 and not in October 1915. Plaintiff attained majority in 1913. The defence was that the money belonged to the defendant which has been disbelieved by

the Court. The question is whether or not the suit is barred by limitation. I submit Article 62 of the Indian Limitation Act would apply to the case. Refers to *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (1), *Mahomed Wahib* v. *Mahomed Ameer* (2). The Subordinate Judge held that Article 120 applies. I submit that Article does not cover the present case. Refers to *Sankunni Menon* v. *Govinda Menon* (3) which case has followed *Mahomed Wahib* v. *Mahomed Ameer* (2). My points are two. The plaintiff was 18 years old on 12th June 1913 as appears from his deposition on 12th June 1916. There is no finding on that point. The plaintiff's maternal uncle also supports that in his deposition. This point, however, was not raised in the Courts below. Even if Article 62 of the Limitation Act applies the plaintiff is entitled to sue, the suit having been within three years of attaining his majority. Refers to *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (4), *Indra Nath Banerji* v. *Rooke* (5), *Punnayil Kuttu* v. *Raman Nair* (6), *Nath Singh* v. *Jodha Singh* (7), *Arjun Das* v. *Gunendra Nath* (8). I submit the judgment of Teunon, J., was right.

Babu *Samatul Chandra Dutta* (with him Babus *Dhirendra Nath Ganguly* and *Pares Chandra Mitra*), for the Respondents.—Refers to *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (4). The finding of both the Courts is that the plaintiff knew of the fraud in 1912.

[MOOKERJEE, J.—It is for you to show that before 12th June 1916, plaintiff had clear and definite knowledge of fraud.]

The plaintiff in his plaint did not state that he was kept from the knowledge of the fraud. The withdrawal of the deposit and the appropriation thereof constitute fraud.

[MOOKERJEE, J.—When did defendant commit fraud?]

If any fraud was committed it was done before 1912. The withdrawal was in 1910. The fraud must be, therefore, between 1910-12.

Refers to *Arjun Das* v. *Gunendra Nath* (8). I submit the view taken by Newbould, J., is correct. The suit ought to be held to be barred.

Babu *Sarat Chandra Roy Choudhuri* replied in brief.

JUDGMENT.

MOOKERJEE, J.—This is an appeal under clause 15 of the Letters Patent from the judgment of two learned Judges of this Court who were equally divided in opinion in an appeal from an appellate decree preferred in a suit for recovery of money. The Court of first instance decreed the suit. The District Judge reversed that decision and dismissed the suit. On second appeal to this Court, Mr. Justice Teunon was of opinion that the decree of the Subordinate Judge should be restored. Mr. Justice Newbould held, on the other hand, that the decree of the District Judge should be maintained. The result was that, under paragraph 1 of sub-section (2) of section 98 of the Civil Procedure Code, the decree of the District Judge stood confirmed.

The facts material for the decision of the question of law raised before us lie in a narrow compass. One Jatindra Mohan Dutta died, leaving as his heir a childless widow, Pranab Kumari Dasi. The widow sold her ornaments through her maternal uncle, Pramatha Nath Ghose and made over the sale proceeds to him to be deposited on her behalf in the Hazaribagh Bank. The deposit was made on the 18th December 1909 and the account was opened in the books of the Bank in the name of "Pramatha Nath Ghose on behalf of Srimati Pranab Kumari Dasi." Pramatha Nath Ghose, who is the defendant in this litigation, was, consequently, the only person who could operate on the account. Pranab Kumari Dasi died on the 21st November 1910, and a sum of about Rs. 800 stood to the credit of the account on that date. On the 22nd December 1910 Pramatha Nath Ghose withdrew the money from the Bank. The plaintiff, who is

(1) 2 C. 393; 1 Ind. Dec. (N. S.) 541.
(2) 32 C. 527; 1 C. L. J. 167.
(3) 14 Ind. Cas. 254; 37 M. 381; 11 M. L. T. 325; (1912) M. W. N. 516; 22 M. L. J. 485.
(4) 20 I. A. 1; 17 B. 341; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222 (P. C.).
(5) 3 Ind. Cas. 316; 14 C. W. N. 101; 37 C. 81.
(6) 31 M. 230; 18 M. L. J. 19; 4 M. L. T. 80.
(7) 6 A. 406; A. W. N. (1884) 140; 4 Ind. Dec. (N. S.) 67.
(8) 27 Ind. Cas. 294; 18 C. W. N. 1266; 20 C. L. J. 341.

the brother of Jotindra Mohan Dutta, the deceased husband of the lady, is her admitted heir-at law. He commenced the present suit on the 6th October 1915 on the allegation that the money belonged to his sister-in-law, that it had been misappropriated by the defendant, and that on the 25th March 1915, he ascertained from the Bank the facts of the transaction. The defendant repudiated the claim as entirely unfounded, and denied that the money deposited in the Bank was the property of his niece. He further contended that the suit was barred by limitation. The Subordinate Judge held that the money belonged to Pranab Kumari Dasi and had been misappropriated by the defendant. The Subordinate Judge further held that the suit was governed by Art. 120 of the Schedule to the Limitation Act which prescribes a period of six years from the date when the right to sue accrues. He adopted the view that the residuary Article applied, because Art. 62 invoked by the plaintiff was inapplicable. The Subordinate Judge also expressed the opinion that even if Art. 62 had been applicable, the plaintiff would have been entitled to the benefit of section 18 by reason of the fraud committed by the defendant. On appeal, the District Judge held, in concurrence with the Primary Court, that the claim was well founded on the merits. On the question of limitation, however, he held that as the plaintiff had knowledge of the deposit and the withdrawal early in 1912, the suit was barred under Art. 62. In this Court, Mr. Justice Teunon and Mr. Justice Newbould have disagreed on the point, which has formed the only subject of controversy before us.

We are of opinion that the suit falls within the scope of Art. 62, which provides that every suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use must be instituted within three years from the date when the money is received. The form of suit indicated by this Art. is applicable where the defendant has received money, which, in justice and equity, belongs to the plaintiff, under such circumstances as in law renders the receipt of it a receipt by the defendant to the use of the plaintiff. In the words of Sir Lawrence Jenkins, the Art. most nearly approaches the formula of "money had and received by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and procedure," *Hukum Chand Bold* v. *Pirthichand* (9), *Mahomed Wahib* v. *Mahomed Ameer* (2), *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (1), *Sankunni Menon* v. *Govinda Menon* (3). In this view the plaintiff is driven to rely upon section 18 to escape from the bar of limitation.

Section 18, in so far as it applies to the case before us, provides that where any person having a right to institute a suit, has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, the time limited for instituting a suit against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person injuriously affected thereby. It may be observed that this is not precisely identical with the provisions of section 26 of the Real Property Limitation Act, 1833, which makes time run from the date when the fraud is, or with reasonable diligence might have been, first known or discovered. This distinction was possibly not brought to the notice of the Court in *Bibee Solomon* v. *Abdool Azeez* (10). The principle is, perhaps, best stated in the words of Westbury, L. C., in *Rolfe* v. *Gregory* (11): "When the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed." This was quoted with approval by Lord James in delivering the opinion of the Judicial Committee in *Bulli Coal Mining Co.* v. *Osborne* (12), where he added: "the contention on behalf of the appellants that the Statute is a bar unless the wrongdoer is proved to have taken active measures

(9) 50 Ind. Cas. 444; 46 I. A. 52; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21 Bom. L. R. 623; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416 (P. C.).

(10) 8 C. L. R. 169; 6 C. 687; 3 Ind. Dec. (N. S.) 446.

(11) (1865) 4 De G. J. & S. 576 at p. 579; 34 L. J. Ch. 274; 11 Jur. (N. S.) 98; 12 L. T. 162; 13 W. R. 355; 46 E. R. 1042; 146 R. R. 413.

(12) (1899) A. C. 351; 68 L. J. P. C. 49; 80 L. T. 440; 47 W. R. 545; 15 T. L. R. 257.

in order to prevent detection is opposed to common sense as well as to the principles of equity." To this must be added further the valuable statement by Lord Hobhouse in *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (4): "When a man has committed a fraud, and has got property thereby, it is for him to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring the suit." The true position then is that where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the Statute from having its ordinary effect. A person who, in such circumstances, desires to invoke the aid of section 18, must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite konwledge of the facts constituting the particular fraud; as Lord Hobhouse points out, it is not sufficient for the defendant to show that the plaintiff had some clues and hints which, perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud. These principles have been repeatedly applied, as for instance, in *Nath Singh* v. *Jodha Singh* (7), *Narayan Sahu* v. *Mohant Damodar Das* (13), *Arjun Das* v. *Gunendra Nath* (8), *Jotindra Mohun Rai* v. *Brojendra Kumar Datta* (14) and *Lokenath* v. *Chintamoni Tripathi* (15). The cases most nearly in point are the decisions in *Avancha Lakshminarasamma* v. *Avancha Lakshamma* (16) and *Lakhpat Pandey* v. *Jang Bahadur Pandey* (17) where the plaintiff had, without knowledge of the defendant, recovered from a stranger money jointly payable to the plaintiff and the defendant, and had concealed from the defendant the fact of such realisation. The only question is, what is the position of the parties in the present case when tested in the light of these principles.

It has been conclusively established in this litigation, notwithstanding the allegation of the defendant to the contrary, that the disputed money belonged not to him but to his niece and had been fraudulently misappropriated by him. The true character of the transaction between him and his niece was specially within his knowledge, and he has taken full advantage of her death to set up a false claim, with impunity if he could. The fraud of concealment of the true state of facts has been persevered in by him, not only up to the time of the present suit, but also during its progress. The burden consequently lies heavily upon him to establish not that the plaintiff had clues and hints which, if vigorously and acutely followed by him, might, perhaps, have led him to a complete knowledge of the fraud, but that the plaintiff had clear and definite knowledge of the facts which constituted the fraud, at a time anterior to the period of limitation. From this point of view, the defendant is in an inextricable difficulty. In the first place, he did not set up such a defence in his written statement, for the obvious reason that such a defence, even if taken as an alternative, would have seriously imperilled the success of his substantial defence that the claim was unfounded and he himself had committed no fraud. In the second place he did not adduce evidence to substantiate such an alternative defence. He is thus inevitably constrained to rely upon isolated fragments from the evidence adduced by the plaintiff to enable him to discharge the burden of proof. It is not surprising that examined from this standpoint his position proves untenable. He contends that the plaintiff had knowledge of the deposit and withdrawal early in 1912; but this is clearly insufficient. The account stood in his name coupled with the statement that the deposit had been made on behalf of his niece. He alone could consequently operate on the account. The withdrawal by him was thus not necessarily an act tainted by fraud. Indeed, he has nowhere asserted that

(13) 16 Ind. Cas. 464; 16 C. W. N. 894.
(14) 24 Ind. Cas. 249; 19 C. W. N. 553.
(15) 16 Ind. Cas. 547.
(16) 21 Ind. Cas. 394; 25 M. L. J. 531; 14 M. L. T. 325; (1913) M. W. N. 836.
(17) 40 Ind. Cas. 37.

he entertained a fraudulent intention at that time to misappropriate the sum; in fact, he alone would have to withdraw the sum from the Bank before he could make it over to the rightful owner. We have thus no allegation by the defendant, much less any proof by him, as to the precise time when he committed the fraud. Apart from this, he has throughout concealed the fraud and has not only assured the plaintiff but has also maintained in Court that the money belonged to him and not to his niece. On the other hand, the plaintiff has given his sworn testimony that it was not till the 25th March 1915, that he obtained from the authorities of the Bank definite information as to the details of the transaction. There is thus no escape from the conclusion that the plaintiff is, *prima facie*, entitled to the benefit of section 18, while the defendant has neither alleged nor proved facts which would exclude the operation of that provision. This raises finally the question whether the defendant should now be allowed an opportunity to set up and establish such a defence; the answer, in our opinion, must be in the negative. The position he would have to take up would be contradictory to what has been hitherto his defence; and he cannot now reasonably ask to be permitted to assert that he has been guilty of fraud and that the plaintiff has been in full possession of the material facts for more than three years prior to the suit.

We hold accordingly that this appeal must be allowed, the decree of the District Judge set aside, and that of the Trial Court restored with costs throughout.

WALMSLEY, J.—I agree.
PEARSON, J.—I agree.

N. K.

Appeal allowed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No 800 OF 1917.
December 13, 1921.
Present:—Mr. Justice Chevis and Mr. Justice Campbell.
RAN SINGH—PLAINTIFF—APPELLANT
versus
RULLIA—JUDGMENT-DEBTOR
GANGA RAM—AUCTION-PURCHASER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution of decree—Auction sale—Reversioners not allowed to go behind decree.

Where an alienee, who is an outsider, finds that the alienor's debt is a decretal debt, he need not make any further enquiry and the reversioners will not be allowed to go behind the decree. This rule, however, does not apply where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances or where it is proved that he actually had knowledge of the bad faith of the decretal transaction [p. 100, col 1.]

Umar Din v. *Budhe Khan*, 13 Ind. Cas. 58; 21 P. L. R. 1912; 23 P. W. R. 1912, followed.

Second appeal from a decree of the District Judge, Ludhiana, dated the 13th August 1915, affirming that of the Subordinate Judge, First Class, Ludhiana, dated the 10th December 1914.

Mr. *Badr-ud-Din Kureshi*, for the Appellant.

Mr. *Dharm Das Suri*, for the Respondents.

JUDGMENT.—Milkhi Ram obtained a decree against Rullia for Rs. 573 and in execution of the decree a house belonging to Rullia was put up to auction and purchased by Ganga Ram for Rs. 730. Ran Singh, son of Rullia, has brought this suit for a declaration that the auction-sale shall not affect his reversionary rights on the death of his father, the judgment-debtor. The lower Courts having dismissed the suit, Ran Singh has lodged a second appeal to this Court.

In appeal it is urged on behalf of the plaintiff-appellant that Milkhi Ram's suit was brought against both Rullia and one Partapa, that the claim was on a bond, and that Partapa was the principal debtor while Rullia was merely a surety, and it is also urged that there was no necessity for Rullia to stand surety and that the debt should not affect the plaintiff's reversionary rights. There is, no doubt, some force in these arguments, but *Umar Din* v.

Budhe Khan (1) is an authority for the proposition that, where an alienee, who is outsider, finds that the alienor's debt is a decretal debt, he need not make any further inquiry, and the reversioners will not be allowed to go behind the decree; though this rule does not apply where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances, or where it is proved that he actually had knowledge of the bad faith of the decretal transaction. Now, in this case there is no proof whatever that Ganga Ram had any knowledge that Rullia was merely a surety. So far as appears, Ganga Ram knew merely that the house belonged to Rullia and that it was being auctioned in execution of the decree passed against Rullia. We fail to see that there was any necessity for him to make further inquiries regarding the circumstances which led to the decree being passed.

Following the judgment above quoted, we hold that the plaintiff cannot go behind the decree and we uphold the orders of the lower Courts dismissing the suit and dismiss the appeal with costs.

N. K.

Appeal dismissed.

(1) 13 Ind. Cas. 66; 21 P. L. R. 1912; 23 P. W. R. 1912.

MADRAS HIGH COURT.

CIVIL APPEAL No. 64 OF 1920.

April 19, 1921.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Coutts Trotter.

GOVINDASAMI PILLAI—DECREE-HOLDER—PETITIONER—APPELLANT

versus

DASAI GOUNDAN AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Authorised agent—Judge paying decree-holder money deposited in Court by judgment-debtor—Judge signing paper indicating payment—"Agent duly authorised," construction of.

A sum of money was deposited in Court in part-payment of a decree and the Judge while paying it to the decree-holder signed a paper indicating the payment in his presence and through Court. The decree-holder took out execution for the balance of the money due under the decree, within three years from the date of payment by the Court but more than three years from the date of the decree:

Held, (*i*) that the execution was within time, as the part-payment gave a fresh starting point of limitation under section 20 of the Limitation Act; [p. 101, col. 1.]

(*ii*) that the fact that the Judge signed a paper indicating the payment in his presence and through Court, satisfied the condition that the fact of payment should appear in the handwriting of the person making the same; [p. 101, col. 2.]

(*iii*) that a Court paying in the course of its duty the money due by judgment-debtor is also a legally constituted agent of the judgment-debtor for that purpose. [p. 103, col. 2.]

Per *Sadasiva Aiyar*, J.—In construing the words "agent duly authorised," Courts ought to be as liberal as possible. The authorisation need not be a voluntary authorisation. The Law of Limitation is partly intended to promote diligence on the part of creditors in the matter of recovery of their debts. The provisions of sections 19 and 20 of the Limitation Act are intended to show that a creditor will not be penalised by the bar of limitation, if he had been diligent enough to get the handwriting of the debtor to evidence an acknowledgment of the fact of part-payment within the period of limitation. These sections, however, have not been based upon the fiction of an implied new promise to pay, for an acknowledgment signed by the party liable is sufficient, even when accompanied by a refusal to pay. [p. 102, cols. 1 & 2.]

Per *Coutts Trotter*, J.—If a debtor's assets are so placed, either by his own act or by operation of law, that if some one other than he alone can realise them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. [p. 110, col. 2.]

Appeal against an order of the District Court, Coimbatore, in Execution Petition No. 1 of 1917 and Execution Petition Revision No. 15 of 1917, in Original Suit No. 60 of 1910.

Mr. *K. S. Krishnasami Aiyangar*, for the Appellant.

Mr. *T. M. Krishansami Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The assignee decree-holder is the appellant. The following are the relevant facts and dates. On 20th September 1912, the final decree for sale of the hypothecated properties was passed. Items Nos. 4 and 5 of the hypothecated properties

were afterwards acquired by the Government under the Land Acquisition Act and Rs. 3,400 (compensation money) was deposited in Court for (by ?) the Government on 11th August 1914 to the credit of the suit. The decree amount with interest on that date amounted to Rs. 3,926 according to the decree-holder. The decree-holder drew the compensation amount of Rs. 3,400 from the Court on 11th August 1914 and he filed the present execution application for sale of two other hypothecated items on 10th August 1917. The questions for consideration are (1) whether the execution petition is barred by limitation, and (2) what was the balance due under the decree; whether it was Rs. 500 and odd with interest from 11th August 1914 as claimed by the decree-holder or a lesser sum, and, if so, what sum ?

The lower Court on 30th September 1919 held on the second point that only Rs. 103-7-8 was the sum due on 11th August 1914 under the decree. On the first point it held that because on 11th August 1914 the compensation amount Rs. 3,400 was paid to the decree-holder on account of the decree by consent of the judgment-debtors, section 20 of the Limitation Act gave a fresh starting point of limitation and hence the execution petition of 10th August 1917 was not barred by limitation. It accordingly directed execution to issue for Rs. 103 and odd with interest. This appeal by the decree-holder was based on the ground that really Rs. 500 and odd was due and not merely Rs. 103 and odd on 11th August 1914 under the decree. Having heard both sides and gone through the records, I agree with the lower Court in its conclusion that only Rs. 103 and odd was really due on the above date. So the appeal fails and has to be dismissed with costs.

But there is a memorandum of objections filed by the first defendant (the judgment-debtor) and the contentions in that memorandum are:—

1. The learned Judge ought to have held that the payments made *ex parte*, having reference to their nature and mode, did not come within section 20 of the Limitation Act and the execution petition was, therefore, barred.

2. The Courts below ought to have held that, even otherwise, the decree has been fully satisfied by payments made.

As regards the second contention that full satisfaction had been made, there is nothing in it and the District Judge was right in finding that Rs. 103 and odd still remained due on 11th August 1914.

The much more important contention remains, namely, "the payment made *ex parte* in August 1914 did not come within section 20 of the Limitation Act" and could not, therefore, save limitation. Section 20 of the Limitation Act (omitting the words unnecessary for the decision in this case) is as follows: "Where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: Provided that in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same. Explanation—'Debt' includes money payable under a decree."

The payment of Rs. 3,400 was clearly part payment of the principal of the decree-debt. But two other questions remain to be considered, *viz.*, (1) whether the fact of the payment appears in the handwriting of the person making the same, (2) whether the payment was made by the debtor or by his agent duly authorised in that behalf.

On the first question, the decree-holder in this case produced before us copies of Court records showing that when the Rs. 3,400 was paid out, the Judge signed a paper indicating that Rs. 3,400 was paid to the decree-holder in the presence of the Judge and through the Court. I think this record sufficiently satisfied the condition that the fact of payment should appear in the handwriting of the person making the same.

The only question that remains, therefore, for consideration is, whether the Judge can be called an agent duly authorised by the judgment debtor to make the payment.

Notwithstanding some *obiter dicta* of their Lordships of the Privy Council based on English decisions that the reason why an acknowledgment of indebtedness gives a fresh starting point for limitation is that it gives a fresh cause of action by reason of its implying a fresh promise to pay, I am clear that the provisions in sections 19 and

20 of the Indian Limitation Act could not have been based upon any such fiction of an implied new promise to pay. Under section 19, Explanation 1, an acknowledgment signed by the party liable is sufficient even when accompanied by a refusal to pay, whereas, in consequence of the fiction of an implied promise to pay being necessary under the English decisions, an acknowledgment accompanied by a refusal to pay is insufficient under the English Law to afford a fresh starting point for limitation, as that fiction of an implied promise to pay becomes still-born in consequence of such refusal to pay.

I think the Indian Law must be held to have required the handwriting of the person making the payment merely in order to exclude fraudulent oral testimony as to payment, just as the Statute of Frauds tried to prevent Courts being flooded with perjury in the case of sale of goods, etc. The fiction of an implied promise to pay and the accrual of a new cause of action by an unregistered acknowledgment or a payment of interest as such would not help mortgage-creditors to obtain decrees for sale, as the new promise not being evidenced by a registered deed cannot be made to affect immoveable property. The Law of Limitation is partly intended to promote diligence on the part of creditors in the matter of recovery of their debts. The concessions made in favour of creditors by the provisions of sections 19 and 20 of the Limitation Act are intended to express the view of the Legislature that a creditor will not be considered wanting in such diligence in bringing his suit and he will not be penalised by the bar of limitation if he had been diligent enough to get the handwriting of the debtor to evidence an acknowledgment of the fact of the part payment within the period of limitation.

Provided, therefore, the evidence of the payment is in a writing binding on the debtor, it seems to me the object of the Legislature is satisfied, and in construing the words "agent duly authorized", the Courts ought, in my opinion, to be as liberal as possible. Section 21 (1) of the Limitation Act says that "the expression 'agent duly authorized in this behalf' in sections 19 and 20 shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment." This shows that the authorization need not be a voluntary authorization; for, the guardian of a person under disability does not get his authority through any voluntary act of the person under disability, but by law. In *Rughoo Nath Doss Cookman* v. *Ranee Shirmonee Pat Mohadebee* (1) there is a sentence in the decision as follows: "As regards the sale made on the 8th March 1869, from which a sum of Rs. 206 was realized, we think that it cannot be considered a part payment under section 21 so as to give a new period of limitation" Section 21 considered therein was section 21 of Act IX of 1871 which is similar to section 20 of the present Limitation Act so far as the question under consideration is concerned. No reasons are given for the opinion. Further, the point whether the condition as to the payment appearing in the handwriting of the person making the payment or his duly authorized agent was not raised or considered in that case. In *Ramchandra Ganesh* v. *Deoba* (2) no judgment was given and the Court discharged the rule granted in favour of the decree-holder without giving any reasons. Whether the Court intended to adopt all or only some of the arguments advanced by the Vakil for the judgment-debtors as found in the report does not appear. One of such arguments was that an acknowledgment must have contained an express or implied promise to pay. Quoting English decisions. I have shown that those decisions are inapplicable in construing the Indian Limitation Act. Of course, from an involuntary payment a promise to pay the balance cannot be implied. *Rughoo Nath Doss Cookman* v. *Ranee Shiromonee Pat Mohadebee* (1) was also quoted in that case not in the arguments before the High Court but only by the lower Court in support of its opinion. It appears from the report that the payment relied upon was not part-payment of the principal in the handwriting of the person making the payment but payment of interest, and it was argued by the creditor that the recovery of rent decreed in a suit brought

(1) 24 W. R. 20.
(2) 6 B. 626; 3 Ind. Dec. (N. S.) 873.

by the usufructuary mortgagee on a bond providing for payment of rent in lieu of interest was payment of interest on the mortgage-bond. The defendants argued that the payment in satisfaction of the decree passed for rent is not a payment to the creditor of interest as such. It may be that the argument was accepted and so the rule was discharged by the Bombay High Court on that ground. I am unable, therefore, to accept the head-note of the Reporter as really representing the opinion of the Judges in that case. In *Oudh Bihari Pande* v. *Mahabir Sahai* (3) the only question decided was that, because the part payment by sale in execution of the judgment debtor's property did not appear in the handwriting of the judgment-debtor, it could not save limitation. In *Brew* v. *Brew* (4) decided by four Judges on the language of a Statute which requires that 'some part of the principal money or some interest thereon, shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent," in order to save limitation, the Court followed the principle of the decision in *Chinnery* v. *Evans* (5). In that case the payment by a Receiver appointed under the Mortgage Act was held to be payment by the agent of the person liable to pay, though the Receiver was appointed by the Court and not by the mortgagor and was appointed for the benefit of the mortgagee to receive "for him particularly" the rents of the mortgagor's property. Johnson, J., says in *Brew* v. *Brew* (4): "Whether it is by the agency of a Receiver or Sheriff, the payment is made to the creditor on foot of the debt which the debtor is bound in law to pay, and out of the debtor's rents or chattels, as the case may be, for the debtor and on his account: to the extent of such payment, the debtor is discharged from so much of the judgment debt. I, therefore, think that such payments by a Sheriff are not payments by a stranger to the judgment-debtor, but are payments out of the debtor's chattels 'by a person paying for him and on his account what he is bound to pay.'" Per Lord Carnworth in *Chinnery* v. *Evans* (5).

In *Lakshumanan Chetty* v. *Sadayappa Chetty* (6) a Bench of this Court held that an acknowledgment of a debt made by a Receiver appointed by the Court on behalf of a firm under dissolution is a valid acknowledgment saving limitation by reason of the provisions of section 19 of the Limitation Act as he was an agent authorized to make the acknowledgment.

If a Sheriff of the Court making the payment can be considered an agent of the debtor, I see nothing in principle or reason which should prevent me from holding that a Court paying, in the course of its duty, the money due by the judgment-debtor is also a legally constituted agent of the judgment-debtor for that purpose.

In the result, I think that the requirements of section 20 are satisfied and I would dismiss the memorandum of objections also with costs.

COUTTS TROTTER, J.—I entirely agree. My Lord has covered the ground so thoroughly that I only propose to add a word on the last point. I think the principle deducible from *Chinnery* v. *Evans* (5) is this:—that, if a debtor's assets are so placed, either by his own act or by operation of law, that if some one other than he alone can realise them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words "his agent duly authorized in that behalf" in section 20 of the Limitation Act are satisfied by the act of the Judge of the Court which authorizes the payment, and that his handwriting is rightly described as that of the person making the payment.

M. C. P.

N. K.

Appeal and memo. of objections dismissed.

(3) 2 Ind. Cas. 524; 31 A. 590; 6 A. L. J. 836.

(4) (1898) 2 Ir. Rep. 163; 33 Ir. L. T. R. 22; 4 Ir. L. R. 705.

(5) (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 45 R. R. 79.

(6) 48 Ind. Cas. 179; (1918) M. W. N. 877; 8 L. W. 594; 35 M. L. J. 571; 25 M. L. T. 371.

KANGAL CHANDRA PAL v. GOPINATH PAL.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 94 OF 1917.

January 9, 1920.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

KANGAL CHANDRA PAL AND ANOTHER —DEFENDANTS NOS. 6 AND 7— APPELLANTS

versus

GOPINATH PAL AND OTHERS—PLAINTIFFS AND OTHERS—*Pro forma* DEFENDANTS— RESPONDENTS.

Contract Act (IX of 1872), ss. 69, 70—Sale of dar-patni *in execution of decree for arrears of rent against some only of* dar-patnidars—*Sale set aside by deposit of decretal amount by co-sharer—Contribution, suit for.*

The plaintiff and the defendants were co-sharers in a *dar-patni* which had been sold by the *patnidar* in execution of a decree obtained in a suit for arrears of rent in which the plaintiff had not been made a party. The plaintiff had the sale set aside by depositing the decretal amount together with the statutory compensation due to the auction-purchaser. In a suit by the plaintiff for contribution against the defendants:

Held, that the suit was maintainable under section 70 of the Contract Act, and not under section 69, and the defendants were liable to contribute in respect of the amount due under the decree as also towards the statutory compensation. [p. 105, col. 2.]

Mohendra Choshal v. *Bhuban Mardana* [*Suchand* v. *Balram*], 6 Ind Cas. 810: 38 C. 1: 14 C.W.N. 945: 12 C.L. J. 566 and *Jog Narain* v. *Badri Das*, 13 Ind Cas. 144; 16 C. L. J. 156, approved.

Batuk Nath Singh v. *Bepin Behari*, 17 Ind. Cas. 90; 16 C. W. N. 975; 17 C. L. J. 179, distinguished.

Appeal against a decree of the Subordinate Judge, Second Court, Burdwan, dated the 17th of January 1917.

Babu *Bepin B. Ghose*, II, and Baba *Bankim Ch. Mukerjee*, for the Appellants.

Mr. *S. K. Sinha*, for the Respondents.

JUDGMENT.—This appeal is preferred by defendants Nos. 6 and 7 in a suit for contribution. The plaintiffs in the suit held a two-anna odd share in a *dar-patni* tenure. The *patnidar* sued for arrears of rent due in respect of the years 1313 to 1316. The defendants in that suit were the defendants Nos 5, 6 and 7 in the present suit The *patnidar* obtained a decree and in execution the *dar-patni* was sold in September 1911 and purchased by the present defendant No 4 On the 25th October 1911 the plaintiffs deposited in Court the amount of the decree, namely, Rs. 4,180, together with the statutory compensation of five per cent. on the purchase money due to the auction-purchaser, Rs. 285, and in consequence the sale was set aside. The plaintiffs allege that in this connection they incurred costs amounting to Rs. 211-5-10. The suit was brought for contribution from the co sharers in the *dar-patni* in respect of the three sums I have stated.

In the course of the suit, defendants Nos. 1 and 4 came to terms with the plaintiffs and a petition of compromise was filed. Defendants Nos. 8 and 11 died and their heirs were not brought on the record. A decree for contribution was made against defendants Nos. 5, 6, 7, 9 and 10. Defendants Nos. 5, 9 and 10 have not appealed.

The first point taken on behalf of the appellants is, that the appellants and the defendant No 5 being only some of the co-sharers in the *dar-patni*, the decree obtained against them was only a money-decree, that the *dar-patni* could not be sold in execution but only the right, title and interest of the appellants and the defendant No. 5, and that the payment made by the plaintiffs for the purpose of having the sale set aside was simply officious. The answer is that, rightly or wrongly, the *dar patni* was in fact sold in execution. The appellants and the defendant No. 5 are the present representatives of the original *dar-patnidars*. Other persons including the plaintiffs and other defendants on the record hold shares in the *dar patni* acquired from the grantees of the lease or their successors. The *patnidar* has refused to recognise them on the ground that the lease forbade alienation. He brought a suit for ejectment on that ground which, we are told, was unsuccessful but neither the judgment in the suit nor the lease is before us. In the circumstances, however, it is quite unnecessary for us to form or to express any opinion on this question. The case of *Mohendra Ghoshal* v. *Bhuban Mardana* [*Suchand* v. *Balram*] (1), where the facts were similar, shows that a suit for contribution will lie in such circumstances. Separate judgments were delivered in that case, but though the learned Judges gave different reasons they came to the same conclusion. The Chief Justice (Sir Lawrence Jenkins)

(1) 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566.

uphold the decision of the Court below under section 70 of the Contract Act. Mr. Justice Doss was of opinion that the case came more properly within the terms of section 69. With great respect we prefer the view expressed by the Chief Justice, which also accords with the view expressed in *Jog Narain* v. *Badri Das* (2). The case of *Batuk Nath Singh* v. *Bepin Bihari* (3) cannot regarded as a decision to the contrary, because the case turned on other questions and the applicability of section 69 was assumed without being considered or discussed. In the case before us, the appellants were, no doubt, bound by law to satisfy the decree obtained against them but it can hardly be said that after the sale of the *dar-patni* they were bound by law to make the payments necessary for the purpose of having the sale set aside. There is that difficulty in the way of applying section 69. No difficulty attends the application of section 70. Nobody suggests that the payments made by the plaintiffs were not made lawfully, or that the plaintiffs intended to make them gratuitously. Their interest in the tenure, which is admitted by the appellants, is an answer to the argument that they acted officiously. In our opinion this ground of appeal fails.

The second point taken is this. It is established that out of the sum deposited to set aside the sale Rs. 2,000 was deposited by the defendant No. 15. The decree in the rent suit was, as we have said, for the arrears of rent due in respect of the years 1313-1316. From 1313 to 1315 the *dar-patni* had been in the possession of the defendant No. 15 as *ijaradar*. It was stipulated in his lease that he should pay the *patnidar* his dues. He was responsible, therefore, in the first instance for the rent due for that period He has himself a small share in the *dar-patni* and the appellants contend that they are entitled to the benefit of the payment made by him We are of opinion that this contention should prevail. Whether he was moved by a belated sense of duty or whether he acted at the instance of the plaintiffs or for some other reason, the payment may well be regarded as a payment made in discharge or part discharge of obligations which he had neglected. The appellants, therefore, will receive credit out of this sum for an amount proportionate to their share in the *dar-patni*.

The third point taken is that the appellants should receive credit in respect of a further sum of Rs. 1,450 said to have been deposited by all the share-holders with the father of defendants Nos. 1—4 for the purpose of satisfying the landlord's decree. The point, however, was not taken, or at any rate was not insisted on, in the Court below and the material facts have not been sufficiently elucidated. The contention must, therefore, be rejected.

One point remains. The learned Subordinate Judge reduced the amount claimed by the plaintiffs on the score of costs to Rs. 20 and as to that no question is raised. The decree, however, makes the appellants liable to contribute towards the statutory compensation. They contend that in that respect the decree is wrong. We were referred to *Suchand's case* (1) already cited. There Mr. Justice Doss, dealing with the matter under section 69 of the Contract Act, no doubt, held that statutory compensation should be excluded from the reckoning. It will be observed that the Chief Justice merely said that the materials before the Court were insufficient for a decision and that the amount at stake was so trifling that it would not be profitable to direct a further enquiry. In the present case there is no doubt as to the facts and if the case falls within section 70, as we think it does, there is no difficulty. The contention put forward for the appellants, therefore, fails.

In the result, the decree of the Court below will be modified in accordance with our decision on the second point above dealt with. In other respects, it will be confirmed. The parties will bear their own costs in both Courts.

B. N. & R. N.

Decree modified.

(2) 13 Ind. Cas. 144; 16 C. L. J. 158.
(3) 17 Ind. Cas. 92; 16 C. W. N. 975; 17 C. L. J. 170.

FATEH MUHAMMAD *v.* IMAM-UD-DIN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1567 OF 1919.

January 29, 1920.

Present—Mr. Justice Scott-Smith.

FATEH MUHAMMAD—PLAINTIFF—APPELLANT

versus

IMAM-UD-DIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XIV, r. 1—Issue not arising on pleadings—High Court, whether will order remand for trial thereof—Ancestral land—Evidence as to its ancestral character not adduced—Assumption that self-acquired—Finding as to custom—Finding not disputable in second appeal without certificate—Punjab Courts Act (VI of 1918), s. 41 3).

The High Court will not, in second appeal, remand a case to the lower Court for the trial of an issue which does not arise on the pleadings

In the absence of proof that a certain land is ancestral, it must be assumed that it is not.

Atar Singh v. *Thakar Singh*, 6 Ind. Cas. 721; 42 P. R. 1910 P. C.); 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom L. R 790, followed.

When the decision of a case depends upon a finding as to custom such decision cannot be disputed in second appeal without a certificate.

Second appeal from the decree of the District Judge, Delhi, dated the 4th June 1919, reversing that of the Munsif, Second Class, Delhi, dated the 22nd January 1919.

Mr. *Nihal Chand Mehra*, for the Appellant.

Maulvi *Ghulam Muhy ud-Din*, for the Respondents.

JUDGMENT.—Fateh Muhammad, plaintiff-appellant, the nephew of Karmoon, deceased, husband of *Musammat* Neki, sued for a declaration that a gift by *Musammat* Neki in favour of Imam Din should not affect his reversionary rights. Imam Din is the daughter's son of Karmoon and *Musammat* Neki. The first Court held that the land was ancestral *qua* plaintiff, that the widow had only a life-interest in the property of her deceased husband and had no authority to make the gift. It accordingly decreed the plaintiff's claim. The lower Appellate Court held that there was no proof that the land was ancestral and that a daughter's son was by custom the heir to the self acquired property in preference to a nephew. On these findings it dismissed the plaintiff's suit.

The plaintiff in second appeal to this Court urges that no issue was framed as to whether the land was his ancestral property and, therefore, he produced no evidence to prove it. It is urged that this Court should remand the case for further enquiry into the question whether the land is ancestral or not. In the plaint there was no averment that the land was the ancestral property of the plaintiff. Plaintiff merely stated that he was the nephew of Karmoon and was the heir in preference to the daughter's son and that the gift by the widow was invalid. There was nothing in the defendant's written pleas to the effect that the property was the self-acquired property of Karmoon. As there was no allegation in the plaint that it was ancestral *qua* the plaintiff, there was no necessity for the defendant to say that the land was self-acquired property of Karmoon. O. XIV, r. 1, Civil Procedure Code, lays down that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. On the pleadings in the present case no issues arose as to whether the land was ancestral or self acquired. It cannot be said that the Trial Court was in error in not framing an issue which did not arise on the pleadings. As pointed out by the lower Appellate Court, the *onus* was upon the plaintiff to prove strictly that the land was ancestral. In the absence of any proof it must be assumed that the land is not ancestral. *Atar Singh* v. *Thakar Singh* (1) is a clear authority upon the point I, therefore, see no reason why the case should be remanded. The decision, in the case of self-acquired property, that a daughter's son excludes a nephew depended upon a finding as to custom which cannot be disputed in second appeal without a certificate. No certificate has been obtained in the present case.

The appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 6 Ind. Cas. 721; 42 P. R. 1910; 12 C. W. N. 1049; 35 C. 1039; 35 I. A. 206; 8 C. L. J. 359; 18 M. L. J. 379; 128 P. W. R. 1908; 4 M. L. T. 207; 10 Bom. L. R. 790 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

[APPEAL FROM APPELLATE DECREE No. 427 OF 1920.

September 29, 1921.

Present:—Mr. Kotval, A. J. C.

KARELAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BADRIPRASAD—PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), s. 60—License—Personal—Successor or transferee of grantor not bound—Revocation, notice of.

A license under the Easements Act is of a personal character, not merely as regards the grantee but also as regards the grantor. With the latter's death it comes to an end and his successor is entitled to treat the licensee as a trespasser even without a notice of revocation [p. 108, col. 2]

Wallis v. *Harrison*, (1838) 51 R. R. 715; 4 M. & W. 538; 8 L. J. N S. Ex. 44; 1 H. & H. 405; 2 Jur. 1019; 150 E. R. 1543 and *Coleman* v. *Foster*, (1856) 108 R. R. 442; 1 H. & N. 37; 4 W. R. 489; 156 E R. 1108, referred to.

Appeal against a decree of the District Judge, Jubbulpore, dated the 10th July 1920, confirming that of the Additional District Judge, Jubbulpore, dated the 18th March 1920.

Messrs. *V. Bose*, *P. N. Rudra* and Sir *Pipin Krishna Bose*, for the Appellants.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—One Sukhain died, leaving two widows, Sukwara and Sukarti. Ramrattan, the father of the plaintiff, who is a minor, was the next reversioner. In Sambat 1966 the two widows re married. In Sambat 1967 Sukwara mortgaged a 2-annas share of Mauza Urna and certain *malik makbuza* lands which were her husband's property to defendant, Karelal, and leased for a term of 9 years the *sir*, *khudkasht* and *malik makbuza* lands to his father, defendant, Jhurroo. Ramrattan died in Sambat 1970 or 1913 A. D. In Suit No. 52 of 1917 the plaintiff sued the defendants for possession, obtained a decree and took possession of the village share and the lands in December 1918. In the present suit he sues for mesne profits of the lands leased to Jhurroo for the years 1914 to 1919. It is not denied that both defendants were in possession of these lands. The pleas of the defendants with which we are concerned in this appeal are contained in paragraphs 3, 4 and 7 of Karelal's written statement and paragraph 9 of Jhurroo's written statement. They are as follows:—

"Karelal's written statement—

3. That Ramrattan, father of the plaintiff, divided the property left by Sukhain between his widows after their re-marriage and actually helped them in retaining possession and in mortgaging and leasing out the property and allowed *Musammat* Sukwara to be the ostensible owner of the property, for which mesne profits are claimed.

4. That this defendant, therefore, parted with Rs. 1,300 and the plaintiff is now estopped from claiming any portion of profits and from denying *Musammat* Sukwara's power to lease and mortgage.

7. That defendant No. 2 became an ordinary tenant by virtue of the leases granted to him by *Musammat* Sukwara with the consent and tacit license from Ramrattan. Plaintiff was not even born then"

"Jhurroo's written statement—

9. That this defendant was not a trespasser and held the *sir*, *khudkasht* and *malik makbuza* lands in Mouza Urna under leases executed by *Musammat* Sukwara who was then the ostensible owner and in possession of the said lands. This defendant had no knowledge of *Musammat* Sukwara's re-marriage and acted in good faith in taking the leases from her with the knowledge and consent of plaintiff's father, Ramrattan, who was alive then."

The plaintiff in reply did not deny any of these pleas but only said that they were *res judicata* by reason of the judgment in the suit for possession. The issues framed on these pleadings were:—

"Issue No. (1). Is not the judgment in the suit for possession (No. 52 of 1917) conclusive as to the right of the plaintiff to claim mesne profits as against the defendants?

(4) Can the defendants plead the plaintiff's father's consent and knowledge of the mortgage and leases as a bar to the plaintiff's claim for mesne profits? Are not these pleas *res judicata*?"

These issues have been found against the defendants by the lower Courts.

In second appeal it was at first contended that the defendants' possession was so far as Ramrattan was concerned as licensees, and that the plaintiff who claimed through Ramrattan and not as reversioner himself

could no more treat the defendants as trespassers than could Ramrattan before giving a notice revoking the license, that such notice could not be said to have been given before the institution of the suit for possession and that not more than one year's profits being due after the institution of that suit, a decree for more than one year's mesne profits should not have been given. When in reply to this argument it was contended that no plea of a license given to the defendants by Ramrattan was raised or put in issue and that the pleas raised by them were decided or must be deemed to be decided against them in the former suit where the mortgage and the leases were held to be wholly void against the plaintiff a new line of argument was adopted. It was argued that Sukwara was allowed to be in possession by the rightful owner Ramrattan and for the purposes of enjoyment she let the property to the defendants and that, therefore, neither her possession nor that of the defendants was that of trespassers. The answer to this argument is that Sukwara held the property only as a licensee and the license not being transferable the defendants would be, so far as Ramrattan was concerned, trespassers. The mortgage and the lease were really one transaction amounting to a usufructuary mortgage for 9 years for the sum advanced and considering that the license might terminate at any time by revocation or by death of the licensee the transaction cannot be treated as a mode of personal enjoyment under the licence.

Assuming, however, that there was an implied license by Ramrattan in favour of the defendants and that it was in effect pleaded, the question is whether it continued beyond Ramrattan's lifetime and bound his successor until the latter gave notice of revocation. It is not contended that the license to the defendants was a license to which either of clauses (*a*) and (*b*) of section 60 of the Easements Act applied. It was, therefore, revocable by the grantor. Admittedly Ramrattan did not revoke it before his death, but if he had transferred the property affected by it, the transferee would not have been bound by it, (section 59, Easements Act), and the licensee would have been a trespasser so far as the transferee was concerned: *vide Wallis* v. *Harrison* (1) and *Ooleman* v. *Foster* (2). In *Wallis* v. *Harrison* (1), it was argued that the transferee was not competent to treat the licensees as trespassers without notice of the transfer. Parke, B., observed:

"I take it to be clear, that a parol executory license is countermandable at any time; and if the owner of land grants to another a license to go over or do any act upon his close, and then conveys away that close, there is an end to the license; for it is an authority only with respect to the soil of the grantor, and if the close ceases to be his soil, the authority is instantly gone." * * * *

"A license executory is a simple authority excusing trespasses on the close of the grantor, as long as it is his, and the license is uncountermanded, but ceases the moment the property passes to another."

In *Ooleman* v. *Foster* (2) it was argued that the transferee of the grantor of the license took the property subject to the license and could not treat the licensee as a trespasser until he had done some act to notify that he had determined the license. This argument was not accepted and in both the above cases it was held that the licensees were liable in trespass to the transferees. It would appear from the judgment of Bramwell, B., in *Ooleman* v. *Foster* (2), that the permission which can be relied on in an action of trespass is the permission of the plaintiff himself. These decisions appear to be based on the principle that a license is of a personal character not merely as regards the grantee, but also as regards the grantor. There seems to be no reason why the principle of these decisions should not also apply where the property has passed by inheritance.

The permission given by Ramrattan came to an end with his death and thereafter there being no permission by the plaintiff the defendants were trespassers so far as he was concerned. The appeal fails and is dismissed with costs.

N. K. *Appeal dismissed.*

(1) (1833) 51 R. R. 715; 4 M. & W. 538; 8 L. J. (N. S.) Ex. 44; 1 H. & H. 405; 2 Jur. 1019; 150 E. R. 1544.

(2) (1856) 108 R. R. 442; 1 H. & N. 37; 4 W. R. 489; 156 E. R. 1103.

BRAHMAMOYI DEBYA *v.* SOMARALI SHEIKH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1681 OF 1919.

March 2, 1922.

Present :—Mr. Justice Newbould and Mr. Justice Panton.

BRAHMAMOYI DEBYA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SOMARALI SHEIKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Agricultural lease, expiry of, before the passing of the Bengal Tenancy Act—Holding over, effect of—Stipulation in the original kabuliyat *as to rate of interest, if enforceable—Bengal Tenancy Act (VIII of* 1885*), ss.* 53, 54 *cl.* (3), 67.

The plaintiff brought a suit for arrears of rent in respect of an agricultural tenancy which had commenced with the execution of a registered *kabuliyat* for a term of three years on the 26th May 1880, the defendants in the suit were the sons and son-in-law of the executant of the *kabuliyat* and they or their predecessor had been holding over since the expiration of the first term of the *kabuliyat*. The rent was payable partly in cash and partly in kind and the condition as to interest contained in the *kabuliyat* was that the tenant should pay interest at 6 pies per rupee per mensem on the cash rent and one *kotta* per rupee per month on the rent payable in paddy:

Held, that the provisions of section 67 of the Bengal Tenancy Act were a bar to the plaintiff's getting any higher rate of interest than that provided in the section. [p. 110, col. 2.]

Chandra Nath Sarma v. *Sheikh Inamdi*, 64 Ind. Cas. 118; 34 C. L. J. 369, followed.

Section 67 of the Bengal Tenancy Act is not limited in its application to a case where produce rent is paid quarterly. [p. 110, col. 2.]

Bisheshar Nath Sahu v. *Husani Sao*, 50 Ind. Cas. 506: 4 P. L. J. 282: (1919) Pat. 242, not followed.

Clause (3) of section 54 of the Bengal Tenancy Act is not so exhaustive a definition which includes every kind of arrears of rent. It only deals with cases of rent payable in instalments. [p. 110, col. 1.]

Appeal against a decree of the Subordinate Judge, Mymensingh, dated the 21st of May 1919, modifying that of the First Munsif, Netrokona, dated the 5th of September 1918.

FACTS appear from the judgment.

Babu *Tarak Chandra Chakrabutty* (with him Babu *Profulla Chandra Chakerbutty*), for the Appellants.—The term of the original lease expired before the Bengal Tenancy Act came into operation and the tenant held over. The effect of this holding over must be that the land was held on the terms of the original lease, on the same rent and on the same stipulations as to interest, etc. as were mentioned in that lease. See *Kishore Lal Dey* v. *Administrator-General of Bengal* (1). Refers also to *Alim* v. *Satish Chandra* (2) and *Kali Nath Sen* v. *Trailokhya Nath Roy* (3). See also *Lal Gopal Dutt Chowdhry* v. *Monmatha Lall Dutt* (4) and *Sreemati Pramada Sundari Sarkar* v. *Ledu Mattabar* (5). The defendants are thus liable to pay interest at the rate stipulated in the original *kabuliyat*. Then as to the rent payable in kind section 67 of the Bengal Tenancy Act has no manner of application. See *Bisheshar Nath Sahu* v. *Husani Sao* (6). The expression "arrears of rent" is defined in section 54 clause (3) of the Bengal Tenancy Act, which must be read with section 53 of the Act. This latter section applies only to money rent. Therefore, so far as the produce rent is concerned, section 67 is no bar to the plaintiffs' recovering interest at the stipulated rate. The fact that the contractual rate of interest amounted to a hard and unconscionable bargain cannot be a ground for disallowing the same.

Babu *Birendra Kumar De*, for the Respondents.—It is not necessary for me to rely upon the finding that the transaction was a hard and unconscionable bargain. I rely only upon section 67 of the Bengal Tenancy Act and invite your Lordships' attention to *Chandra Nath Sarma* v. *Sheikh Inamdi* (7). There it has been laid down that the tenant holding over is not liable to pay interest on the arrears of rent more than that mentioned in section 67 of the Bengal Tenancy Act. With regard to the produce rent it cannot be seriously argued that section 67 has no application. The case reported as *Bisheshar Nath Sahu* v. *Husani Sao* (6) is based on a misconception of the decision of the Privy Council in *Hemanta Kumari Debi* v. *Jagadindra Nath Roy* (8). The definition of arrears of rent contained in clause (3) of section 54 of the Bengal Tenancy Act is not exhaustive.

(1) 2 C. W. N. 303.
(2) 24 C. 37; 12 Ind. Dec. (N. S.) 690.
(3) 26 C. 315, 3 C. W. N. 194; 13 Ind. Dec. (N. S.) 805.
(4) 32 C. 258; 9 C. W. N. 175.
(5) 24 C. W. N. clii (152) *notes*.
(6) 50 Ind. Cas. 506; 4 P. L. J. 282; (1919) Pat 242.
(7) 64 Ind. Cas. 118; 34 C. L. J. 369.
(8) 22 C. 214; 21 I. A. 151; 6 Sar. P. C. J. 473; 11 Ind. Dec. (N. S.) 144.

Babu *Tarak Chandra Chakrabutty* replied.

JUDGMENT.—This appeal arises out of a suit for arrears of rent, and the only point to be decided is the rate of interest to be given to the plaintiffs on the arrears.

The tenancy commenced with the execution of a registered *kabuliyat* for a term of three years on the 25th May 1880 and the defendants in this suit are the sons and son-in-law of the executant of the *kabuliyat* and they or their predecessor have been holding over since the first term of the *kabuliyat* expired. The *kabuliyat* provides for payment of 24 rupees in cash and 3 *aras* of paddy, or in lieu of the paddy 12 rupees per annum. The condition as to interest contained in the *kabuliyat* is that the tenant should pay interest at 6 pies per rupee per mensem on the cash rent and one *cotta* per rupee per month on the rent payable in paddy. Both the lower Courts have held that the plaintiffs cannot get interest at higher rate than $12\frac{1}{2}$ per cent. per annum. This finding is based on two grounds, firstly, that the contract for interest was a hard and unconscionable bargain, and, secondly, that the provisions of section 67 of the Bengal Tenancy Act are a bar to the plaintiff's getting any higher rate of interest than that provided in that section.

On appeal both these grounds were attacked. But the learned Vakil for the respondent was content to rely on the application of section 67 and the question of the effect of the finding that the bargain was hard and unconscionable was not argued. As regards the effect of section 67 the point has recently been considered by a Division Bench of this Court in the case of *Chandra Nath Sarma* v. *Sheikh Inamdi* (7). In that case it is pointed out that there has been divergence of judicial opinion as to the effect of holding over and the more important cases dealing with this point are there discussed. On behalf of the appellants it is strenuously urged that when a tenant holds over there is no new contract entered into which would make the provisions of section 178 of the Bengal Tenancy Act applicable and that consequently there is no bar to recovery of interest under the terms of the original contract if that is made before the passing of that Act. This contention is overruled by the decision above cited. That decision has been attacked. We do not think that we should be justified in referring the matter to a Full Bench. On behalf of the appellant our attention has been drawn to another recent decision in the case of *Sreemati Pramada Sundari Sarkar* v. *Ledu Mattabar* (5), Second Appeals Nos. 167 and 2269 of 1918, decided on the 3rd June 1920. A short note of this case appears in 24 Calcutta Weekly Notes, (Notes Portion) Clii. On examination of the judgment we find that it is of no assistance to the present case. The judgment itself does not state the facts. From the paper-book it appears that no question of the applicability of section 67 was ever raised. The lower Appellate Court in that case reduced the interest arbitrarily on the ground that the bargain was hard and unconscionable. The tenancy held by the defendant was *Osat nim howla* or permanent tenure and, therefore, that case would be covered by the Full Bench case in *Lal Gopal Dutt Chowdhry* v. *Monmatha Lal Dutt* (4). The facts of the present case cannot be distinguished from the facts of the case of *Chandra Nath Sarma* v. *Sheikh Inamdi* (7) already referred to and we follow that decision.

One other point was argued. It was contended that so far as the rent in kind was concerned section 67 would have no application. This contention is based on a decision of the Patna High Court, *Bisheshar Nath Sahu* v. *Husani Sao* (6). With all respect to the learned Judges who decided that case we are unable to agree with them that section 67 is inapplicable to a case of produce rent which is not paid quarterly. That decision is based on the decision of their Lordships of the Judicial Committee in *Hemanta Kumari Debi* v. *Jagadindra Nath Roy* (8). That decision has been considered in two reported cases of this Court, *Narendra Kumar Ghose* v. *Gora Chand Poddar* (9) and *Monohar Mukherjee* v. *Khetra Nath* [*Paresh Chandra Mukherjee* (10) and it has been held that their Lordships of the Judicial Committee did not rule that the whole of the section 67 is limited in its application to cases where rent is payable quarterly. We do not see any reason why section 67 should not be applicable to interest on arrears of paddy of rent paid annually. On behalf of the appel-

(9) 38 C. 683; 3 C. L. J. 391.

(10) 19 Ind. Cas. 625; 18 C. L. J. 175 at p. 176; 17 C. W. N. 820.

lants it is contended in support of this objection that arrears of rent is defined by section 54 clause (3) and that clause must be read with section 53 which applies only to money rent. Clause (3) of section 54 is not so exhaustive a definition which includes every kind of arrears of rent. It only deals with cases of rent payable in instalments. It would be absurd to hold that all arrears of rent were covered by this definition, otherwise rent payable annually would never fall in arrear.

For these reasons, we hold that this appeal fails and must be dismissed with costs.

B. N.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONR'S COURT.

APPEAL FROM APPELLATE DECREE No. 44 OF 1919.

August 16, 1921.

Present :—Mr. Prideaux, A. J. C.

VITHOBA—PLAINTIFF—APPELLANT

versus

WAMAN—DEFENDANT—RESPONDENT.

Hindu Law—Mitakshara—Insanity—Inheritance and Partition, exclusion from—Insanity need not be congenital.

Under the Mitakshara Law, a person is disqualified from succeeding to property, if he is insane when the succession opens, and cannot demand a partition or share in one when it actually takes place. [p. 112, cols. 1 & 2.]

Ram Singh v. *Bhani*, 32 Ind. Cas. 127; 38 A. 117; 14 A. L. J. 11, followed.

Insanity, as a ground for exclusion from inheritance under Hindu Law, need not be congenital. [p. 112, col. 2.]

Muthusami Gurukkal v. *Meenammal*, 55 Ind. Cas. 576; 43 M. 464; 38 M. L J. 291; (1920) M. W. N. 253; 27 M. L. T. 329, followed.

Appeal against a decree of the District Judge, Wardha, dated the 23rd November 1918, confirming that of the Subordinate Judge, No. 1, Wardha, dated the 6th August 1918.

Mr. *W. V. Gharpure*, for the Appellant.

Mr. *V. Bose*, Sir *Bipin Krishna Bose* and Mr. *S. R. Mangrulkar*, for the Respondents.

JUDGMENT.—Vithoba, son of Harbaji Rajput, a lunatic suing through his next friend and corsin, one Bajirao, claims from his two wives and Waman, his son, partition of his ancestral estate situated in the Wardha District. The District Judge, Amroati, had in 1913 declared Vithoba to be a lunatic under Act XXV of 1856, appointing the son guardian of the lunatic's person and property. The case was tried on the following issues :—

(1) Should Bajirao be allowed to act as the next friend of the lunatic plaintiff?

(2) Can the lunatic claim partition of the family property?

The Trial Court found the second issue in the negative, and also found against Bajirao acting as the next friend. The suit was dismissed. The lower Appellate Court dealt with the single question whether a lunatic can claim partition and confirmed the finding of the Trial Court in this respect.

Again in this Court the sole question is whether Vithoba, an admitted lunatic, can sue for partition.

For the appellant only one case exactly in point has been quoted, namely, *Hotchand Gulabrai* v. *Manghanmal Gulabrai* (1), in which two of three Judges of the Judicial Commissioner's Court held, to quote the head-note: "A co-parcener who has become a lunatic subsequent to his birth can, during his lunacy, maintain a suit for partition of his share in the joint family property. He has vested rights in such property by birth which are not divested by his subsequent lunacy."

Mayne in his well-known book on Hindu Law writes :—

"Persons who labour under any defect which disqualifies them from inheriting are equally disentitled to a share on partition." (Paragraph 484.)

And also dealing with the question of exclusion from inheritance the same author writes in paragraph 594 :—

"As to mental infirmity, it has been held that the degree of incapacity which amounts

(1) 29 Ind. Cas. 42; 8 S. L. R. 279.

to idiocy is not utter mental darkness. It is sufficient if the person is, and has been from his birth, of such an unsound and imbecile mind as to be incapable of instruction or of discriminating between right and wrong. He must, in short, be one whom it would be impossible to describe as a reasoning being."

NOTE.—It appears probable that in this passage the words "incapacity" and "idiocy" have been interchanged by a printer's error.

Shastri at page 360 of his book on Hindu Law quotes the text of Manu governing the case as follows :—

"An impotent person and an outcast are excluded from a share of the heritage, and so are those deaf-and-blind-from-birth, as well as madmen-idiots-and-the-dumb and any others that are devoid of an organ of sense or action."

At page 373 of the same book the author writes :—

"Insanity is a disease of the mind, which need not be congenital nor incurable to exclude from inheritance the person affected thereby at the time the succession opens. And also a member of a joint family governed by the Mitakshara will be precluded from participating in a share as co-parcener if at the time of partition he is affected by insanity, although he was free from that disease before, and did acquire a right to the ancestral property from his birth."

The cases directly in point are *Wooma Pershad Roy* v. *Grish Chunder* (2), *Ram Sahye* v. *Lalla Laljee Sahye* (3) and *Ram Soonder Roy* v. *Ram Sahye* (4). On the question whether an insane person can inherit under Hindu Law it was held in *Ram Singh* v. *Bhani* (5) that a person is disqualified from succeeding to property if he is insane when the succession opens, whether his insanity is curable or incurable : and the question was decided in the same manner in *Deo Kishen* v. *Budh Prakash* (6) by the Judges of the Allahabad High Court. So far back as 1872 it was held in *Dwarkanath Bysack* v. *Denobundho Mullick* (7) that a mad man could not inherit, and insanity was held by their Lordships of the Privy Council to be a bar to inheritance in *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh* (8). It seems clear that insanity, as a ground of exclusion from inheritance under Hindu Law, need not be congenital : *Muthusami Gurukkal* v. *Meenammal* (9). The weight of authority is, therefore, to the effect that insanity at the time when the succession opens is sufficient to disqualify, and that under the Mitakshara Law a person who is at the time insane is not entitled to share upon a partition in a joint family ; if he is not entitled to share he is not entitled to demand partition. The view taken by the two lower Courts is correct.

It is unnecessary to decide, nor has it been argued, whether Bajirao could act as the next friend of the plaintiff. This appeal is dismissed with costs and I direct appellant to pay respondents' costs.

N. K. *Appeal dismissed.*

(2) 10 C. 639 at p. 641; 8 Ind. Jur. 617; 5 Ind. Dec. (N. S.) 429.

(3) 8 C. 149 at p. 153; 9 C. L. R. 457; 6 Ind. Jur. 308; 4 Ind. Dec. (N. S.) 96.

(4) 8 C. 919; 7 Ind. Jur. 85; 4 Ind. Dec. (N. S.) 593.

(5) 32 Ind. Cas. 127; 38 A. 117; 14 A. L. J. 11.

(6) 5 A. 509; A. W. N. (1883) 105; 3 Ind. Dec. (N. S.) 442.

(7) 18 W. R. 305 at p. 312; 9 B. L. R. 198.

(8) 13 M. I. A. 519; 15 W. R. P. C. 1; 6 B. L. R. P. C. 509; 2 Sar. P. C. J. 607; 20 E. R. 645.

(9) 55 Ind. Cas. 576; 43 M. 464; 38 M. L. J. 291; (1920) M. W. N. 253; 27 M. L. T. 329.

NARAIN DAS v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 902 OF 1921.

March 3, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

Mahant NARAIN DAS—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 288—Statement made before Committing Magistrate—Transfer to Sessions record—Evidence Act (I of 1872), ss. 105, 114 ill. (b), 133, 154—Cross-examination of witness by party producing him—Accomplice—Corroboration—Confession of co-accused—Penal Code (Act XLV of 1860), ss. 100, 102—Right of private defence of body, when commences.

The Sessions Court has absolute discretion to allow the statement of a witness made before the Committing Magistrate to be transferred to its own record under section 288 of the Criminal Procedure Code, but it should not allow the statement to be read out to the witness before the defence has had an opportunity of cross-examining him. [p. 123, col. 2.]

A Public Prosecutor is not bound to produce witnesses whom he considers to be false and the Court should not allow him to cross-examine prosecution witnesses immediately they are produced. [p 123, cols. 1 & 2.]

The burden of proving the existence of circumstances bringing a case within any of the general exceptions of the Penal Code rests upon the accused and section 105 of the Evidence Act says the Court shall presume the absence of such circumstances. [p. 132, col. 1.]

Section 133 of the Evidence Act lays down the rule of law regarding the testimony of accomplices, and section 114, illustration (*b*), is merely a guide to assist the Court, though in a vast majority of cases prudence requires that there shall be corroboration. No hard and fast rules can, however, be laid down to regulate the extent and nature of this corroboration, this being dependent entirely on the circumstances of each case. [p. 133, col. 2.]

Balmokand v. *Emperor*, 28 Ind. Cas. 738; 17 P. R. 1915 Cr.; 11 P W. R. 1915 Cr.; 16 Cr. L. J. 354; 248 P. L. R. 1915, *Barkat Ali* v. *Emperor*, 36 Ind. Cas. 861, 2 P. R. 1917 Cr.; 18 Cr. L. J. 29, relied upon.

Mamun v. *Queen-Empress*, 14 P. R. 1894, *Emperor* v. *Nilakanta*, 14 Ind. Cas 849, 35 M. 247; (1912 M. W. N. 207; 13 Cr. L. J. 305; 22 M. L. J. 490; 11 M. L. T. 1 Supp., referred to.

The evidence of one approver cannot be said to corroborate that of another except where both have, at the earliest opportunity, and before there has been any chance of corroboration, deposed to the same acts as having been committed by a particular accused person. [p. 148, col. 2; p. 149, col. 1.]

The Court should insist on there being unanimity as to the incidents deposed to, or a sufficient number of them, by two approvers before their uncorroborated testimony is deemed sufficient to warrant a conviction thereon. [p. 149, col. 1.]

A confession made by a co-accused after the whole of the prosecution evidence has been recorded can be used as evidence against the person making it, but cannot be used as against his co-accused either as evidence in itself or as corroboration of the testimony of an accomplice. [p. 134, col. 2.]

Section 100 of the Penal Code gives the right of private defence of the body only against actual assailants, it does not authorise the killing or causing of hurt to persons who may in the future when re-inforced by others become assailants. The right arises only on the occurrence of an offence, or of an attempt to commit an offence, and as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed. [p. 137, col. 2.]

Appeal from an order of the Additional Sessions Judge, Gujranwala at Lahore, dated the 13th October 1921.

Messrs. *Hasan Imam*, *B. R. Puri* and *Ram Lal*, for the Appellant.

Mr. *H. A. Herbert*, Government Advocate, and Pandit *Jawala Parshad*, R. B., Public Prosecutor, for the Respondent.

JUDGMENT.—On the 20th of February 1921 a very serious occurrence took place inside the enclosure of the Janam Asthan Gurdwara at Nankana in the Sheikhupura District, in the course of which a number of persons, estimated at 130, lost their lives. The majority of these persons are said to have been killed inside the enclosure of the shrine but a few, as will be shown hereafter, were killed outside in the vicinity. In connection with this occurrence Narain Das, the Mahant of the shrine, and 50 other persons were committed to take their trial before the Additional Sessions Judge of Lahore on charges under sections 304, 148, 149, 201, 109 and 114, Indian Penal Code. Out of these 51 persons, Sundar Singh, accused No. 45, died in jail before the trial commenced and the charge against accused No. 47, Abdul Karim, was withdrawn by the Government Advocate during the trial. Out of the remaining 49, 16 were acquitted, 8 persons, namely, Mahant Narain Das, Hari Nath, Kadir, Nur Sadin, Atma Ram, Surain Singh, Ranjha and Rehana were convicted of murder and of rioting armed with deadly weapons under section 302, read with sections 149 and 148, Indian Penal Code, and were sentenced to death. Eight others, namely, Piara Singh, son of Hari Singh, Jiwan Das, Arsjan Das, Kaman, Piar

Singh son of Sunder Singh, Balak Das, Jetha Singh and Jagat Singh were convicted of murder under section 302, read with section 149, Indian Penal Code, and of rioting armed with deadly weapons under section 148, Indian Penal Code, and were sentenced to transportation for life. The remaining 17 persons, namely, Gul Akbar Khan, Ashiq *alias* Sher Baz, Nur Muhammad, Rahman, Nek Muhammad, Aziz Ul'ah, Abdullah, Ismail, Muhammad Azam, Abdul Karim, Abdul Wali, Lal Muhammad, Imam Gul, Sayyad Fakir, Mehr Ali, Gul Ahmad and Lal Das, were convicted under section 201, Indian Penal Code, of causing the disappearance of evidence of the commission of an offence punishable with death and were sentenced to seven years' rigorous imprisonment each.

From this order the following eleven separate appeals have been filed to this Court: Criminal Appeal No. 902 by Mahant Narain Das; No. 904 by Ranjha and Rehana, No. 906 by Surain Singh; No. 1065 by Kaman and Piar Singh, son of Sunder Singh, Jetha Singh and Jagat Singh; No. 983 by Piara Singh, son of Hari Singh, and Jiwan Das; No. 984 by Lal Das; No. 1066 by Balak Das and Arjan Das. Mr. Hasan Imam, Advocate of the Patna Bar, appeared in the above appeals in this Court. With him appeared Mr. Bhagat Ram Puri, Advocate, and Mr. Ram Lal, Advocate, except in the appeals of Surain Singh, Piara Singh, son of Hari Singh, Lal Das and Jiwan Das for whom Mr. Dhanraj Shah appeared along with Mr. Hasan Imam; Criminal Appeal No. 903 by Kadir and Nur Sadin for whom Mr. Miran Bakhsh, Advotate, appeared; Criminal Appeal No. 905 by Atma Ram for whom Mr. Bhagat Ram Puri, Advocate, appeared; Criminal Appeal No. 917 by Hari Nath for whom Mr. Ram Lal, Advocate, appeared; Criminal Appeal No. 907 by 16 persons sentenced under section 201, Indian Penal Code, to seven years' rigorous imprisonment, for whom Mr. Miran Bakhsh, Advocate, appeared. Mr. Herbert, Government Advocate, and Pandit Jowala Parshad, Public Prosecutor, appeared for the Crown. This judgment disposes of all these appeals.

The shrine at Nankana is dedicated to Guru Nanak and is called the Janam Asthan Gurdwara, or the brith place Gurdwara, Guru Nanak having been born at Nankana. The history of the shrine is thus given in a letter No. 210/6, dated the 7th April 1906, from C. J. Hallifax, Esquire, Deputy Commissioner, to H. J. Maynard, Esquire, I. C. S., Commissioner, Lahore, a copy of which was filed by Mahant Narain Das along with his written statement:—

"In the middle of the 17th century Bava Lajpat Bedi, a descendant of the Guru, visited his birth place and built a shrine there which was called Janam Asthan. A little later other shrines were built. When these shrines had been established, Hammun, an *Udasi*, and after him Duni Chand *Udasi*, and Natha Singh, a *Nirmala* Sadhu, as Hammun's assistants, were appointed to look after them, and the *chelas* of these Sadhus who have inherited directly through them have ever since been in possession."

From the above it would appear that the *Sadhus* have been the managers or Mahants in possession of the Janam Asthan shrine since it was founded more than 250 years ago and would naturally consider themselves entitled to retain possession as such, and would be entitled to resist attempts to dispossess them by unlawful means. Narain Das *Udasi*, appellant, was the Mahant of the shrine at the time of the occurrence—20th February. Like the Mahants of many other shrines in the Punjab he is an *Udasi*. According to Macauliffe's book on the Sikh Religion, page 79 of the Introduction, we find that "there were three great schisms of the Sikh religion which led to the falsification of old, or the composition of new, Janam Sakhis. The schismatics were known as the *Udasis*, the *Minas*, and the *Handalis*. The first schism of the Sikhs began immediately after the demise of Guru Nanak. Some of his followers adopted Sri Chand, his elder son, as his successor, and repudiated the nomination of Guru Angad. The followers of Sri Chand were termed *Udasis* or the solitary, and they now constitute a large body of devout and earnest men."

The orthodox Sikhs, who follow all the ten Gurus, are, or profess to be, dissatisfied with the management of the Gurdwaras, and in the autumn of 1920 a Committee consist-

ing of 175 members from different parts of the Province and known as the Gurdwara Parbandhak Committee was formed in Amritsar for the management of all Sikh Gurdwaras and other religious institutions of the Sikhs and for the purpose, if necessary, of taking possession forcibly of such places. See in this connection the note on Sikh agitation prepared by P. W. No. 17, Hakim Ikram-ul-Haq, Deputy Superintendent Police, C. I. D. In the course of his note this witness states that on the 21st-22nd November 1920 a party of Akali Sikhs seized the Panja Sahib shrine at Hasan Abdul, and on the 28th of December the Sachcha Sauda Gurdwara in the Sheikhupura District was seized by a Sikh *jatha* and the Mahant was expelled. Fearing a similar fate the Mahant of the Nankana Sahib shrine of the same district collected a number of supporters with a view to offering resistance should his shrine be attacked. In January 1921 the Gurdwara at Chohala village in the Amritsar District was seized by a party of Sikhs of the Manjha. At Tarn Taran, in the Amritsar District, a collision occurred on the 25th January 1921 between the *pujaris* and the reforming party in which a number of persons were injured, two of whom have since died. The seizure of these shrines was quite sufficient to make the Mahants of other shrines, including Mahant Narain Das, appellant, apprehensive that the Sikhs might come and take forcible possession of their shrines too. In consequence, he applied to the authorities, as he himself admits in his written statement (pages 310—312 of the printed paper-book). In paragraph 4 of this statement he says: "Being apprehensive of attack, I approached every quarter for help and assistance. I had an interview with Mahatma Gandhi at Lahore, and he promised to speak to the Sikhs, which he did in the Annual League Meeting at Lahore. I also made representations to His Excellency the Governor, to the Members of the Executive Council and to the Ministers. I laid my case before nearly all high Police Officials, particularly Mr. Bowring and Mr. Mercer. I waited in a deputation on the Hon'ble Mr. C. M. King, then Commissioner, Lahore Division, and pleaded for protection against apprehended attack, which every subject can of right demand of duly established Government." In paragraph 5 he states that he was told by the Commissioner and other responsible Government Officials that this was a religious matter, and he was to make his own arrangements. In the absence of getting any help from the authorities he admits in paragraph 8 that he engaged Pathans as *chaukidars* who kept watch outside the shrine and also took steps to put the shrine in a state capable of defence and even made arrangements for storing food and other provisions inside the Gurdwara in case of a seige. He also admits in paragraph 9 that he possessed a revolver and two guns and that he purchased a certain quantity of ammunition and had previously also bought ammunition for sport. In paragraph 11 he says that his instructions to the Pathans and his adherents were only to repel all attacks to seize possession of the shrine and that firearms were to be used only as a last resort.

The Mahant's statement as to the application made by him for protection to the authorities was borne out by the evidence of the following witnesses:—

P W. No. 128 Mr. I. W. Bowring, Superintendent Police, C. I. D. (page 240 of the paper book) says: "The Mahant appealed to me personally that he was afraid of being dispossessed by the Sikhs. On the first occasion he did so at the Nankana fair in November and later on he came to see me at my office in Lahore. I did not tell him whether he could have Police protection or not. It was not in my province."

D. W. No. 97 Mr. C. M. King, (page 426 of the paper-book) says: "On one occasion a large number of Mahants came to me. They wanted Government to protect the shrine generally. I did not supply the protection on behalf of Government that they were seeking. There was a conference of Government Officials about the Gurdwaras. It was decided that there should be no defending of the Gurdwaras by Police force." It is also clear from the evidence on the record that the Gurdwara Parbandhak Committee were contemplating interference with the management of the shrine at Nankana.

D. W. No. 76 is Sardar Sundar Singh, Honorary Magistrate and *Jagirdar* and President of

the Gurdwara Parbandhak Committee. In the course of his evidence he states that there was certainly a resolution of some date which he could not remember that an open letter was to be addressed to a Mahant or Mahants and that it was decided to write to the Nankana Mahant that if a satisfactory reply was not received, a Diwan should be held at Nankana to discuss the matter. The 4th or 5th of March was probably the date fixed for this meeting at Nankana.

D. W. No. 153 Sardar Sardul Singh says (page 465 of the printed paper-book): "I have been interested throughout in the Gurdwara movement and have taken a prominent part in it. The Sikhs several times asked Government to help them to reform the Gurdwaras but without results. The Parbandhak Committee was formed for the reformation of the Gurdwaras before the Nankana occurrence. The Committee warned the Mahant of Nankana to reform abuses in his Gurdwara. It is correct that the Committee gave him notice that the Sikhs would be obliged to turn him out at the Diwan of the 3rd or 4th March if he did not institute reforms. I think 23rd Phagan was fixed for a Diwan at Nankana." It appears from the calendar that the 23rd of Phagan corresponded with the 5th of March 1921.

In consequence of the forcible seizure of shrines in various parts of the Province the Mahants decided upon having a meeting in Lahore on the 20th February 1921 to consult together as to what steps should be taken for their protection. It is common ground that Mahant Narain Das was in Lahore in connection with this conference on the 18th of February and that he returned to Nankana by train arriving there on the morning of the 19th. The chief day of the conference was to be the 20th of February and on the evening of the 19th the Mahant went to the station at Nankana in order to proceed to Lahore. When he was in the train there waiting for it to start he was informed that a *jatha* or band of Sikhs was at Bughiana, some seven miles distant, and fearing that this *jatha* was on its way to Nankana to take forcible possession of the shrine he gave up his intention of proceeding to Lahore and returned to his *baithak* which adjoins the enclosure of the Gurdwara. At the same time he had sent some of his adherents to find out what the movements of the *jatha* said to be at Bughiana were and learnt that it had proceeded to some other place. It, therefore, appears probable that he did not anticipate any immediate attack by the Sikhs on his Gurdwara and went to rest on the night of the 19th February feeling fairly secure.

We now proceed to quote two paragraphs from page 2 of the learned Sessions Judge's judgment which shows what he finds to be the main facts of the occurrence of the 20th February.

"On the night of the 19th February a body of Sikhs of uncertain numbers gathered from various villages in the neighbouring Lyallpur District, and under the command of one Lachhman Singh of Dharowal in that District, marched through the night to Nankana with the object of taking possession of the Janam Asthan shrine in the name of the Sikh reformation party. Although they were styled a *jatha*, a name which implies some sort of organisation, they were in fact a mere rabble.

"They arrived at Nankana about daybreak and most of them marched straight into the four walled enclosure surrounding the shrine or Gurdwara. This enclosure has a principal entrance facing the east called the Darshani door which leads into a porch or *deorhi*, another door on the south facing the Bazar and called the Bazar door, and a third door on the west. The Sikhs found a few early morning worshippers and a Pujari named Thakur Das conducting a service in the shrine proper and some of the Mahant's tenants, who were supposed to be on guard but were in fact asleep, in a verandah of one of the enclosure walls. Thakur Das was pushed out roughly but no particular harm was done to him. No one else was molested. The doors were shut but the guards were allowed to escape by the Darshani door. Meanwhile, a crowd of the Mahant's supporters began to gather outside the doors, some armed with *chhavis* and axes and some with sticks. An attempt on the part of the Sikhs to oust the Mahant from the control of the Gurdwara had been expected, but for the moment both parties were taken by surprise and neither had any definite plan of action. Then a few men of the Mahant's party climbed on to

the walls of the enclosure. Three or four of them had shot guns and opened fire on the Sikhs below in the enclosure, while others threw bricks of which there were several heaps on the walls. This caused a panic. The Sikhs bolted for shelter into the rooms and varandahs at the Darshani entrance and into the shrine itself. Their assailants admitted the main crowd of the Mahant's followers, and a systematic attack was made upon the hiding places of the Sikhs. Into these the guns were fired and the stick and axe men finished off all who were not shot to death. Other Sikhs who came up later, being either stragglers from Lachhman Singh's party or possibly casual visitors, were attacked and pursued outside the enclosure walls and some were killed and wounded. Finally, the dead were gathered together in heaps, mostly within the Gurdwara enclosure but some outside, and burnt."

It is necessary to somewhat amplify the above summary. After the attacks in pursuit of stragglers outside the Gurdwara enclosure the pursuers returned. It is said that one Gurdit Singh then reported that the doors of the *chaukhandi* (the actual shrine of the Janam Asthan) were closed and that he could not open them and that there were probably some Sikhs inside. Upon this the Mahant's adherents went inside the Gurdwara enclosure and killed a number of Sikhs who had shut themselves into the *chaukhandi*. When the killing was over the bodies were dragged out and those already outside having been collected they were set on fire in heaps with the help of wood and kerosine oil.

It is common ground that the Gurdwara Parbandhak Committee had fixed the 23rd of Phagan, corresponding to 5th March 1921, for the holding of a Diwan or Jor Mela at Nankana at which the question of reforms in the Janam Asthan shrine was to be discussed and it was to be seen whether the Mahant had instituted or intended to institute the reforms desired by the Committee, and whether he should be turned out from his Mahantship or not. It is also in evidence and not disputed that certain persons including Lachhman Singh were to go there beforehand and prepare the *langar* or, in other words, make preparations for feeding the concourse of people who were expected to gather. The prosecution version is that the members of Lachhman Singh's *jatha*, who entered the enclosure of the Janam Asthan on the morning of the 20th February, had gone there merely with the object of making preparations for the Diwan of the 5th March. The learned Sessions Judge, however, has, after carefully reviewing the evidence, come to the conclusion that Lachhman Singh and his party intended to capture the Gurdwara—see page 5, line 20 *et seq* of the judgment. He has discussed the question at length in the judgment from page 3, line 22, to page 5, line 32. He points out at page 4, line 31, that "there is plenty of evidence on the prosecution side that Lachhman Singh's party shut the doors of the Gurdwara enclosure when they entered and placed guards over them, *e.g.*, the statements of worshippers such as Balak Nath (P. W. No. 27), Barkat Singh (P. W. No. 45), Ladha Mal (P. W. No. 57), Piara (P. W. No. 61) and Radha (P. W. No. 110), of Jowala Singh (P. W. No. 51), Harnam Singh (P. W. No. 32) and the guards who are tenants of the Gurdwara lands, namely, P. W. Nos. 64, 65, 67 to 76 and 91 to 93. That the Akalis interrupted the service and turned out Thakur Das Pujari is proved by the evidence of Thakur Das himself, Ghani Nand, (P. W. No. 247), Ladha Mal (P. W. No. 57) and Radha (P W. No. 110) of which no rebuttal is offered."

It is clear, therefore, that the Sikhs on arrival marched straight into the enclosure, turned out the worshippers and guards, shut the doors and put guards over them. These acts are *prima facie* evidence that Lachhman Singh and his party intended to take possession of the shrine. We are not impressed with the learned Government Advocate's arguments that the doors were shut and guarded so that the Sikhs should not be interrupted in their worship. These were acts signifying their intention to take possession and were in themselves quite sufficient for the Mahant and his followers to conclude that this was their intention.

Some members of Lachhman Singh's *jatha* were certainly armed with axes, *safa jangs* (battle-axes) and long *kirpans*, but there is very little evidence that any of them possessed any fire-arms. There is no evidence at all on the record that any of them used fire arms. In our opinion it must be held

that none of the members of the *jatha* possessed any.

No less than 263 witnesses have been examined on the side of prosecution. They are classified as follows by the learned Sessions Judge :—

Police Officers testifying to the investigation and arrests ...	16
Medical witnesses ...	8
Formal witnesses in connection with Exhibits ...	47
Eye witnesses including four approvers ...	66
Alleged eye witnesses regarded by the prosecution as hostile ...	9
Alleged eye-witnesses cross-examined by the prosecution or tendered for cross-examination ...	10
Witnesses tendered for cross examination and not questioned ...	11
Relatives or acquaintances of Sikhs killed or alleged to have been killed ...	96

The approvers are Gomi, Ladha, Takiullah and Farid, P. W. Nos. 23 to 26.

The Sessions Judge in his judgment has described these witnesses and the way in which they came to be given conditional pardons. Takiullah and Farid are two out of 28 Pathans who were engaged by Mahant Narain Das as guards on the 3rd February—see in this connection the evidence of Shamboo Nath (P. W. No 140). We do not believe the evidence of the Pathans that they were not engaged as guards but merely for the purpose of building a school. These men were arrested on the evening of the 20th February and were sent at once to Lahore along with Mahant Narain Das and others, and were kept in custody in the Central Jail until they made statements to the Police on the 17th March. Conditional pardons were then tendered and their statements were recorded by Diwan Mahesh Das on the 22nd and 23rd March. These are marked Exhibits P. D. R. and P. D. S. and will be found printed at pages 54 to 61 of the book of Exhibits. As pointed out by the Sessions Judge, these two Pathans had no opportunity of meeting Gomi and Ladha between the 20th February and the dates on which their statements were recorded, Gomi and Ladha who were arrested a few days after the occurrence were kept at Nankana and were never sent to the Central Jail at Lahore. The reason given by the Police Officers for keeping them at Nankana and not sending them to Lahore was that they were expected to make confessions. We shall refer hereafter to the evidence of Hakim Ikram-ul-Haq, D. S. P., C. I. D., (P. W. No. 17), and Fazl Imam, Inspector, C.I.D. (P. W. No. 19), which shows that Gomi and Ladha were kept apart from each other under such circumstances that they could not collaborate and they had no opportunity of collaborating prior to making their statements to Diwan Mahesh Das. Ladha made his statement on the 10th and 11th March—see pages 43 to 53 of the book of Exhibits and Gomi made his on the 15th—pages 37 to 42 of the same book. The facts that, prior to the making of their statements previous concert between them was highly improbable, and that concert between them on the one hand and the Pathan approvers on the other was also highly improbable, have to be paid regard to in connection with illustration (*b*) to section 114 of the Evidence Act which is that an accomplice is unworthy of credit unless he is corroborated in material particulars.

The learned Sessions Judge at pages 12 to 16 of his judgment has given a *resumé* of the evidence of the four approvers which it is not necessary for us to repeat. He also refers to the case of Hari Nath, appellant, who in the Committing Court denied complicity in the occurrence of the 20th February, but in the Sessions Court at the commencement of the trial pleaded guilty and after the conclusion of the prosecution evidence made a long statement fully inculpating himself as well as other accused persons. We shall show hereafter that this statement cannot, in our opinion, be used as corroboration of the evidence of the accomplices as against his co-accused.

The Sessions Judge has divided up the occurrences of the 20th February into seven main incidents and the learned Counsel in their arguments before us have adopted this division and we cannot do better than give it at this place.

(1) Entry of Lachhman Singh's *jatha* into the Gurdwara enclosure and its doings up to the commencement of the attack;

(2) Gathering of the Mahant's men outside the southern gate and the first attack from the walls of the enclosure;

(3) Killing in the *darshani deorhi*;

(4) Subsequent doings inside the enclosure, *i. e.*, the *baradari* incident described by Takiullah and the killing of two Sikhs on the south wall;

(5) Exit from the enclosure and the shooting of Mangal Singh by Mahant Narain Das;

(6) Pursuit and killing of stragglers outside the enclosure and beyond the Railway line after the shooting of Mehnga Singh;

(7) The killing in the *chaukhandi* and the burning of bodies.

Before addressing us upon the events of the 20th February Mr. Hasan Imam had a great deal to say about the attitude of the Sikhs after the occurrence. The shrine was on the 21st February made over by the authorities to a Committee of Sikh gentlemen. There is ample evidence on the record and it is not denied that after the occurrence hundreds or rather thousands of Sikhs, mostly armed with axes or *kirpans*, assembled at Nankana or in the vicinity and that their attitude was a threatening one. It is also proved and admitted that a Committee of Sikhs was constituted for the purpose of investigation and that the members of this Committee arrested people wholesale on their own account. They behaved generally in a rather high-handed manner and interfered with the Police investigation. This matter is dealt with by the learned Sessions Judge at page 32 of his judgment from which we quote the following:—

"There is no doubt that the Sikhs interfered considerably to start with. This is proved by Mr. Bowring, Superintendent of Police (P. W. No. 128) and Hakim Ikram-ul-Haq, Deputy Superintendent of Police (P. W. No. 17). Nine persons were released by the Police from actual confinement. Sixty-seven more were detained by the Sikhs and released by the Police. Out of 40 more arrested at the instance of the Sikhs 36 were discharged under Magistrate's order during the investigation.

"A number of these persons have been called as defence witnesses and although they complain of their treatment and some say that they were told by the Sikhs that they would be let off if they gave evidence against the Mahant, none can repeat any definite story which the Sikhs told him to tell.

"For instance, D. W. Nos. 2, 3, 9, 15, 17, 18 and 34 say that the Sikhs beat them but said nothing to them. D. W. No. 8 was merely asked why he had come to Nankana. D. W. Nos. 4, 5, 6, 7 and 19 say that they were questioned by the Sikhs and told them nothing. D. W. Nos. 10, 11, 14, 16, 20, 28, 29 and 62 say that they were told to give evidence but not what to say. D. W. No. 22 says that the Sikhs merely threatened him and others arrested by them, D. W. Nos. 23 and 25 that they were told to say what they had seen, and that they said they had seen nothing, D. W. No. 30, that he replied that he had seen the Sikhs arrive armed and that he was beaten again for saying so. D. W. Nos. 28, 35, 36, 42, 50, 51, 53, 54, 56, 61 and 63 say that they were told to give evidence against the Mahant and that they said they knew nothing.

"Only D. W. Nos 44, 45, 48, 55 say that they were told by Uttam Singh (P. W. No. 108) to state that they had seen the Mahant and others firing guns. And all these defence witnesses declare that neither they nor anyone else in their presence yielded to threats or violence and consented to give false evidence.

"Balak Nath (P. W. No. 27) says that his statement was taken by the Sikh Committee on 21st February. Sant Singh (P. W. No. 28) says that he volunteered a statement to the Sikh Committee, which was recorded. Atma Ram (P. W. No. 31) says that he was arrested and ill-treated by the Akalis. He was one of the men released by the Police. Jai Singh (P. W. No. 64), one of the guards, says that he was detained by the Sikhs and was urged to speak the truth and say what he had seen.

"None of these men except Sant Singh has deposed personally against the Mahant, although they support the prosecution on other points. Sant Singh admits that he had a previous grudge against the Mahant, and that he was a companion and not a victim of the Akalis during the investigation."

Mr. Hasan Imam in particular drew our attention to the evidence of Mr. Bowring at page 238 of the printed record where he says: "When I arrived the Committee had

head quarters at the Serai. I heard from my officers that the Committee had been examining witnesses. The inhabitants of Nankana ran away in large numbers. It was found necessary to appoint special Police Officers to enquire into the actions of the Sikhs. I found a party of nine persons confined in a *kothri* in the Serai. I had no reason to believe that they were there voluntarily. Some of them complained." At page 239 he says: "The Committee had an armed *jatha* at Nankana. It was found necessary to send for troops again and both cavalry and infantry came about a week or ten days after my arrival. There was a great deal of excitement. Many bad characters had collected and it was necessary to enforce order and re-assure the people."

Diwan Mahesh Das (P. W. No. 141) says, see page 253 of the printed record—"Numbers of Sikhs arrived at Nankana on the 21st February. The local people were frightened. Excesses were committed which commenced on the 22nd February. There were complaints of assaults, interference with women and destruction of Hindu pictures. Formal complaints as well as Police reports of cognisable offenses used to come to me in regard to the excesses by the Sikhs."

Mr. Connor, Superintendent of Police, (P. W. No. 255) stated that when His Excellency the Governor visited Nankana on the 22nd February, there were a number of armed Sikhs inside the Gurdwara, that they had *kirpans* on their shoulders, that they were shouting Sat Sri Akal, and that they gave him the impression that their attitude was threatening. When questioned by the learned Government Advocate he said that he considered that their attitude was threatening towards the partisans of the Mahant and that the people at Nankana were panic stricken on account of the attitude of the Akalis. Mr. Hasan Imam asked us to hold that all this evidence showed high handedness on the part of the Sikhs after the occurrence of the 20th February. He did not, however, ask us to hold that any particular witnesses for the prosecution had been coached by the Sikhs. In fact he was emphatic in stating that he did not in any way attack the conduct of the Police investigation. We think it is clear that the Sikhs did behave in a high-handed manner after the occurrence and we have no doubt that their conduct alienated the sympathies of many of the inhabitants of Nankana, who otherwise might have given evidence on behalf of the prosecution, and that the Police in their investigation were hampered by their conduct. At the same time, our conclusion is that the evidence as to the attitude of the Sikhs does not in any way tend to discredit the case of the prosecution or to show that the Police acted improperly in the course of the investigation.

Before discussing the case of each of the appellants individually there are certain points raised by Counsel in their arguments which may conveniently be dealt with at this stage.

I. *Gomi's presence in Nankana on the 20th February.* The defence produce 9 witnesses, D. Ws. Nos. 34, 39, 57, 60, 112 and 135 to 138, with the object of showing that Gomi was not at Nankana on that day, but was at the conference at Lahore. It is common ground that Gomi was in Lahore with the Mahant on the 18th February and that they and others returned together to Nankana by train on the 19th and that on the afternoon of that day the Mahant, Gomi and others went to the station at Nankana in order to proceed again to Lahore for the chief day of the conference which was the 20th February. While at the station the Mahant was informed that there was a *jatha* of Sikhs at Buchiana seven miles distant, and fearing that perhaps they intended to come on to Nankana with the object of taking possession of the shrine he turned back and remained at home that night. What the above nine witnesses for the defence seek to establish is that Gomi did not along with others get out of the train at Warburton and return to Nankana but went on to Lahore. The Sessions Judge has pointed out in detail the contradictions in the evidence of these witnesses and has come to the conclusion that it is impossible to hold that Gomi was at Lahore on the 20th February. He also noted that Mr. Petman, who was the chief Counsel for the Mahant, did not appear to rely on that evidence and had not referred to it in detail nor attempted to explain the inconsistencies in the evidence which convinced the Judge that it was false. In this Court also Mr. Hasan Imam merely gave us the numbers

of the witnesses, but did not read out their evidence nor attempted to convince us that it should be accepted. We agree with the Sessions Judge that it is false evidence. Moreover, we think it highly improbable that Gomi would have been chosen by the Police as an approver if he had not actually taken part in the various occurrences which he has deposed to. Ladha had already made a statement to the Police and it would have been much too risky for the Police to fix upon a man as an approver who had no personal knowledge of the occurrence of the 20th February. Gomi has told a long and detailed story and has repeated it twice before Magistrates and again in the Sessions Court, and we do not think it possible that he could have done this without breaking down seriously under cross-examination had he not really witnessed the events deposed to by him.

We are quite satisfied, therefore, that Gomi was at Nankana on the 20th February and that he took part in the occurrences of that day. It is not denied that the other three approvers, Ladha, Takiullah and Farid, have deposed to events which they witnessed.

II. Gowardhan Das, son of Gomi, was betrothed three or four years before the occurrence to the daughter of Sundar Das who is a brother of Mahant Narain Das. The Mahant in paragraph 18 of his written statement at page 312 of the printed record states that Gomi deposes against him out of enmity as he (Mahant) was instrumental in breaking off the betrothal of his son and his (Mahant's) relations have excommunicated him because of his bad character and livelihood. Gomi himself denies that the betrothal has been broken off. The defence produced four witnesses in support of this contention, namely, D. W. No. 58 Gopal Das, D. W. No. 59 Hem Das, D W. No. 145 Lorind Chand, and D. W. No. 151 Mahant Lal Das. Mr. Hasan Imam read the evidence of Gopal Das only and asked us to accept his story, which is to the effect that some three years ago the witness was at a wedding at Khara, that Gomi got drunk at the wedding, that Mahant Narain Das was also present and was much annoyed and on account of Gomi's conduct got the betrothal between his brother's daughter and Gomi's son broken off. He also stated that the brotherhood at that time excommunicated Gomi. In answer to a question put in cross examination he stated that Dal Das and Ram Chand told Gomi to give up drinking and that Gomi replied that he would never give up drinking. Contrary to this, Hem Das, (D W. No. 59), says that Gomi admitted that he got drunk but asked for pardon, but that the *Panchayat* refused to forgive him although he promised not to drink again. This is a serious discrepancy between the statements of these two witnesses. Lorind Chand (D. W. No. 145) states that when his wife died Gomi offered him his daughter in marriage but the witness refused because he had already betrothed himself elsewhere. He does not say that he refused because Gomi had been excommunicated from his brotherhood, and it is very unlikely that, if Gomi had been excommunicated, he would have approached this witness in the way stated. Mahant Charan Das, at the bottom of page 452 of the printed record, states that he was at a wedding at Kasba a year ago and that Gomi also was there and sat and ate along with others.

The witness did not sit with him because he was a celibate, and the celibates sat in one row and the non-celibates, like Gomi, in another. This evidence also is quite opposed to the allegation that Gomi had been excommunicated from the brotherhood. We cannot, therefore, accept the evidence about the breaking off of the betrothal and the excommunication of Gomi. It is common ground that Gomi was with the Mahant at Lahore on the 18th February and accompanied him to Nankana on the 19th and that they intended to go back to Lahore together on the afternoon of that day. This fact is quite inconsistent with the story of the defence that the betrothal had been broken off, and that Gomi was on bad terms with the Mahant. Mr. Hasan Imam has urged that, if the betrothal had still subsisted, the personal equation would have come in and Gomi would not have given such strong evidence against the Mahant as he has done, whereas the existence of enmity would account for his doing so. It must, however, in this connection be remembered that Ladha's statement had already been recorded by Diwan Mahesh Das. Gomi did not know

exactly what Ladha had stated and he might well have thought that it would be risky for him to conceal any part of his story whether it went particularly against the Mahant or not. He knew that his pardon was a conditional one dependent upon his telling the whole truth so far as he knew it in relation to the incidents of the 20th February. We are, therefore, not impressed with Mr. Hasan Imam's arguments upon this point.

III. After Gomi and Ladha had been granted conditional pardons and their statements had been recorded by Diwan Mahesh Das, they were taken to Lahore and the suspected persons were paraded before them in the Central Jail in the presence of a Magistrate on the 25th March. Gomi identified various persons—see page 8 of the book of Exhibits—but Ladha expressed his inability to identify any one. On the 28th March the suspected persons were again paraded before him in the Jail in the presence of a Magistrate and he identified a number of them—see pages 12 and 13 of the book of Exhibits. Ladha's explanation for not identifying any one at the first identification parade on the 25th March will be found in his statement at the bottom of page 70 of the printed record. It runs: "I was taken twice to Lahore Jail. On the first occasion I did not identify anyone because Sikhs at Nankana station said that the Akalis would not give any evidence and, therefore, the approver would be hanged." He added that he told Ikram-ul-Haq, D. S. P., the reason why on the first occasion he had not identified any of the accused, and that he made a statement to that effect also at the Deputy Commissioner's bungalow in Lahore, which is Exhibit P. D. Q. The latter statement is a detailed one and is corroborative of the reason given by him at the trial for his failure to identify anyone in Jail, on the 25th March. His statement is borne out by the evidence of P. W. No. 19 Fazal Imam, Inspector of Police, C. I. D., who states—see page 75 of the printed record. "On the 24th March Ladha was taken to Lahore by the 3 30 P. M. train. Certain witnesses were also taken. At the station a crowd of Nankana people gathered. I heard the crowd shout that in the Tarn Taran case the *gurdwara* had killed Sikhs, but that there had been non-co-operation and no case had been brought, and that in the same way in the Nankana case the Sikhs would non-co operate and would not give evidence and that only those who confessed would be hanged." In this connection we may also refer to the evidence of Sardar Sundar Singh, President of the Gurdwara Parbandhak Committee (D. W. No. 76), who states—see page 412 of the printed record: "I first helped the Police until the resolution for non-co-operation was passed." From this it appears that at one period of the investigation the Sikhs passed a resolution of non-co operation and, therefore, there is nothing improbable in the reason given by Ladha and in evidence of Fazl Imam (P. W. No. 19). In our opinion Ladha has given a satisfactory explanation for his failure to identify any of the accused at the first identification parade.

IV. It has been further urged in arguments that Ladha is a *badmash* against whom the Mahant had given evidence and that on this account he must be regarded as hostile to him. The record of a section 110 case against Ladha has been put in evidence from which it appears that he was discharged on 30th July. Mahant Narain Das, however, was not a witness against Ladha in that case. The Mahant in his written statement—see page 312 of the printed record—says that Ladha is a Register No. X *badmash* and that he gave evidence against him in those proceedings. It, therefore, does not appear that the Mahant ever gave evidence against him in any section 110 case. S. Buta Singh (P. W. No. 105) stated—see page 216 of the printed record—"I held a meeting at Sheikhupura in December 1920. Ladha, approver, was present drunk and the Mahant was outside. A Sikh present seized him and said that he was Mahant Narain Das's *chela* and was drunk before the Granth Sahib. He was brought to me in the *deorhi*. I asked what he had come for and he said that he had come to find out what was happening. I asked where he got his liquor from, and he said that he had a bottle outside in the Mahant's carriage. He was searched and two or three cartridges were found in his possession, and I wrote a *rukka* to the *thana*. Ladha said that the cartridges belonged to the Mahant." The *rukka* is Exhibit P. D. B.

and is dated the 28th of January 1921, so that the witness apparently is mistaken in saying that the occurrence took place in December 1920. In connection with this possession of cartridges Ladha was *challaned* for an offence under the Arms Act and a charge was framed against him on the 1st February 1921. In his statement in Court he stated that he was with the Mahant who had come by motor and sent him by train and that the cartridges belong to the Mahant. He cited the latter as a defence witness and the case was fixed for 10th February, but there were no proceedings on that date and the hearing was adjourned to the 24th February. Now Ladha was in the service of the Mahant up till the time of the occurrence and had been in his service for the five or six years previous to it. It does not appear to us to be at all probable that he was on bad terms with the Mahant seeing that he cited him as a witness for his defence only a few days before the 20th February. On the other hand, Ladha has undoubtedly toned down the original statement which he made before Diwan Mahesh Das. In that—see page 49 of the book of Exhibits—he stated that when Rehana and Ranjhe, appellants, were firing from the south wall, Mahant Narain Das was saying with a loud voice from the roof of his *baithak*: "Do not feel any anxiety, keep firing shots." At the trial he made no statement of this sort though he admits that he went up to the *baithak* and saw the Mahant on the roof while the firing was going on. After a careful consideration of all the circumstances we see no good reason for supposing that Ladha has given evidence against the Mahant because he bears him a grudge or was not on good terms with him.

V. Before the Committing Magistrate certain witnesses for the prosecution did not give the evidence which they were expected to give. They are said to have resiled from the statements made by them in the course of the Police investigation. Some of these witnesses, for instance, P. W. Nos. 78, 79, 82, 95, 96 and 104, were produced by the prosecution at the trial and the Court allowed the Public Prosecutor to cross-examine them from the very start. This procedure has been objected to in arguments before us. In our opinion it was certainly the duty of the Prosecutor to have these witnesses in attendance so that they could be examined by the defence, if necessary, though he was not bound to produce witnesses who were considered by the prosecution to be false. We do not think that it was right for the Court to allow the Prosecutor to put them in and to at once begin to cross-examine them. At the same time, no argument has been based upon this point and we do not find that any prejudice has been caused to the defence by the procedure adopted.

VI. Statements made by the approvers in the Committing Magistrate's Court were put in evidence by the prosecution, and were transferred to the record of the Sessions Court under the provisions of section 288 of the Criminal Procedure Code. The course which was adopted was that, after the witnesses had been examined-in-chief by the prosecution, their statements in the Committing Magistrate's Court were tendered and were then and there read out before the cross-examination took place. Mr. Petman, who appeared for Mahant Narain Das and others at the trial, objected to the statements being read out at that stage but the Court overruled the objection. Now, the Court had absolute discretion to allow the statements to be transferred under section 288 of the Code, but we do not think it should have allowed the statements to be read out to the witnesses before the defence had had an opportunity of cross-examining them.

VII. There is ample evidence on the record to show that at the time of the occurrence there were some 20 or 30 wandering *fakirs* or Nanga Sadhus encamped outside the Janam Asthan shrine. The learned Sessions Judge, in his judgment at page 23, says that at one stage of the case it appeared to be a definite defence that what occurred was a fight between Lachhman Singh's Sikhs, and these Nanga Sadhus who resented the invasion of the shrine by the Sikhs, that the Sikhs were victorious, and that after the affray they set fire to the bodies of the dead of both sides and disappeared. The learned Sessions Judge, however, has pointed out quite correctly that no evidence is forthcoming to support such a story. It was ultimately argued at the trial and the point has again been pressed before us that the presence of a

number of Nanga Sadhus outside the shines has been proved and that the number of dead bodies estimated by the prosecution is far in excess of the number of Sikhs who were definitely proved to have come to Nankana as members of Lachhman Singh's *jatha* and to have disappeared since the 20th February. On the 23rd February an attempt was made to estimate the number of corpses inside the Gurdwara enclosure and in the potter's kiln outside where some five or six bodies had been burnt. This estimate was made by Sub Inspector Charan Singh (P.W. No. 21) with the help of three students of the Lahore Medical College, two of whom have been produced as witnesses, namely, Gian Singh (P. W. No. 112) and Harbans Singh (P.W. No. 181). These persons estimated the number of bodies in the Gurdwara to be 120 and the number outside to be six. In addition to this the dead bodies of three Sikhs and of Sant Ram Sadhu, which had not been burnt, were found lying inside the enclosure. Now, Gian Singh and Harbans Singh admit that they left Lahore without permission. Both of them are Sikhs and Gian Singh admits that he is an Akali. They are certainly not experts and the probability is that they sympathise with the Akalis and their tendency would be, if anything, to exaggerate the numbers of persons killed. Charan Singh is also a Sikh and not an expert, and we do not know to what extent he was influenced by the opinion of the two students. It is to be regretted that no examination of the dead bodies with a view to estimating their number was made by any qualified officer. It is impossible, in our opinion, to attach very much importance to the estimate of the number of dead bodies made by these three witnesses. It is quite possible, we think, that there may not have been more than 100 dead bodies even if there were as many as that.

Returning to the question of the presence of Nanga Sadhus in the shrine we quote the following passage from page 23, line 58 *et seq* of the judgment of the Sessions Judge:—

"Aggression against stray Sikhs by Nanga Sadhus outside the Gurdwara enclosure is spoken of by three prosecution witnesses, Nos. 51, 54 and 106, but they give the number of Sadhus only as 4 or 5, 2 and 6 or 7 respectively.

In cross-examination some other prosecution witnesses admit having seen Nanga Sadhus in various numbers up to 30 in or outside the Gurdwara on the night of the 19th, *e. g.*, Balak Nath (P. W. No. 27) Ladha Mal (P. W. No. 57). Thakar Das (P. W. No. 58) and some of the guards (P. W. Nos. 64 to 69, 73 and 91). Hostile prosecution witnesses such as Tirath Singh (P. W. No. 60), Piara (P. W. No. 61) and Utman (P. W. No. 79) speak of Nanga Sadhus having been inside on the following morning before the Sikhs arrived, but the only witnesses who say anything about their having come to blows are *Musammat* Saddan (P. W. No. 102), *Musammat* Lachmi (P. W. No. 95) and Kishen Singh (P. W. No. 78). The first named is nearly blind and her fantastic story that the floor was strewn with the bodies of Nanga Sadhus over which she had to step cannot be taken seriously. The other woman *Musammat* Lachmi says that she heard sounds of fighting, that she does not know who fought and that she heard the Sikhs calling out that the bodies of Nanga Sadhus were to be burnt quickly in order that none might know whether Sikhs or Nanga Sadhus had been killed." I do not believe her either. Kishen Singh also is discredited. He has gone back on his former statement to the Police, he told his tale under cross-examination by the defence, and he followed it up by what I hold to be an equally false story about an attack on the Mahant by Akalis outside the Gurdwara.

"To the contrary is the evidence of Ghani Nand (P. W. No. 247) who is practically a Nanga Sadhu himself, that although he was ordered out and refused to go, he was not molested by the Sikhs and that he remained with them in the *chaukhandi* until the massacre there. There is no evidence of any Nanga Sadhu having a fire arm and this is also very unlikely. It is said by Kishen Singh that their weapons were *fakirs'* tongs, and it is absurd to suppose that wholesale slaughter could have been caused by such things. It is possible that Nanga Sadhus joined the crowd of the Mahant's supporters, but, beyond the story of P. W. No. 103 that six or seven Nanga Sadhus joined others in chasing him and his companions outside, there is no evidence that they did and there is

nothing better than conjesture to conneet those who were seen there on the 19th with what happened inside the Gurdwara enclosure the next day. We note here that Mr. Hasan Imam expressly told us that the evidence of *Musammat* Saddan and *Musammat* Lachhmi might be disregarded.

We find, moreover, on reference to the record, that Barkat Singh (P. W. No. 48), a bailiff, and Ladha Mal (P. W. No. 57), both of whom were inside the shrine when the Sikhs arrived, say that they saw no Nanga Sadhus there at all, and in addition they make no mention of any fight occurring inside the enclosure. Piara (P. W. No. 61) says that he saw five or seven Nanga Sadhus only inside the enclosure. Utman (P. W. No. 79) who was cross examined with permiesion by the Public Prosecutor says that there were 30 or 32 Sadhus inside the Gurdwara when the Sikhs arrived and that the latter said, "Kill the Sadhus inside and shut the doors." The witness, however, went out, and does not say that any Sadhus were killed in his presence. In our opinion his statement is most improbable and we do not believe it. The killing of Sadhus in the way mentioned by him would have been entirely objectless.

To sum up, there is no evidence at all of any fight between the Sikhs and Nanga Sadhus and, if any such fight had occurred, we are sure that some of the witnesses would have deposed to it. As to the presence of Sadhus at all in the Gurdwara when the Sikhs arrived, we think there may have been a few but certainly not more than 10 or 12. It is probable that these men would have gone out with Thakar Das and others when the Sikhs arrived and before the firing began. Ghani Nand (P. W. No. 247), himself a Nanga Sadhu, states that he stayed inside the *chaukhandi*, but he does not say that any other Nanga Sadhu stayed there, and he admits that the Sikhs used no violence against him. It is, of course, possible that some Nanga Sadhus, who were in the shrine, did not leave the enclosure upon the arrival of the Sikhs and that they were killed by the Mahant's gun-men by mistake when the shooting from the walls began or afterwards in the *darshani deorhi*, but this would not affect the case so far as the appellants are concerned. Sant Ram, who is described as the brother of a Nankana *halvai*, was killed inside the enclosure and his body was found there when the Police arrived. Takiullah, approver, says that he ran out of the *baradari* when the killing in the *darshani deorhi* was going on and that he was shot by one of the Mahant's gunmen, and after he fell was struck with *chhavis* by other adherents of the Mahant. Some evidence has been produced to the effect that the Mahant ordered one Indar Das, an absconder, to cut the bullet out of Sant Ram's body so that it might not appear that he had been shot. Unfortunately there was no proper *post mortem* examination of any of the dead bodies because the Sikhs objected to the bodies being cut. We do not find it necessary to decide whether the bullet was cut out of the body of Sant Ram as alleged by the prosecution or not. It is quite possible, as pointed out by the learned Sessions Judge, for him to have been mistaken for a Sikh and to have been shot by accident and the mere fact that he was killed does not, in our opinion, lend any support to the defence theory of a fight between Sikhs and Nanga Sadhus.

We proceed now to deal more particularly with the case of Mahant Narain Das and the evidence against him. He had, prior to the 20th February, undoubtedly, as he himself admits, made preparations to resist any attack which the Sikhs might make with the intention of getting possession of the shrine. He has admitted in his written statement, that he engaged Pathans as guards, and Gomi and Ladha have both deposed to his having imported men from the Manjha and elsewhere for his protection, both on the occasion of a fair in November 1920 and shortly before the occurrence. Ranjha and Rehana, appellants, are two outsiders who were certainly imported by him. We will deal with their individual cases elsewhere in this judgment, but we may say at this place that we consider it proved that they were armed with guns during the attack on the Sikhs which was made from the south wall, and that they took part in that attack and in any such other attacks as were made upon Sikhs outside the Gurdwara enclosure. It is an admitted fact that the Mahant was licensed to possess a revolver and two guns. In his written statement part (2), pages 311 and 312 of the printed record, he says: "My instruc-

tions to the Pathans and my other adherents were only to repel all attacks made to seize possession of the shrine, and that fire-arms were to be used only as a last resort. The gun and the revolver with all the ammunition for the same were kept in one of the side rooms of the *darshani deorhi* to be immediately available on an emergency. One gun was out of order, and was kept in the *baithak* adjoining the Gurdwara enclosure." In his oral statement he said that the good gun and the pistol were kept inside the Darbar Sahib. His written statement shows that one gun at least, the revolver and ammunition for both weapons were kept in an accessible place and we are, therefore, of opinion that they cannot have been inside the Darbar Sahib on the night between the 19th and the 20th February. If they had been there, there would have been no opportunity for the Mahant's men to get possession of them on the morning of the 20th, for the Sikhs' visit was a surprise one and directly they entered the Gurdwara enclosure they closed the doors and placed guards in front of them. It is proved by abundant evidence that Rehana and Ranjha were firing guns from the south wall into the enclosure shortly after the arrival of the Sikhs, and Ladha in his evidence, at page 72 of the printed record, says that these men had the Mahant's guns. No witness deposes that they had guns of their own and we think there is no reason to disbelieve this part of Ladha's statement.

The first part of the prosecution case against the Mahant, in connection with the events of the 20th of February, is that he stood on the roof of his *baithak*, which is outside the Gurdwara enclosure, at a few yards distance from the south-west corner, and incited his adherents to attack the Sikhs. The evidence on this point is as follows:—Gomi, who says he came up on hearing the firing, states—see page 47 of the printed record—that the Mahant was standing on the north-east corner of the *baithak* and told his men not to be afraid but to kill the Sikhs; that he also called out to Shammun, who was one of the men on the south wall, to open the door as only a few men could climb the ladder and get up that way. Ladha, approver who apparently arrived after Gomi, says that he went up to the north-east corner of the Mahant's *baithak* where the Mahant was, but unfortunately he was not asked whether he had any conversation with the Mahant or whether the latter said anything to him. He probably went up to get orders from his master, the Mahant, and there can be little doubt that there was some conversation between them. He, like Gomi, states that the Mahant told Shammun to open the gate. Takiullah (P. W. No. 25), in his statement at page 84 of the printed record, states that there were some 40 of the Mahant's men assembled at the southern gate armed with sticks and axes and the Mahant told them to attack the Gurdwara and on this the men began to mount by a ladder. Farid, approver, says nothing about this incident. Harnam Singh (P. W. No. 32) who was one of the guards, says, see page 118 of the printed record—that, he saw the Mahant standing on the roof of his *baithak* facing towards the Gurdwara enclosure and waving his hands in that direction. Fateh Din (P. W. No. 115)—see page 228 of the printed record—says that he heard that the Sikhs had come, and on going to the Mahant's *baithak*, he saw that the Mahant had climbed on to the roof, that people were running towards the Gurdwara and the Mahant was shouting to them, "*kise wara de nal inhan nun kaddo*," in other words, "turn them out in some way," Shamboo Nath (P. W. No. 140), the Mahant's own servant, states that the Mahant was standing on his roof and not hiding inside as he himself says. We do not for one moment believe his story that he shut himself up in his *baithak* and stayed there till every thing was over. Bhurga Nand (D. W. No. 67) is the only witness upon this point but he is connected with the Mahant by marriage and is an interested witness. The Mahant on the afternoon of the 19th February, when he thought that there was a danger of Sikhs coming to attack the Gurdwara, did not go to join the conference at Lahore but returned to his *baithak* evidently with the intention of being on the spot to guard against the threatened aggression. Under these circumstances it is in the highest degree improbable that he would shut himself up in his *baithak* the whole time while the occurrences of the 20th February were

going on. The evidence which we have referred to above coupled with the facts that Ranjha and Rehana were armed with the Mahant's guns and were firing at the Sikhs inside the Gurdwara, and that the Mahant took no steps to prevent them, satisfies us beyond all doubt that the Mahant did incite his followers to kill the Sikhs who had gone inside the Gurdwara.

We next come to the evidence as to the shooting of Mehnga Singh. It is in evidence that after the Sikhs, who were taking refuge in the *Darshani deorhi* and the rooms adjoining it, had all been killed the Mahant's men came out, some by the *Darshani deorhi* and some by the southern door. As they emerged from the latter a party of Sikhs, variously estimated as 8 to 15 in number, came round the corner from the direction of the Mahant's *baithak*. It is said that Rehana aimed his gun at these men and that one of them struck him with a *chhavi*, wounded him on the arm and caused him to drop the gun. Some of them are then said to have run in a south-easterly direction towards the potter's kiln while others turned back and ran in the direction of the Railway pursued by Ranjha, Wasakha Singh and Amli, absconders, and others. The witnesses go on to say that the Mahant, who was at that time riding on a grey mare near the south eastern corner of the Gurdwara enclosure and was armed with a pistol, fired at the men who were running in the direction of the potter's kiln and hit one of them who fell down, and that this man was finished off by *chhavi* blows. The party of Sikhs, who came from the direction of the Mahant's *baithak* is said to have consisted of the following :—

Sadhu Singh, Bhagat Singh, son of Bhagwan Singh, Asa Singh and Gurdial Singh (P. W. Nos. 35 to 38), Mehnga Singh, Narain Singh, Karm Singh and Dasondha Singh (P. W. No. 214). Mehnga Singh is the man who is said to have been shot at by the Mahant. He as well as Narain Singh and Karm Singh are said to have been killed and their bodies burnt in the potter's kiln. P. W. Nos. 35 to 38 belong to Bundala village and the three men, who are said to have been killed, and Dasondha Singh belong to the village of Lohki. They are said to have been coming to Nankana along with Mangal Singh (P. W. No. 50), Labh Singh (P. W. No. 55) Ram Singh and Mota Singh (P. W. Nos. 39 and 40), all of Bundala. This lot of four men say that they lagged behind near the Railway in order to ease themselves. Whether these men were part of Lachhman Singh's *jatha* or separate from it is not very material, but all of this party who have been produced as witnesses say that they were coming to Nankana to arrange for the *langar* in anticipation of the Diwan of the 5th March. The evidence that the Mahant was riding on a grey mare and firing a pistol at Mehnga Singh is fully detailed in the judgment of the learned Sessions Judge, from the bottom of page 39 to page 41. In addition to the Bundala witnesses (P. W. Nos. 35 to 38) Gomi, Ladha and Takiullah, approvers, have all deposed that the Mahant did fire his pistol at the men who were running away towards the potter's kiln. Sant Singh (P. W. No. 23) is another witness to the same occurrence, but in cross-examination he gave a very confused account as to the direction in which the Sikhs at whom the Mahant was firing were running. Moreover, he admits that on one occasion the Mahant had him shoe-beaten by a sweeper, and the Government Advocate frankly admits that he does not rely upon his evidence so far as the Mahant and the latter's near relations are concerned. Narain Singh (P. W. No. 29) is another witness to this occurrence. He is the Mahant of Labana Gurdwara in Nankana and states that on the morning of the occurrence he heard the sound of guns and went up on to his roof from which he saw two men with guns on the southern well of the Gurdwara and on the roof of the *Darshami deorhi*. He came down from his roof and went into the open. He then saw the Mahant on a mare on the road leading from the south-east corner of the Gurdwara to the potter's kiln. He saw four Sikhs pass the southern gate and go down the road leading from the southern gate to the potter's kiln. When they got to a point, which he showed on the model in Court, the Mahant fired a pistol and one of the Sikhs fell down, and a man ran up and struck him with a *chhavi* and the Mahant said that the body was to be taken to the potter's kiln. This was

the first witness to tell the Police that he had seen the Mahant firing at the Sikhs and he did so on the 22nd February, which was the first day of the systematic investigation by the C. I. D. This man struck the learned Sessions Judge as a reliable and respectable witness, and the Judge says that he was favourably impressed also by Bhagat Singh, son of Bhagwan Singh, and Ata Singh and points out that these two, as well as Sadhu Singh and Mota Singh, were examined by the Police on the 25th February. It is important to remember that Gomi and Ladha, in all their three statements before Diwan Mahesh Das, under section 164, Criminal Procedure Code, in the Committing Magistrate's Court and in the Sessions Court stated that the Mahant did fire at these Sikhs. As we have shown elsewhere in this judgment, Gomi and Ladha, after their arrest, were kept apart and had no opportunity of collaborating before their statements were recorded by Diwan Mahesh Das. Their evidence in this respect is fully supported by that of the witnesses already mentioned, and we agree with the learned Sessions Judge that it is proved that Mahant Narain Das fired a pistol shot at these Sikhs, whose only object apparently was to get away from the vicinity of the Gurdwara. The learned Sessions Judge on pages 40 and 41 of his judgment has discussed the evidence of P. W. No. 53, Bhagat Singh, son of Kika Singh, of Bandala, P. W. No. 54 Bhagat Singh, son of Nihal Singh of Bandala, P. W. No. 55 Labh Singh of Bandala and P. W. No. 214 Dasondha Singh of Lohki. It was argued before him that the evidence of these witnesses proves indirectly that the story of shooting by the Mahant is false. Labh Singh and Dasondha Singh's evidence in Court certainly differs from the statements made by them and duly recorded under section 164, Criminal Prosedure Code, during the Police investigation. The differences in their statements merely show, in our opinion, that it would not be safe to place much reliance upon these witnesses. The Sessions Judge is correct in his view that the previous statements of those witnesses are not substantive evidence in the case and cannot be used to contradict the evidence of other witnesses for the prosecution. We agree with the remarks of the learned Sessions Judge in regard to these four witnesses and in regard to discrepancies in the statements of the witnesses to the shooting of Mehnga Singh. It has been argued by Mr. Hasan Imam that even if the Mahant did fire at these Sikhs he was justified in doing so because he had a reasonable apprehension that they would otherwise attack him. In support of this argument he has referred us to Ladha's statement in cross-examination at the bottom of page 73 of the printed record where he says: "After being struck Rehana ran along the southern wall in the direction of the Mahant. Rehana ran in front with the Akalis behind him." Now, Ladha is the only witness who says that these Sikhs ran along the southern wall in the direction of Mahant while all the Bandala witnesses, who were the men most concerned and others say that they were running along the road in the direction of the potter's kiln when the Mahant fired at them. We are not prepared to accept Ladha's statement in this respect.

Considering the whole of the evidence, we see no reason to suppose that these men were running in the direction of the Mahant or had any intention of attacking him. We agree with the learned Sessions Judge that there can be no inference from the evidence that they tried to attack the Mahant, and we do not think that he could have had any reasonable ground for supposing that they intended to attack him. The evidence shows that there were a number of his armed retainers near the Mahant at the time and this fact also negatives the theory that the Sikhs who were greatly outnumbered were intending to attack him. Some of these Bandala witnesses gave evidence of direct incitements by the Mahant. Sadhu Singh (P. W. No. 35) says that the Mahant called out, that more Sikhs had come, and should not be allowed to escape. Bhagat Singh (P. W. No. 36) says that there was a man on a grey mare who said: "more Sikhs have come, kill them." He did not identify the man on the grey mare, but there is no evidence that there was any one else in that vicinity who was riding a grey mare. Asa Singh (P. W. No. 37) says that the Mahant called out, "kill them too." Gurdial Singh (P. W. No. 38) says that the Mahant shouted, "kill them don't let any Sikh escape." There is ample evidence that some of the Sikhs were pursued

beyond the Railway line and several of them received slight wounds from buckshot. Ladha and Takiullah, approvers, both state that t ey were directed by the Mahant to join the pursuit in the direction of the Railway after Mehnga Singh had been shot, but no one else supports them on this point.

After the men returned from the pursuit beyond the Railway, news is said to have been brought by a Sadhu called Gurdit Singh that he could not open the doors of the *chaukhandi* and that there were probably some Sikhs hiding there. Upon this the Mahant's men went inside the enclosure and the evidence of the approvers is to the effect that all the men to the number of some 40, who were taking refuge inside the *chaukhandi*, were massacred. Gomi, in his statement at the bottom of page 48 of the printed record, says: "A Sadhu came and said that perhaps there were Sikhs inside the *chaukhandi*. By this time the party which had pursued in the direction of the Railway line had returned. The Mahant told us to go and see whether there were men in the *chaukhandi*, and if there were, to kill them. Ranjha, Wasakha Singh and others naming them) went I remained by the Mahant. I heard shots and the Mahant told me to go too." This is the only evidence that the Mahant directly incited his followers to kill any Sikhs who might be in the *chaukhandi*. Ladha, in his statement at page 69 of the printed record, merely says that, after Ranjha and others came back from the pursuit beyond the the Railway, Gurdit Singh came up and said that he could not get the doors of the *chaukhandi* opened and that there were probably men inside. Upon this all the men who were with the Mahant went inside by the Bazar gate. Ladha himself went to the *langar* to drink water. Now, in his statement in the Committing Magistrate's Court (see page 79 of the printed record) he states that when Gurdit Singh brought the news that the doors of the *chaukhandi* were closed, the Mahant said: "Go and see if there are any Sikhs inside." It would be unsafe to rely on this statement, especially as in the statement recorded by Diwan Mahesh Das he made no mention of the Mahant saying anything about the men in the *chaukhandi*. In our opinion it would not be safe to hold that the Mahant directly incited his followers to kill the Sikhs in the *chaukhandi*, but we see no reason to doubt that he was still riding his mare outside the Gurdwara enclosure when his adherents returned from pursuing the Sikhs beyond the Railway and that he heard it said that there were probably some Sikhs in the *chaukhandi* and that thereafter he saw his men going into the enclosure and heard shots being fired. We have no doubt that he must have known that if there were any Sikhs concealing themselves in the *chaukhandi* they would be killed and he did nothing to prevent the killing of any men that might be there.

The next point to be dealt with is, that of the burning of the dead bodies, both those inside and outside the Gurdwara. Gomi, at page 48 of the printed record, states that after the shooting of Mehnga Singh, the Mahant told Arjan Das, his nephew, to bring oil and burn the bodies. Arjan Das and another brought two tins of oil and some wood, and that five corpses, which were outside the enclosure, were then collected, were taken to the potter's kiln and there set fire to. He also states that after the killing of the men in the *chaukhandi* the Mahant went into the enclosure and gave orders that the bodies of Sant Ram and of three Sikhs which were lying there should be left as they were and not burnt, so that it might appear that there had been a fight. Ladha, at page 68 of the printed record, states that the Mahant sent Gurdit Singh inside the Gurdwara to fetch oil for the burning of the bodies and that before the *chaukhandi* affair the Mahant was riding about outside while the bodies were burning in the potter's kiln, and while the Pathans were burning bodies inside the Gurdwara. This witness also deposes like Gomi to the Mahant going into the enclosure after the *chaukhandi* incident and giving orders that the bodies of Sant Ram and three Sikhs should not be burnt. Gomi and Ladha both detailed this incident in their original statements before Diwan Mahesh Das and in the Committing Magistrate's Court—see pages 42 and 52 of the book of Exhibits, and pages 69 and 79 of the printed record. As already pointed out, they had no opportunity of collaboration, if we are to believe the evidence of responsible Police Officers, and we see no reason for not believing

it, before their statements were recorded by Diwan Mahesh Das. The bodies of Sant Ram and of the three Sikhs were the only ones which had not been burnt and there must have been some reason why they were left unburnt, and we see no reason to disbelieve the statements of Gomi and Ladha that it was done by the Mahant's order and for the reason stated by him. Takiullah, at the trial, made a similar statement, but we find that he said nothing about this incident in the original statement before Diwan Mahesh Das and we, therefore, are of opinion that his statement in this respect should not be relied upon. Narain Singh (P. W. No. 29), as we have already noted, stated that he heard the Mahant order the body of the man whom he had shot to be taken to the kiln, and Nihal Singh (P. W. No. 30) says that he was dragged there apparently in the presence of the Mahant. The learned Sessions Judge has also referred to the evidence of Lakhmi Das (P. W. No. 66) and says that he sees no reason to disbelieve him. He is, however, a partner in contracts with Uttam Singh (P. W. No. 103) who is an Akali Sikh and whose evidence on this account we do not think we should accept. Even, however, if we ignore the evidence of Lakhmi Das there is still ample proof that the Mahant ordered the burning of the bodies in the potter's kiln. Nur Ahmad, Head Constable (P. W. No. 18), was the first Police Officer to arrive on the spot. He arrived about noon and found the Mahant riding about outside. The bodies at that time were burning inside and the Mahant refused to open the door of the Gurdwara saying that he would not do so until some more responsible officer arrived. The Deputy Commissioner, Mr. Currie, and Narain Singh, District Engineer, arrived soon afterwards and went into the enclosure. There is no evidence to show that the Mahant gave the first order for the burning of the bodies inside the enclosure. It is in evidence that the Pathans were burning bodies inside before the *chaukhandi* incident while the Mahant was riding about outside ordering the burning of other bodies in the potter's kiln. He took no steps to stop the burning of bodies inside. He went into the enclosure subsequently while the burning was going on and ordered the bodies of Sant Ram and three Sikhs which were found by the Police on arrival, not to be burnt and gave the reason referred to by Gomi and Ladha in their evidence. He took no steps to prevent the burning of the other bodies which was still in progress when Nur Ahmed arrived at 12 noon. All the evidence shows that the Mahant specifically ordered some bodies to be burnt and acquiesced in the burning of others. He was in full control of the whole enclosure after the occurrence as is clear from the evidence of Nur Ahmed and Narain Singh, District Engineer, and all the circumstances show that he was in control during the occurrence and fully identified himself with his adherents.

There are one or two other points to be noticed before we deal with the points upon which Mr. Hasan Imam laid very special stress, namely, whether in what he did the Mahant acted in the exercise of good faith and in the right of private defence and whether, if so, he exceeded that right.

The first intimation of the occurrence which the Police received, was in the form of a telegram, Exhibit P. A. A. This purports to have been sent by Mahant Narain Das from Nankana Railway Station at 9.40 A. M. and was recivd at the *thana* at Warburton at about 10.30. It is worded as follow:—"Sikhs have been attacked. Come soon." The original form shows that the actual sender was one Ram Lal. He has not been produced by either side. The original form was put in merely at the request of the defence who wanted to see all telegrams despatched from Nankana on the 20th February. It has never been admitted by the prosecution that Mahant Narain Das sent this telegram or had it sent. It was produced by the prosecution merely to show what was the first information received by the Police. We agree with the learned Sessions Judge that the telegram helps neither side, though it is possible that the Mahant may have had it sent. A number of telegrams were sent by Uttam Singh (P. W. No. 103), the first as early as 8 20 A. M., in other words, an hour and 20 minutes before Exhibit P. A. A. was sent. If the Mahant was innocent and stayed in his *baithak* during the whole time that

the massacre was in progress, as he would have us believe, we think he would certainly have sent a telegram to the Police long before 9-40 A. M.

He produced five witnesses, D. W. Nos. 64, 65, 66, 68 and 69 to say that he passed them on horseback on the morning of the 20th February on his way to look for the Deputy Commissioner, who was encamped at Mangtanwala. The learned Sessions Judge has referred to their evidence on pages 42 and 43 of his judgment and we agree with him that it is not at all convincing. We think it extremely improbable that he would have ridden off alone to a place several miles off because he would certainly have been afraid of being attacked on the way by some of the Sikhs. As already remarked by us, the Mahant possessed and was licensed to carry two double barrelled guns and a revolver. In his written statement he said that one gun and the revolver were placed where they could be easily accessible, and the other gun was out of order. A gun was taken from him when he was arrested after 4 P. M. on the 20th February. This was taken to Walter Locke and Co., Lahore, on the 7th April by Mr. Bowring, Superintendent of Police, and was examined by the Manager of the Gun Department, Mr. Webb (P. W. No. 169). He found that the breech action was jammed with sand and dirt, that it had not been cleaned since last fired and that otherwise it was all right. We agree with the Sessions Judge that the possibility of Ranjha or Rehana having used this gun is not excluded by the fact that the breech was jammed when the Mahant was arrested several hours after the occurrence. There is evidence to which we have already referred that Rehana pointed his gun at the Bandala and Lohki party of Sikhs and that one of them hit him with a *chhavi* knocking the gun out of his hand. Rehana is said to have run away and there is no evidence that the gun was immediately picked up. If it lay on the ground for any time the breech may easily have become jammed with dirt and sand. When Nur Ahmed, Head Constable (P. W. No. 18), arrived at 12 noon the Mahant had no thing in his hand and it is not clear what object he had in carrying a useless gun afterwards, because he certainly had it in his hand when he was arrested. He may have done it with the object of showing that the only gun in his possession was not in working order.

Though it is not proved that the Mahant ordered the first attack from the southern wall, we consider it to be clearly proved that soon after it commenced and whilst Rehana, Ranjha and two others, said to be absconding, were firing at the Sikhs inside the enclosure, he was standing on the roof of his *baithak* and was inciting his followers to kill the Sikhs, that subsequently he was riding about on a mare outside the Gurdwara and was instigating his followers to kill Sikhs who had never entered it, and that he himself participated in the attack on those Sikhs from which murder resulted. We also hold it proved that in his presence his followers entered the enclosure in order to kill any Sikhs who might be hiding in the *chaukhandi*, that he took no steps to prevent them, and that he ordered some of the dead bodies to be burnt and acquiesced in the burning of others.

We proceed now to examine the plea that the Mahant acted in good faith in the exercise of his right of private defence. We have in an earlier part of this judgment described how the Mahant in vain approached the authorities with the object of getting Police protection for the shrine, and how, as he himself admits, upon failure of his representations he engaged guards and took steps to protect himself and the shrine against possible aggression by the Sikhs. We hold that he was entitled to take such steps and we do not think any inference that he intended to repel attacks by any means, lawful or unlawful, arises from the fact that he engaged for the protection of the shrine persons like Ranjha, Rehana, and the Pathans.

Mr. Hasan Imam urged that the Mahant's adherents who gathered outside the south gate did not constitute an unlawful assembly, that they had no common object except perhaps to turn out the Sikhs and that every man acted on his own initiative. The common object must, in our opinion, be judged from a consideration of all the facts. It is possible that the men did not assemble with the common object of killing the invad-

ing Sikhs but the scaling of the wall, the throwing of bricks and firing of guns from the wall, the opening of the south door so as to let more of the Mahant's men in and the systematic killing of the Sikhs in and outside the enclosure satisfy us that the above common object was very soon formed. The question is whether this killing was justified.

The burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code rests upon the accused, and section 105 of the Indian Evidence Act says the Court shall presume the absence of such circumstances.

It is contended that the Mahant and his followers were justified in causing the death of the invading Sikhs in accordance with the provisions of section 103 of the Indian Penal Code, *fourthly*. In other words, it is urged that the invading Sikhs by forcibly entering and taking possession of the shrine committed house trespass, and did so under such circumstances as might reasonably cause apprehension that death or grievous hurt would be the consequence, if such right of private defense were not exercised.

Now, we have no difficulty in holding that the Mahant was up to the morning of the 20th February 1921 in possession of the Janam Asthan shrine and that the members of Lachhman Singh's *jatha* took forcable possession with the intention of ousting the Mahant from his office. Under sections 97 and 104, Indian Penal Code, the Mahant had the right to defend his possession and in doing so to cause, if necessary, any harm to the invaders other than death. But we quite fail to see how the acts of the Sikhs who, though they turned out Thakur Das and others, did not attempt to cause death or grievous hurt to any one, could have caused reasonable apprehension in the minds of the Mahant and his followers that death or grievous hurt would be caused to any of them unless the Sikhs were exterminated.

We see no reason to the suppose that the Sikhs intended to use any violence to any one once they had entered the enclosure and shut the doors. It is quite probable that had the Mahant's followers gone in and tried to turn out the invaders by force there would have been a fight and people on both sides would have been killed, but this probability did not justify the wholesale killing of the invaders in the way deposed to in order to regain possession and complete control of the shrine.

With regard to the killing of Sikhs outside the Gurdwara Mr. Hasan Imam's argument was as follows: The Mahant saw the Bundala men and various other small parties of Sikhs arriving, and this led him to think that reinforcements were coming to the help of Lachhman Singh's party. He, therefore, thought it necessary to kill all who appeared so as to lessen the number of his enemies. Now, section 100, Indian Penal Code, gives the right of private defence of the body only against actual assailants, it does not authorize the killing or causing of hurt to persons who may in the future when reinforced by others become assailants. The right arises only on the occurrence of an offence, or of an attempt to commit an offence, and, in the words of section 107, "as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed."

No right of private defense of the body arose in favour of the Mahant under section 100, Indian Penal Code, because no offence against him was committed, attempted or threatened and any right of defending his possession of the Janam Asthan shrine was greatly exceeded and we find it impossible to hold that he exceeded it in good faith.

Mr. Hasan Imam has very eloquently set forth the difficult position which the Mahant was in before the 20th February by reason of his failure to secure protection from Government, and we have already stated that in our opinion he was fully justified in taking steps for his own protection both by engaging Pathans as guards and by importing men who were reputed to be good fighters, such as Ranjha and Rehana.

We fully realize that he must have been in constant expectation of an attack and in a highly nervous state. He did not, as already pointed out, anticipate an immediate attack when he retired to rest on the night of the 19th February and must have been greatly dismayed on the morning of the 20th when he heard that the Sikhs had actually arrived and entered the Gurdwara. He probably heard that there was

a large body and that many of them were armed, and either at once ordered his gunmen and other adherents to attack them, or if the attack had begun before he issued any orders he subsequently encouraged and incited his men to kill all the Sikhs. He was suffering doubtless under a deep sense of wrong and helplessness, and it is not surprising that he lost his head and acted as he did. Taking all the circumstances into consideration and in view of the facts that we do not hold it proved that he ordered the final massacre in the *chaukhandi* and that the evidence shows that he did not enter the enclosure till all the killing was over, we are of opinion that he should not suffer the extreme penalty of the law. We accordingly so far accept the appeal of Mahant Narain Das as to reduce the sentence to one of transportation for life. His conviction is maintained.

Before dealing with the individual cases of the other appellants, it will be convenient to refer to the arguments advanced by the learned Counsel in connection with the evidence of the approvers.

Mr. Herbert for the Crown contended that it was not illegal to base a conviction on the uncorroborated statement of an accomplice witness, and further that so long as the evidence of an accomplice was corroborated generally it was not necessary that each incident referred to by such witness should be corroborated by unimpeachable evidence. He relied on *Balmokand* v. *Emperor* (1), *Mamun* v. *Queen Empress* (2) and *Emperor* v. *Nilakanta* (3). On the other hand, Mr. Hasan Iman and his colleagues contended that, while it was not illegal to base a conviction on the uncorroborated testimony of an accomplice witness, as specifically provided for by section 133 of the Indian Evidence Act, experience had shown that it was, as a general rule unsafe to do so and that it had become an almost universal rule of practice, adopted by all Courts, to require material corroboration of tainted testimony and to raise the presumption referred to in section 114 of the Evidence Act. After a careful consideration of the subject, and an examination of the authorities cited, we are in agreement with what was laid down in *Barkat Ali* v. *Emperor* (4) and consider that section 133 of the Evidence Act contains the rule of law regarding the testimony of accomplices, and section 114, illustration (*b*) is merely a guide to assist the Court, though as stated by Johnstone, O. J., in *Balmokand* v. *Emperor* (1), in a vast majority of cases prudence requires that there shall be corroboration. No hard and fast rules can, however, be laid down to regulate the extent and nature of such corroboration, this being dependent entirely on the circumstances of each case.

In the present case, the learned Sessions Judge has held that the testimony of Gomi can be regarded as supporting or corroborating that of Ladha Ram, and that their testimony can similarly be supported or corroborated by that of Takiullah and Farid for the reason that Gomi and Ladha Ram were carefully kept apart by the Police from the moment of their arrest, and that, therefore, they had had no opportunity of discussing the evidence they should give or collaboration in any way. Similarly, Farid and Takiullah had been in the Central Jail and thus unable to see or consult with Gomi or Ladha Ram, at any rate, up to such time as they had made their statements before a Magistrate.

Section 114 of the Evidence Act, illustration (*b*), lays down that the Court *may presume* that an accomplice is unworthy of credit unless he is corroborated in material particulars. At the same time, it is also laid down that the Court *shall have regard* in considering whether this maxim does or does not apply to the particular case before it, to such a fact as the following: "A crime is committed by several persons, *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other and each gives an account of the crime implicating *D*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

(1) 26 Ind. Cas. 738: 17 P. R. 1915 Cr.; 11 P. W. R. 1915 Cr.; 16 Cr. L. J. 354; 246 P. L. R. 1915.

(2) 14 P. R. 1894.

(3) 14 Ind. Cas. 819; 35 M. 247; (1912) M. W. N. 207; 13 Cr. L. J. 305; 22 M. L. J. 490; 11 M. L. T. 1 Supp.

(4) 36 Ind. Cas. 861; 2 P. R. 1917 Cr.; 18 Cr. L. J. 29.

Now, in the present case Farid and Takiullah were arrested on the evening of the 20th of February and removed, along with others arrested on the same date, to the Central Jail at Lahore where they remained until such time as they were granted a pardon under section 337, Criminal Procedure Code. During this period these two persons had no opportunity whatever of seeing Ladha Ram and Gomi so that the chance of any previous concert can be excluded.

Again, Ladha Ram and Gomi are said to have been kept apart, as it was considered that they would ultimately agree to appear as witnesses for the Crown. This fact is deposed to by (P. W. No. 17) Hakim Ikram-ul-Haq, Deputy Superintendent of Police, and (P. W. No. 20) S. Gopal Singh, Inspector of Police. There is no direct or concrete evidence to contradict the definite and clear assertions made by these two witnesses, who also swear that Gomi was told nothing of what Ladha Ram had said beyond the fact that he had mentioned Gomi's name. As pointed out by the learned Sessions Judge, this evidence can only be disbelieved by assuming that these officers are thoroughly dishonest and untruthful merely because they are Policemen. We agree in thinking that to discredit these witnesses for that reason alone is impossible. They are both Police Officers holding responsible positions and there is no reason whatever to doubt their veracity. Mr. Bhagat Ram Puri suggested that as both Ladha Ram and Gomi had been taken to Lahore from Nankana on the 5th March 1921 they must have travelled in the same train and that, therefore, it was possible for them to have discussed the situation. Both these witnesses give a detailed account of the occurrences of the 20th February 1921 and we consider it highly improbable, if not impossible, that there could have been any previous concert between them. We accept the statements of Hakim Ikram ul-Haq and S. Gopal Singh that, as a matter of fact these two persons were kept strictly apart, and consider, therefore, that the deposition of one can support the deposition of the other.

Takiullah and Farid, however, are not on the same plane. Admittedly, they were arrested together and were together in the Central Jail. They, therefore, might have had opportunities to consult one another as to what they were to say. The presumption laid down by section 114 of the Evidence Act, therefore, arises in their case. They were first examined by (P. W. No. 22) Amir Muhammad Khan, Sub-Inspector and (D. W. No. 70) Khan Bahadur Abdul Hakim, Deputy Superintendent of Police. These witnesses depose that they were deputed on the 12th of March 1921 to question the Pathans who had been arrested in connection with the affair at Nankana. They both swear that they were not informed of the details of the occurrence and had not been told what Gomi and Ladha Ram had said. We see no reason to doubt the veracity of these two witnesses, but as the statements of Takiullah and Farid were not recorded till the 22nd and 23rd of March 1921 and the depositions of Ladha Ram and Gomi had been recorded on the 10th, 11th and 15th March 1921, we cannot attach the same value to any corroboration or support that the statements of Takiullah and Farid may afford to the evidence of Ladha Ram and Gomi.

There is another matter that needs reference. At the trial one of the persons arraigned before the learned Sessions Judge was Hari Nath who, at the opening of the trial, pleaded guilty. He was not convicted on this plea but kept in the dock as one of the persons under trial. On the conclusion of the case for the prosecution when Hari Nath was examined he made a statement admitting his participation in all the events which formed the subject matter of the trial. He implicated himself to the hilt and his incriminating or confessional statement appears to have been utilised by the learned Sessions Judge as supporting the depositions of the four approvers. No doubt, the confession made by a person can be taken into consideration as against persons who are being tried along with him; such a statement, however, is always regarded as tainted, and in the present case we consider that it cannot be used to corroborate the testimony of the accomplice witnesses. It is to be borne in mind that Hari Nath made his statement at the end of the prosecution case when the whole of the evidence had been freshly detailed in his presence. It can be rightly used as evidence against Hari Nath himself whose appeal will now be considered.

Hari Nath has been convicted of the

offences of rioting and murder under sections 148, 302 and 149, Indian Penal Code and has been sentenced to death. He preferred an appeal through the Jail, in which he alleged that, while inside the Gurdwara, a *jatha* of Akali Sikhs attacked the shrine in order to take possession of it, that he was set upon by two or four Sikhs and fought with them in self defence, and had, therefore, killed no one intentionally. Subsequent to this he submitted another memorandum of appeal, also through the Jail, in which he alleged that the confessional statement made by him had been made at the instance of the C. I. D. Police Officials who had promised him immunity, that they had not carried out their promise and that his confession was wrong. We may say at once that there is no indication whatever that the confession made by this appellant was in any way induced by the Police or any other person in authority, and that we consider that it was voluntarily made. Apart from this confession, however, there is the evidence of (P. W. No. 23) Gomi, (P. W. No. 24) Ladha Ram, (P. W. No. 25) Tak'ullah, (P.W. No. 26) Farid, (P. W. No. 28) Sant Singh (P. W. No. 35) Sadhu Singh, (P. W. No. 36) Bhagat Singh, (P. W. No. 5) Bhagat Singh(P.W.No. 39)Ram Singh,(P.W.No. 31) Atma Ram, (P. W. No. 43) Sunder Das and (P. W. No. 55) Labh Singh. The last named witness, Labh Singh, states that he was personally attacked and struck by Hari Nath. The evidence of this witness is not convincing and at the identification parade held in the Jail he identified no one saying that he was feeling too ill to do so. According to (P. W. No. 23) Gomi, Hari Nath was in the crowd outside the southern door armed with a long *takwa* or *chhavi*, and also threw bricks from the *deorhi* roof. (P. W. No. 24) Ladha Ram mentioned this appellant as having been in the crowd at the southern gate and also in the *Darshani deorhi* where "he killed men". (P. W. No. 25) Takiullah identified Hari Nath as one of those concerned in the killing of men at the *Darshani deorhi*, and also attributes to him the death of two Sikhs on the southern wall. (P. W. No. 26), Farid says that this appellant was armed with a *chhavi* and was seen by him assisting in dragging dead bodies at the *chaukhandi*. (P. W. No. 28) Sant Singh states that he saw Hari Nath in the vicinity when the Mahant shot Mehnga Singh. There is no reason to doubt the statement of this witness so far as this appellant is concerned. (P. W. No. 35) Sadhu Singh, (P. W. No. 36) Bhagat Singh, son of Bhagwan Singh, and (P. W. No. 53) Bhagat Singh, son of Kikar Singh, are Bundala witnesses who give similar evidence to that given by Sant Singh as having seen this appellant armed with a *chhavi* outside. (P. W. No. 39) Ram Singh identified Hari Nath as one of those who pursued the Bundala men towards the Railway line. (P. W. No. 31) Atma Ram also identified this appellant as one of those returning from the pursuit of Sikhs in the direction of the Railway line. The evidence of this witness is, however, not convincing. (P. W. No. 43), Sunder Das, deposes to having seen Hari Nath killing persons with a *chhavi* in the *Darshani deorhi*. There is no reason whatever to think that Hari Nath has been falsely implicated by any of the witnesses. He is closely connected with the shrine and his presence there on the 20th February, 1921, is not unnatural. The evidence of the approvers is amply corroborated by the statements of the witnesses detailed above whose testimony *qua* this appellant there is no reason whatever to doubt. Further corroboration is to be found in Hari Nath's own confession in which he fully admits his guilt. We have no hesitation whatever in holding that he has been rightly convicted and we accordingly dismiss his appeal and confirm the sentence of death.

The next case argued was that of Surain Singh who has been convicted of offences of rioting and murder under sections 148, 302 and 149, Indian Penal Code, and sentenced to death. He was arrested in Kasur on the 25th February 1921. His village is at a considerable distance from Nankana.

His conviction is based on the evidence of (P. W. No. 23) Gomi, (P. W. No. 24) Ladha Ram and (P. W. No. 26) Farid, the learned Sessions Judge holding that the evidence of these approvers is corroborated in respect of this appellant by the fact that he fabricated evidence of an *alibi*. Mr. Herbert contended that corroboration was also to be

found in the statement of P. W. No. 213 Jharda Singh.

While it is true that at the trial P. W. No. 26 Farid picked out Surain Singh as one of those men who were armed with *chhavis* and "were dragging bodies and striking the wounded" (page 97 lines 4 to 7) he did not identify him either in the Jail or in the Committing Magistrate's Court. In these circumstances, his evidence cannot be regarded as of any value against this appellant.

P. W. No. 23 Gomi and P. W. No. 24 Ladha Ram were kept apart from each other, at any rate, up to such time as their statements had been recorded by Diwan Mahesh Das. In the present case, however, this fact cannot afford any assistance, for, in his statement to Diwan Mahesh Das, Ladha Ram did not name or give any description of Surain Singh. His subsequent statements in Court, therefore, cannot add any weight to the statement of Gomi. This witness states that he went to Nankana on the 19th February and found Surain Singh there among those who had come to assist the Mahant (page 46). On the morning of the 20th February 1921 Gomi says he saw the appellant armed with a *chhavi* standing among some forty men collected at the southern gate (page 47) and that he went inside on to the southern wall (page 48) and after that on to the roof of the *Darshani deorhi* from where he joined in throwing bricks (page 48) Later, Gomi includes him as being in the number of those who went into the Gurdwara for the *chaukhandi* incident (page 49) and also states that Surain Singh actually went into the *chaukhandi* itself. This witness made a similar statement to the Committing Magistrate (pages 57-58) and to Diwan Mahesh Das on the 15th March 1921.

Ladha Ram's evidence involves Surain Singh as having been in the assembly at the southern gate (page 67) and as having taken part in the *deorhi* incident (pages 68-70). He refers to him in connection with the same incidents in his statement to the Committing Magistrate (page 78). He, however, did not know him before, nor did he see him at Nankana on the 19th February 1921.

As has been said above, Ladha Ram's statement in the present case cannot be regarded as strengthening the evidence of Gomi and we consider that there must be some independent corroboration of the evidence given by these two witnesses. The learned Sessions Judge finds this in what he holds to be the fabrication of a false *alibi* In the first place, the fabrication of a false defence cannot be regarded as clearly established on the record, and secondly, we consider that it would be unsafe to hold such a circumstance as sufficient. The learned Government Advocate urged that ample corroboration is to be found in the statement of P W No. 213 Jhanda Singh (page 276) which is to the effect that he saw Surain Singh with Ranjha, Rehana and others at 3 P. M. or 4 P M. on the 20th February, 1921, at the well of Sahib Das. Sahib Das has been produced by the defence as D. W. No. 27 (page 378) and flatly denies the incident. We note that, although the learned Sessions Judge does not refer to the evidence of Sahib Das, he does not appear to have placed any reliance on the statement of P. W. No. 213, Janda Singh, and, in all the circumstances, we consider that it would be wholly unsafe to accept Jhanda Singh's statement as affording the necessary corroboration. We must, therefore, accept this appeal and acquit Surain Singh.

The next case taken up was that of Ranjha son of Ghulam, a *machhi*. He has been convicted under sections 148, 302 and 149, Indian Penal Code, and sentenced to death. He was arrested in the Lyallpur District on the 19th March 1921. According to the prosecution he took a very prominent part in all that occurred on the 20th February 1921. P. W. No. 23 Gomi says that when he reached the Gurdwara he saw some 10 or 11 men on the top of the southern wall, four of whom were firing guns in the Gurdwara, Ranjha being one of these four (page 47). Later on he says he saw him on the north of the roof over the staircase from where guns were fired and bricks thrown, and that, at the suggestion of Ranjha, the assailants went down below into the *deorhi* and killed Sikhs who had taken shelter there. Again, at Ranjha's instance the *kothris* in the southern wall were searched for hidden Sikhs. After the Sikhs had been disposed of there they all went out and Ranjha is stated by the witness to have joined in the pursuit of the Sikhs in the direction of the Railway line, Ranjha being armed with a gun (page 48-51). After this Gomi says

that Ranjha was among those who went into the *chaukhandi* and took an active and prominent part in shooting the Sikhs hidden therein (page 49). Gomi made a similar statement to the Committing Magistrate, and in his statement to Diwan Mahesh Das on the 15th March 1921, he implicated Ranjha in the same manner.

P. W. No. 24 Ladha Ram gives similar evidence He refers to Ranjha as having been engaged by the Mahant as "body guard" some seven or eight months prior to this occurrence (page 66). On his arrival at the Gurdwara on the morning of the 20th of February he says that Ranjha was one of those on the southern wall firing a gun into the Gurdwara. Ladha Ram says he himself went on to the roof soon after this and found Ranjha there firing a gun (page 67). He includes him in the number of those who went into the *Darshani deorhi* and killed Sikhs (pages 68-69). He also says that the gun used by Ranjha belonged to the Mahant (page 72) and further states that Ranjha had told him that he had killed two Sikhs in the direction of the Railway line. In his statement to the Committing Magistrate and Diwan Mahesh Das, Ladha Ram mentions Ranjha as having been concerned in the same incidents. The appellant was obviously well-known to Ladha Ram and was identified by him, as well as by Gomi, in the presence of Mr Bowring on the 20th March, 1921, (*vide* Exhibit, P. B). Having regard to the fact that Gomi and Ladha Ram had had no opportunity of consulting each other prior to the time when they made their statements to Diwan Mahesh Das, their statements may be taken to mutually support each other. P. W. No. 24 Takiullah and P. W. No. 25 Farid also depose to having seen Ranjha on the scene. The former says that he saw him firing a gun from the wall in the *Darshani deorhi* and at the *chaukhandi*. The latter deposes to having seen the appellant firing a gun at the *chaukhandi*. The evidence of these two witnesses must, however, be eliminated from consideration, as Takiullah failed to identify him before Mr. Bowring, and Farid only pointed him out as a man whom he suspected. There is, however, other evidence which corroborates the statements of Ladha Ram and Gomi. P. W. No. 32 Harnam Singh states that he saw Ranjha on the wall by the southern gate firing a gun (page 118). This witness is a resident of Nankana and obviously knew Ranjha. There is no reason to doubt his veracity. P. W. No. 35 Sadhu Singh (page 124), P W No. 37 Asa Singh (page 129) and P. W. No. 38 Gurdial Singh (page 130), Bundala witnesses, agree in saying that Ranjah was armed with a gun and standing on the *thara* near the southern gate about the time when Mehnga Singh was killed. P. W No. 59 Amar Singh deposes to having seen Ranjha on the southern wall armed with a gun (page 172) and says he had seen Ranjha for two or three months prior to the occurrence and that he lived with the Mahant (page 173). This witness resiled from the statement made by him to the Committing Court and asserted that that statement was false. He is a *Patwari* and a resident of Nankana and had every chance of knowing Ranjha if Ranjha had been in the employ of the Mahant as stated by Landa Ram. He certainly cannot be regarded as a witness unduly favouring the prosecution and we think the learned Sessions Judge has rightly regarded his statement that Ranjha had been living with the Mahant for two or three months as strong corroboration of Ladha Ram's statement to that effect. P. W. No. 61 Piara, another resident of Nankana, deposes to having seen Ranjha on the southern wall with a gun in his hand (page 180). Then there is P. W, No. 75 Kapur Singh, a resident of Kot Sadha Ram, who states that he was one of the guards on duty at Nankana on the night preceding the occurrence. He states that as he was returning home after he had finished his watch duty on the early morning of the 20th February he met Ranjha in the Bazar near the Mahant's dwelling house. Finally, there is the statement of P. W. No. 213, Jhanda Singh, to the effect that he saw Ranjha and others at the well of Sahib Das on the afternoon of the 20th February. The evidence of these last two witnesses is not of any great importance and we do not attach weight to that of Jhanda Singh. The other witnesses, however, have corroborated the testimony of Ladha Ram and Gomi, and we consider that the evidence against this appellant

establishes his guilt. His defense is that he has been dragged into this case at the instance of one Kada who had enmity against him owing to the fact he, Ranjha, had abducted the sister of one Malli *machhi*, a connection of Kada. While it is true that this Kada was instrumental in getting Ranjha arrested (*vide* the statement of Mr. Bowring P. W. No. 128, page 240), we are unable to see any reason for thinking that a false case has been brought against this appellant. He took a prominent part in killing the Sikhs on the wall, in the *Darshani deohri* and in the *chaukhandi*. We accordingly dismiss his appeal and confirm the sentence of death.

The next case argued was that of Rehana who has been sentenced to death under sections 148, 302 and 149, Indian Penal Code. His name appears in the *ruqa* P.A.J. written by Inspector Fazl Imam who has deposed to the fact that the names entered in this *ruqa* were given to him by Ladha Ram. The *ruqa* is dated 24th February 1921 and Rehana is named as one of several persons who had been *brought by Arjan Das from Thamman*. P. W. No. 23 Gomi states that a month or so prior to the fair at Nankana he had gone to a wedding at village Kalu Khara and from there had gone on to Mauza Thamman which is close to Kalu Khara. At Thamman he met Arjan Das, son of Khushal Das, and was told by him that his father Khushal Das had gone to collect men on behalf of Narain Das. Arjan Das asked Gomi to go with the party. Soon after Khushal Das arrived with 15 or 16 men among whom was Rehana of Thamman. They formed a party of about thirty men and together went to Lahore and on to Nankana. They all, with others, stopped there for a day or so and then were dismissed by the Mahant who told them to return in time for the fair. Rehana was given money at that time. Gomi went to Nankana again at the fair and found Arjan Das, son of Khushal Das, *with a number of men including Rehana*. No disturbance took place at this time and the men were dismissed being told that they would be sent for when required. Gomi went to Lahore on the 18th February 1921 in connection with the congress called by the Bedis. He went to the house of the Mahant in Ram Gali and there found, among others, Rehana. On the following day the party returned to Nankana as already stated (pages 45-46). On the morning of the 20th February 1921 on hearing the sound of firing Gomi went to the Darbar Sahab and says that he saw four men on the southern wall firing guns, Rehana being one of the four men (pages 47 48). In his statements to the Committing Magistrate and Diwan Mahesh Das he refers to Rehana in connection with the same incidents on the 20th February 1921. P. W. No. 24 Ladha Ram deposes to having seen Rehana on the 19th February on his arrival from Lahore, and to having seen him firing a gun on the southern wall on the morning of the 20th of February (page 67). He includes Rehana in those who were concerned with the killing in the *Darshani deohri* (page 68). Later on he refers to him as having been struck by a Sikh outside the southern gate just about the time when Mehnga Singh was killed (pages 69-73). He made similar statements to the Committing Magistrate and Diwan Mahesh Das. It may also be noted that on a previous occasion Rehana had been brought by Arjan Das to assist in repulsing any attack that the Sikhs might make on the Gurdwara. The evidence of these two witnesses has been consistent throughout so far as Rehana is concerned, and, as in the case of Ranjha, we consider that the testimony of these two approvers gives mutual support to one another. P. W. Takiullah states that Rehana was firing a gun while on the roof and that a man was killed outside the Gurdwara but that he did not fire during the *chaukhandi* incident (pages 87-89). P. W. No. 26 Farid deposes to having met Rehana outside the *Darshani deohri* coming from the north and going towards the Bazar having a wounded hand (page 97). At an identification parade held on the 2nd April 1921 both Takiullah and Farid identified this appellant (*vide* Exhibit P. H. I.). P. W. No. 35 Sadhu Singh identified as being outside armed with a gun (page 124). P. W. No. 37 Asa Singh deposes to having seen Rehana at the southern gate armed with a gun (page 129). P. W. No. 38 Gurdial Singh says the same (page 130). P. W. No. 36 Bhagat Singh son of Bhagwan Singh deposes to having seen a man armed with a gun at the southern gate who aimed at Kaim Singh (one of the

killed) but was struck by Karm Singh with a *tabua* before he could fire, (page 126), and that the man with a gun was Rebana (page 127). At an identification parade held on the 4th April 1921 Bhagat Singh picked out Rebana but was not quite certain of him (Exhibit P. D.). P. W. No. 44 Ichhar Singh alleges that he was pursued by a number of men of whom Rebana was one, being armed with a gun (pages 149 150). This witness identified Rebana at an identification parade held on the 2nd April 1921, (Exhibit P. H. I.). P. W. No. 47 Jhanda Singh (pages 152-153) corroborates Ichhar Singh. P. W. No. 54 Bhagat Singh and P. W. No. 213 Jharda Singh also refer to this appellant, but their evidence is not of any great weight. The learned Sessions Judge has utilised the confessional statement of Hari Nath against this appellant, but, as stated above, we do not think that this can properly be done. Rebana declined to make any statement before the Committing Magistrate but the trial admitted that he was wounded by a *chhavi* near the eastern gate (page 365). He does not admit that his arm was broken and in all probability it was not. In a written statement filed by him he admits his presence at Nankana and states that on the morning of the 20th a great noise was heard and it was stated that a fight had taken place in the Gurdwara. All the people went in that direction and he went with them. As he reached there an Akali Sikh struck him a blow with a *chhavi* on his arm after which he ran away. After a careful consideration of the case, we are satisfied that the approvers' statements have been materially corroborated against Rebana, and that he has been rightly convicted. We accordingly dismiss his appeal and confirm the sentence of death.

The next case is that of Piara Singh, son of Hari Singh, who has been sentenced to transportation for life, having been convicted of offences under sections 148, 302 and 149, Indian Penal Code. His conviction is based by the learned Sessions Judge on the evidence of P. W. No. 23 Gomi, P. W. No. 25 Takiullah, P. W. No. 26 Farid, taken together with the confessional statement of Hari Nath. As pointed out above, Hari Nath's statement was made after he had heard the whole of the evidence for the prosecution, and we cannot regard it as safe to use his confession for the purpose of corroborating or strengthening the testimony of the approvers. The evidence of P. W. No. 23, Gomi, that this appellant was in the crowd at the southern gate with a stick in his hand (pages 47, 50, 58) but that he was some ten yards behind the others and did nothing (page 55). P. W. No. 25, Takiullah, states that Piara Singh was going about with a *chhavi* (page 85), and that he took part in the occurrence (page 93). He assigns no definite part to the appellant, probably because he was not properly examined on the point. P. W. No. 26, Farid, is more specific and includes this appellant in those men who were armed with *chhavis* and dragged bodies and struck the wounded (page 97). He also attributes the killing of the two Sikhs on the south wall to Piara Singh (pages 99, 100).

Farid and Takiullah cannot, however, be regarded as independent witnesses and their evidence does not corroborate the testimony of Gomi. Ladha Ram P. W. No. 24, not only does not mention this appellant, but definitely states that he did not see him at all (page 75). There is thus no corroboration of the approvers' evidence, for the only other witness who speaks of this appellant is P. W. No. 28, Sant Singh, who says that he was the last of the crowd of men following the Mahant, but that he had nothing in his hand. Sant Singh is on bad terms with Lal Das, brother of the appellant, and his evidence, therefore, cannot be regarded as very satisfactory. In these circumstances we accept this appeal and acquit Piara Singh son of Hari Singh.

The next case discussed was that of Lal Das son of Hari Singh, who is the brother of Piara Singh. He has been found guilty of an offence under section 201, Indian Penal Code, and sentenced to seven years' rigorous imprisonment. The learned Sessions Judge apparently bases the conviction of this appellant on the evidence of P. W. No. 25, Takiullah, and P. W. No. 26 Farid, taken along with the confessional statement of Hari Nath. As has already been stated, Hari Nath's confession cannot safely be used as corroboration of the evidence of the approvers.

According to P. W. No. 25 Takiullah, Lal Das was the manager or agent of the Mahant, and took part in the

engagement of the Pathans on the 4th February 1921 (page 83). On the day of the occurrence under orders of the Mahant he and others, went towards the Railway line to dispose of any enemies that might be in that direction (pages 85, 89). Later, at the time of the *chaukhandi* incident, Lal Das is said to have told the Pathans and the other Mahant's supporters that the Mahant had said "we could do what we liked with these men" (page 86), and directed the proceedings inside, though he was armed only with a small *bit* and attacked no one (page 87). In his statement to the Committing Magistrate Takiullah refers to a Lal Das who joined in the pursuit towards the Railway line (page 85), but that he meant this to refer to the appellant is not quite clear, as, at the end of his statement, he includes the appellant in the list of those who took part in the occurrence in addition to those already named by him.

It should be noted that more than one Lal Das, "*Munshi* of the Mahant" has figured in the case (see the evidence of P. W. No. 28 Sant Singh, page 107). In his statement to the Magistrate on the 22nd March 1921 Takiullah referred to Lal Das as the *Munshi* who had taken down the names of the Pathans at the time of their engagement and his having taken part in the pursuit towards the Railway line, but not as directing the proceedings in the *chaukhandi*.

P.W. No. 23 Farid states that Lal Das had a white *bit* in his hand and was directing the proceedings inside at the time of the *chaukhandi* incident (page 97). Before the Committing Magistrate he referred to him in general terms as having been one of those concerned in the occurrence.

In his statement to Dewan Mahesh Das on the 23rd March 1921 he did not refer to the appellant as having taken part in any of the incidents of the 20th February 1921. P. W. No. 23, Gomi, also mentioned Lal Das, but after including him among those who were at the southern gate he says later that he saw him for the first time at the tank outside after the shooting of Meha Singh, and that he did not see him at the *chaukhandi* at all. He also says that Lal Das had a thin stick in his hand and did nothing in this presence. P.W. No. 24 Ladha Ram states that he saw Lal Das at the tank only doing nothing. From the above it will be seen that the evidence of Gomi and Ladha Ram does not assist the prosecution, and, if anything, indicates that Lal Das was merely a looker on; Farid's statement cannot be treated as corroborating Takiullah's evidence.

The only other evidence is that of P. W. No. 31, Atma Ram, who deposes to having seen Lal Das pursuing Sikhs towards the Railway line and later directing the burning of three dead Sikhs near a tree (page 116). He, however, admits having had a dispute with Lal Das over a lease of some land (page 117), and his evidence does not carry any weight. In the absence of any clear and satisfactory corroboration of the evidence of Takiullah and Farid, we are unable to maintain the conviction and, accepting his appeal, acquit Lal Das.

The next case taken up was that of Jiwan Das, who has been sentenced to transportation for life under sections 148, 302 and 149, Indian Penal Code. P. W. No. 23 Gomi deposes to having seen this appellant (described by him as a man with cut moustaches) outside the southern gate armed with a *chhavi* or *takwa* (pages 47, 58) and joining in the attack on the *kothis* inside (page 58). Neither in his statement to the Committing Magistrate, nor in that made to Diwan Mahesh Das on the 15th March 1921 is he recorded as having referred to a man with a cut moustache.

P.W. No. 24, Ladha Ram, states that Jiwan Das went with the Mahant to Lahore on the 18th February 1921 and returned with him from there on the 19th February. He says that on the morning of the 20th February 1921 he saw the appellant in the crowd at the southern gate (page 67) and also saw him go upstairs on to the roof (page 70). He again saw him coming down (page 68) and was told by him that he had killed two men below (pages 76, 78). As, however, he failed to identify Jiwan Das at the Jail identification parade on the 28th March 1921, there is a possibility of error on his part which, in our opinion, vitiates his evidence. P. W. No. 25, Takiullah, refers to this appellant as one of those who killed two Sikhs on the southern wall. The learned Sessions Judge has held (we consider rightly) that there is some uncertainty as to Jiwan

Das's complicity in this incident, but has accepted Takiullah's testimony as showing his presence in, and membership of, the unlawful assembly. At the identification parade held in the Jail, however, Takiullah was not certain of Jiwan Das, a fact that materially reduces the value of his evidence.

The only other witness against Jiwan Das is P. W. No. 28, Sant Singh, who professes to have seen him with the Mahant at the time of the killing of Mehnga Singh (page 104) and says that he had a *dang* in his hand (page 105). He, however, failed to identify him at the Jail, as well as in the Court of the Committing Magistrate (page 105) and admits that Jiwan Das's mother complained that he had broken into her shop (page 107). No reliance can, therefore, be placed on his evidence so far as this appellant is concerned. We are unable to hold that Jiwan Das's complicity has been established beyond doubt, and, accepting his appeal, acquit him.

The next case taken up was that of Piar Singh son of Sundar Singh, who has been convicted of rioting and murder and sentenced under sections 148, 302 and 149, Indian Penal Code to transportation for life. The evidence against him consists of the statements of P. W. No. 23 Gomi, P. W. No. 24 Ladha Ram, and P. W No. 26 Farid Of these, P. W. No. 26, Farid (who includes him among those who dragged bodies and killed wounded men at the *chaukhandi*) failed to identify him at the Jail identification (a circumstance not referred to by the learned Sessions Judge), and for this reason his evidence is not of any value.

P. W. No. 23 Gomi says that on his arrival he saw this appellant (whom he refers to as Wasakha Singh's nephew) on the southern wall armed with a *chhavi* and throwing bricks (pages 47, 54). In his statement to Diwan Mahesh Das on the 15th March 1921 while he refers to the nephew of Wasakha Singh" as having come on previous occasions to Nankana he does not refer to him as having been at Nankana on the 20th February 1921.

P. W. No. 24, Ladha Ram, deposes to Piar Singh having come from Lahore with the Mahant on the 19th February 1921 and states that on the morning of the 20th February 1921 he saw him in the crowd at the southern gate (page 67) and taking part in the killing in the *Darshani deorhi* (pages 68, 69 and 76). In his statement to the Committing Magistrate, Ladha Ram refers to Piar Singh as having come on a previous occasion, and as having been in the crowd at the southern gate on the morning of the 20th February 1921 (page 77). He does not refer to him specifically in connection with the incident at the *Darshani deorhi*. It is true, as pointed out by Mr. Herbert, that Piar Singh appears in the *ruqa* (Exhibit P. A.) either by Inspector Fazal Imam to Inspector Sardar Gopal Singh on the 24th February 1921, the names therein having been given by Ladha Ram. But the value of this is done away with by the fact that in his statement to Diwan Mahesh Das made on the 10th-11th March 1921 Ladha Ram does not mention the appellant as having been concerned in the events on the 20th February 1921, although he refers to him as having come to Nankana on a previous occasion. From the foregoing it will be seen that Piar Singh was not implicated by either Gomi or Ladha Ram in the earliest statements made by them to Diwan Mahesh Das. In these circumstances we accept this appeal and acquit Piar Singh son of Sunder Singh.

We now come to case of Balak Das *alias* Babali who has been sentenced to transportation for life under sections 148, 302 and 149, Indian Penal Code. P. W. No. 23 Gomi says that Balak Das was present in the crowd outside the southern gate and was armed with a stick. To the Committing Magistrate as well as to Diwan Mahesh Das he made the same statement. P. W. No. 24 Ladha Ram supports Gomi in saying that Balak Das was in the crowd at the southern gate, for he says that he, Gopal Das and Balak Das were together drinking *sardai* where they heard the sound of firing and together went towards the Bazar, Balak Das having a stick (page 67). He also says that this appellant accompanied him on to the north-east corner of the Mahant's *baithak* where the Mahant was at the time. He next refers to him as being on the roof, and states that it was just as they were going down the stairs that Balak Das was struck on the forehead by a brick, though he does not know where the brick came from (page 68), and that he told him to go and get his head bandaged (page 69). P. W. No. 25,

Takiullah, picked out Balak Das as one of the Mahant's supporters and armed with a *chhavi* who killed men in the *Darshani deorhi* (page 89). P. W. No. 26, Farid, says that he saw him with a *chhavi* in his hand at the *chauk andi* dragging bodies and striking wounded Sikhs, but was unable to identify him in the Court of the Committing Magistrate, although he had identified him at the parade in the Jail. In addition to the evidence of these approvers, we have the statement of P. W. No. 28, Sant Singh, who deposes to having seen him with a *dang* in his hand outside the Gurdwara with the Mahant, and P. W. No. 43, Sunder Das, gives similar evidence (page 137), although he cannot say what Balak Das had in his hand. Finally, there is his own statement (Exhibit P. C. D.). This statement was recorded by Diwan Mahesh Das as a confession. As pointed out by the learned Sessions Judge, however, it can scarcely be regarded as a confession in true sense of that word. It is, however, an admission of his presence at Nankana on the day of the occurrence and in it he also admits that he climbed on to the roof by means of a ladder. He goes on to say that some one struck him on the forehead with a brick which made him feel weak and, therefore, he retired to the tank to wash his wound. In his statement in the Sessions Court he states that he had gone to Nankana to get *ghee*, and had slept the night at Wiram Das's *baithak*, Ladhu being in another *kotha*. He also admits that he had followed Ladha Ram to the scene, and that he was standing bowing down at the southern gate of the Gurdwara when a brick struck him from above, after which he went to Kot Sudh Das, but was arrested at Waigal in Kasur Tahsil some eight days later. He alleges no enmity with Gomi or Ladha Ram. His account of how he received the injury is unsatisfactory, and there is absolutely no reason to think that either Gomi or Ladha Ram is falsely implicating him. He is a resident of Bhai Pheru, and his presence at Nankana on this occasion was evidently due to the fact that he had been enrolled by the Mahant or his relatives to protect the Gurdwara. This defence witness, D. W. No. 139, Sulakhan and D. W. No. 140, Sher Singh, do not say anything that can be regarded as contradicting the story told by Ladha Ram and Gomi. Ladha Ram gave his name to the Police at a very early stage, for we find Balak Das's name in the *ruqa*, Exhibit P. A. K., dated 24th February 1921 from Inspector Fazal Imam to Inspector Sardar Gopal Singh. Having regard to all the circumstances we are of opinion that Balak Das has been correctly convicted and dismiss his appeal.

Next, we come to Jetha Singh who has been sentenced to transportation for life under sections 148, 302 and 149, Indian Penal Code. His conviction is based on the evidence of P. W. No. 23 Gomi, P. W. No. 24 Ladha Ram and P. W. No. 32 Harnam Singh. Gomi states that Jetha Singh was in the crowd at the southern gate (page 47) and went up on to the south wall (page 50), but saw him doing nothing in particular, and in his statement to the Committing Magistrate he refers to Jetha Singh only as having been in the crowd at the southern gate (page 58). Ladha Ram deposes that Jetha Singh was outside and went up on to the roof (page 70). His statement to the Committing Magistrate was similar. Neither of these two witnesses appear to have named or clearly described the appellant in their depositions to Diwan Mahesh Das, which circumstance detracts considerably from the value of their evidence. Harnam Singh states that he saw Jetha Singh in front of the Darbar Sahib with a *lathi* in his hand going towards Kot Sadhu Ram, (*i. e*, away from the scene) before the *chaukhandi* incident had taken place. Harnam Singh and Jetha Singh both live at Kot Sadhu Ram. This evidence does not sufficiently connect Jetha Singh with the crime and cannot be regarded as a sufficient corroboration of the statements of Ladha Ram and Gomi. We accordingly accept Jetha Singh's appeal and acquit him.

The next case discussed by Mr. Hasan Imam was that of Jaggat Singh *alias* Jaggu, who has been sentenced to transportation for life under sections 148, 302 and 149, Indian Penal Code. In his statement to Diwan Mahesh Das on the 15th of March 1921, P. W. No. 23, Gomi said that Jaggu of Sidwani was at Nankana when he and others returned there at *kh'o pio wela* on the 19th of February

1921 after the Mahant had been warned at the Railway Station of the proximity of the Sikhs, and that the same Jaggu of Sidhwani armed with a *chhavi* had along with others entered the Gardwara by the southern gate as soon as it had been opened and had gone on to the roof. He also said that he had seen Jaggat Singh *alias* Jaggu of Sidhwani among those concerned in the *chaukhandi* incident. The appellant, though now residing in Aulakh Hithar, admits that till four years ago he lived at Sidhwani (page 38).

In his statement to the Committing Magistrate he referred to Jaggu Sidhwaniwala in connection with the same incidents (pages 57, 59). At the trial he said he had seen Jaggu of Sidhwani with a *chhavi* in the crowd of the Mahant's supporters at the southern gate, and that when the door had opened they had *all* gone inside (page 47). Later on he saw him taking an active part in the *chaukhandi* incident (page 49).

P. W. No. 26, Farid, states that this appellant was one of those who dragged bodies and killed wounded at the *chaukhandi* (page 97). In his statement to the Committing Magistrate he pointed him out as among those who had taken part in the occurrences. As Jaggat Singh was not known to the witness he could not refer to him by name in his statement to Diwan Mahesh Das but he identified him at the identification parade held on the 2nd of April 1921 [*vide* Exhibit P. H. (*i*)]. P. W. No. 33 Amir Singh identified Jaggat Singh as one of five or six men who had chased him and his companion (page 120), but though he identified him at the identification parade on the 2nd April 1921 he states that to the Committing Magistrate he said he could not identify any of his pursuers. This circumstance renders his evidence of little or no value.

P. W. No. 34, Gurdit Singh, is one of the Sikhs who claims to have gone into the Gurdwara that morning. He states that while he and his companions were reciting hymns firing commenced. He sought shelter by the eastern wall, and saw a man with a gun and three or four others with *chhavis* standing on the wall to the west of the southern gate and says that this appellant was one of the *chhavi* men. He identified Jaggat Singh at the parade on the 2nd April 1921 [*vide* Exhibit P. H. (*i*)].

P.W. No. 43, Sundar Das, deposes to having seen Jaggat Singh with the Mahant, but saw nothing in his hand (page 137). In his statement to the Committing Magistrate he pointed the appellant out as having had a *chhavi*. He identified him at the parade on the 2nd April 1921, [*vide* Exhibit P. W. (*i*)].

P. W. No. 114, Ismail, deposes to having seen Jagat Singh at Nankana on the 19th February 1921 (page 228). He identified him at the parade on the 2nd April 1921, but said he was not quite certain of him.

Jaggat Singh denied his complicity and urged that he was in his own village of Aulakh Hithar, and that as he is on the register of bad characters (No. 10), he could not have absented himself without a report of the fact being made by the Lambardars. In his defence he produced D W. No. 133, Babal Singh, and D. W. No. 134, Allah Din, the Lambardar and Chaukidar of Aulak Hithar, who state that Jaggat Singh was not absent from the village on the night in question, and that they would have reported the matter had he been. D. W. No. 161, Sultan Alam, Head Constable, had also been produced to show that no report of the appellant's absence had been made. As pointed by the learned Sessions Judge the absence of a report is no valid proof that the appellant was in the village, as it is a notorious fact that Lambardars and Chaukidars are slack in the discharge of their duty.

It was also alleged that Jaggat Singh was an Akali and, therefore, could not have joined in this affair. It is true that D. W. No. 168, Kartar Singh, of Jhabbar, admits having baptized Jaggat Singh, but he says this was five years ago, and he does not know if he is an Akali or not.

We are not impressed by the defence set up which does not, in our opinion, rebut the case for the prosecution. No reason has been suggested why Gomi should have falsely implicated Jaggat Singh, and it will be seen that this witness has been consistent throughout in his account of the part taken by this appellant. Eliminating the evidence of Amir Singh and Ismail the corroboration of Gomi's statement is to be found in the deposition of Sundar Das and Gurdit Singh. No valid reason has been given for thinking that these two witnesses are not worthy of credence

against the appellant, and that the learned Sessions Judge has pointed out that there is no real contradiction of Gomi's statement in the evidence of Gurdit Singh. After a careful consideration of the evidence we think that Jaggat Singh has been rightly convicted and dismiss his appeal.

Next the case of Atma Ram was discussed by Mr. Puri. This appellant has been sentenced to death under sections 148, 302 and 149, Indian Penal Code. He is a resident of Nankana and was arrested on the 20th February 1921. The evidence against him is that of the four approvers, P W. No. 23, Gomi, refers to him as a *Brahman* who arrived with a stick and was in the crowd outside the southern gate (page 47). Before the Committing Magistrate he made no reference to any *Brahman*, but pointed out Atma Ram as having been in the crowd at the southern gate (page 58). In his statement on the 15th March 1921 he made no reference to any *Brahman*, and did not refer to the appellant, unless he is to be taken as included in the expression "the Mahant's men." At the most, ther, according to Gomi, Atma Ram was at the southern gate in the crowd that had collected there.

Mr. Puri contended that Gomi was the only witness who placed this appellant at the southern gate. But this is not correct for P. W, No. 24, Ladha Ram, also says that he saw him there (page 67). He also saw the appellant going on to the roof by way of the stairs and coming down again (page 68). Mr. Puri contended that there was a discrepancy as to this, as Ladha Ram also says that he could not tell who went up by way of the stairs, and who used the ladder (page 72). There is, however, no force in this, as it is obvious that Ladha Ram meant that he could not give all the names of those who went up by one means, and those who went up by the other. Before the Committing Magistrate he says that Atma Ram was at the southern gate and among those who were trying to climb on to the roof (pages 77, 78), and in his statement to Diwan Mahesh Das he said that he had seen Atma Ram at the southern gate and on the roof. This witness, therefore, depores to the appellant having been at two places, firstly in the crowd at the southern gate, and then on the roof.

P. W. No. 25, Takiullah, identified him in the Jail on the 25th March 1921 (Exhibit P. C.) and in his statement to Diwan Mahesh Das he refers to the killing of two Sikhs on the southern wall by the Mahant's men. In his statement to the Committing Magistrate he again referred to this incident and pointed out Arjan Das as one of the men who killed two Sikhs. He definitely stated that the other assailant was not present in Court (page 95). In his final statement at the trial, however, he pointed out Atma Ram as one of those who took part in this incident (page 86).

In the statement recorded by Diwan Mahesh Das, Farid makes no reference to Atma Ram, but identified him at the parade on the 25th March 1921. In the Committing Magistrate's Court he pointed him out as one of those who took part in the occurrence (page 101). In his statement at the trial, however, he pointed him out as being one of two men who were present at the *chaukhandi* incident, and who killed two wounded Sikhs who had tried to get out of the fire (pages 97, 99, 100).

The identification of Atma Ram by Takiullah and Farid is not impressing seeing that he was arrested on the 20th February 1921 and sent to the Central Jail with the Pathans. Each of them makes him take part in totally different incidents, and though the differences in the three statements made by Farid may be due to his not having been properly examined, these differences exist and tell against the prosecution. Neither Gomi nor Ladha Ram referred to Atma Ram in connection with these incidents, and there being no corroboration of the stories told by these two Pathan approvers, we cannot regard that evidence as sufficient. Similarly, Ladha Ram alone referred to Atma Ram as having been on the roof. He and Gomi agree only as to his presence at the southern gate. Hari Nath refers to him in his confessional statement, but the confession of this man cannot be utilised for the purpose of strengthening the story of the approvers. Atma Ram himself says that he was at the Bazar, the whole time, and as neither Ladha Ram nor Gomi attribute any definite act to him, it is not improbable that after going to the southern gate on hearing the firing (as doubtless many others must have done) he went off to the Bazar to carry

out his duties there. We have carefully considered the evidence against this appellant and cannot regard it as sufficient. We accordingly accept his appeal and acquit him.

Arjan Das's appeal was argued by Mr. Ram Lal. This appellant has been sentenced to transportation for life under sections 148, 302 and 149, Indian Penal Code. He is a nephew (brother's son) of the Mahant. The witnesses who depose against him are P. W. No. 23, Gomi, P. W. No. 24 Ladha Ram, P. W. No. 25 Takiullah, P. W. No. 26 Farid, and P. W. No 28 Sant Singh, and he is also implicated by Hari Nath. As in the case of others, we do not think that Hari Nath's confession can carry any weight against this appellant. Of the witnesses Sant Singh admittedly has enmity with the Mahant and Mr. Herbert conceded that he would be prejudiced against the Mahant's relatives. Takiullah and Farid failed to identify him at the identification parade in the Jail, so that their subsequent identification in the Court when they both give him an active and prominent part cannot be regarded as of any value. P. W. No. 23, Gomi, says that he saw Arjan Das in the crowd at the southern gate (page 47), and that he procured oil at the instance of the Mahant (page 48) and later went off in the direction of the *chaukhandi* just before killing there commenced. He referred to him in connection with the same incidents to the Committing Magistrate (pages 56-59) and to Diwan Mahesh Das, on the 15th March 1921. P. W. No. 29 Ladha Ram states that he saw this appellant at the southern gate (page 57) but not again till the occurrence was over when he saw him taking people away to Kot Ladha Ram (page 70). In his statement to the Committing Magistrate he says he saw Arjan Das at the southern gate among those who were trying to get on to the roof (pages 77, 78). He made a similar statement to Diwan Mahesh Das. From above it will be seen that Gomi and Ladha Ram agree only as to having seen the appellant at the southern gate. It is curious that Ladha Ram should not have noticed him again at any stage of the proceedings if he had taken the somewhat prominent part allotted to him by Gomi, and seeing that he was a relative of the Mahant and known to Ladha Ram we are unable to regard the evidence of these two approvers as sufficient to warrant the conviction of this appellant. Finally, there is Arjan Das's own admission as to his presence at the Nankana on the day of the occurrence, but this statement does not incriminate him in any way. It was urged by Mr. Herbert that having regard to his relationship with the Mahant, it was highly probable that Arjan Das took part in the happenings at the Gurdwara. While recognizing the force of this, we are unable to hold that the evidence on the record is sufficient to prove the case against him in the absence of any corroboration of the approvers' statements. We accordingly accept his appeal and acquit Arjan Das.

Mr. Ram Lal then dealt with the case of KammanMachhi who has been found guilty of rioting and murder and sentenced to transportation for life under sections 148, 302 and 149, Indian Penal Code. The only witnesses against this appellant are the three approvers P. W. No. 23 Gomi, P. W. No. 25 Takiullah, and P. W. No. 26 Farid. Gomi refers to a stammering Musalman whom he identified as Kamman as being present in the crowd at the southern gate armed with a stick, and he picked the appellant out in the Court of the Committing Magistrate, but at the identification parade held on the 25th March 1921, he is recorded as having said that he suspected him to some extent. Takiullah pointed him out as one of those armed with a *chhapi* (page 87), but attributes no particular act to him, and in the Court of the Committing Magistrate he pointed him out as one of those who took part in the occurrence (page 93). Farid includes him in those who were dragging bodies and striking wounded Sikhs. Thus, while all these three approvers identified him, Gomi was not sure of him at the outset, and only said that he saw him at the southern gate. Takiullah and Farid do not allot the same parts to him. As to their identification of him it has to be borne in mind that Kamman Machhi was in the Central Jail from about the 2nd March 1921. Kamman denies his presence at Nankana on the date in question and alleges that he was in his own village at Mangu Tara. There is no corroboration whatever of the statement of the approvers and a point in his favour is that while Ladha Ram referred to a Musalman Machhi when he gave information to the Police (*vide*

Exhibit P. A. J.) he does not identify Kamman. We accept his appeal, set aside his conviction and acquit him.

The cases of the Pathan appellants were then taken up by Mr. Miran Bakhsh who, however, contented himself with referring us to those parts of the record where the word 'Pathans' happened to be written and then asked us to disbelieve the evidence of the approvers on the ground that they had been *induced* to make their statement. We may say at the outset that there is ample evidence on the record to show that all these Pathan appellants were engaged by the Mahant on the 3rd February 1921 to act as guards. From a perusal of the whole record, we consider that the learned Sessions Judge is right in thinking that they played a minor part, and that it is quite possible "that some of them did not venture to play any part at all." With the exception of Nur Sadin and Kadir who have been sentenced to death under sections 148, 302 and 149, Indian Penal Code, the other Pathan appellants have been convicted under section 201, Indian Penal Code, and sentenced to seven years' rigorous imprisonment. Before any individual Pathan can be convicted, however, we think there should be some definite evidence against him, and that evidence of a general character that Pathans, as a whole, did this or that, cannot be looked upon as sufficient. The conviction of these appellants are based almost, if not entirely, on the statements of Takiullah and Farid. In regard to these two witnesses it has to be borne in mind that they undoubtedly knew their comrades and were with them for a considerable period in the Central Jail. It was, therefore, to be expected that they could identify them. As has been said above, Takiullah and Farid had ample opportunity while in the Central Jail to discuss the situation and they, therefore, cannot be regarded as independent witnesses and the testimony of one cannot afford support to the testimony of the other. With these remarks we proceed to deal with the individual appeals, and take up that of Gul Akbar.

Against him there is the evidence of Takiullah and Farid. The former says that Gul Akbar went up on to the roof (page 84) and threw bricks. He was armed with a stick. The latter says that Gul Akbar was armed with a stick and was dragging bodies and striking wounded Sikhs at the *chaukhandi*. There is no corroboration of their statements, although Ladha Ram pointed him out as one of those who went on to the roof from the southern gate. The case against Abdulla is precisely the same, Ladha Ram, in addition, saying that Abdulla was the man who introduced the Pathans (page 70). We cannot regard this evidence as sufficient as we consider that it would be unsafe to convict on the uncorroborated statements of Takiullah and Farid. We accordingly accept these appeals and acquit Gul Akbar and Abdullah.

The cases against Mahomed Azim, Abdul Karim, Abdul Wali, Mohammad Ali, Gul Ahmad, and Ismail depend entirely on the evidence of Takiullah and Farid, there being no corroboration of their statements. We are unable to uphold their convictions and accepting their appeals acquit all these men.

Ashiq, Nek Muhammad, and Aziz Ullah have been dealt with together by the learned Sessions Judge. Takiullah and Farid say that they were concerned in the occurrence having gone up on to the roof, dragged bodies and struck wounded Sikhs at the *chaukhandi* and, according to Takiullah, brought oil and wood. Here again there is no corroboration and accepting their appeals we acquit all three.

Against Lal Mahomed there is the evidence of Takiullah and Farid. P. W. No. 43, Sundar Das, identified this appellant as one of those who were killing men with *chhavis*. As, however, he did not identify him in jail, and as according to both the approvers, Nur Sadin was the only one who had an axe, the others having sticks, it is obvious that Sundar Das's identification can carry no weight. In the absence of any corroboration we accept Lal Mahomed's appeal and acquit him.

The learned Sessions Judge dealt with the cases of Nur Muhammad and Rahman together. Farid and Takiullah are the only witnesses against them. According to Farid, Rahman had been dragging the bodies for burning before the attack on the *chaukhandi*, while Takiullah omitted Rahman in his list of those who went on to the southern wall. It was urged that as against Nur Muhammad corroboration of the approvers' story was to be found in the fact that the

pair of shoes which he was wearing (O. 14) have been proved to have belonged to Sewa Singh, one of the persons who is alleged to have been killed inside. Nur Muhammad admits that he was wearing the shoes, but says that they belonged to him, P. W. No. 233, Dalip Singh, and P. W. No. 234, Makhan Singh have been produced by the prosecution to prove that these shoes belonged to Sewa Singh. Dalip Singh says that Sewa Singh was his sister's husband and lived a quarter of a mile from him. He identified these shoes as the pair that Sewa Singh was wearing on the 6th Phagan when he came to see him at his own village. Makhan Singh is the brother of Sewa Singh, and says that he had seen Sewa Singh wearing these shoes for some time There is nothing on the record to show that there were any marks on the shoes which could render them capable of identification, and we are not satisfied with the evidence of these witnesses as to their having belonged to Sewa Singh. Thus, as in the former cases, there is no corroboration of the approvers' evidence against these two appellants, and accepting their appeal we acquit them.

The case of Said Fakir is very similar to that of Nur Muhammad. According to Takiullah he saw Said Fakir bringing wood but doing nothing else. Farid says that Said Fakir helped to collect bodies for burning before the attack on the *chaukhandi*, and also robbed the dead of Rs. 71, and a pair of shoes (Exhibit P, 15). There can be no doubt that Said Fakir was found in the jail wearing these shoes Farid also says that out of the Rs. 71 taken by this appellant, Rs. 50 had been deposited with one Bishen Singh. Bishen Singh denies that Said Fakir made any such deposit with him. Farid's story is thus not corroborated on this point. As to the shoes, P.W. No. 259. Hazura Singh, says that they belonged to his maternal uncle, Dalip Singh, with whom he lived. We are unable to regard this evidence as sufficient to prove that Dalip Singh owned them. There is thus no corroboration of the approvers' statements against Said Fakir and we accordingly accept his appeal and acquit him.

As to Imam Gul, Takiullah states that he was one of those who climbed the ladder on to the south wall and threw bricks on to the Sikhs below, dragged bodies at the *chaukhandi* and wall and brought away a bundle of clothes belonging to the dead persons. Farid's story is that Imam Gul dragged bodies out of the *chaukhandi*, struck wounded man and carried away a bundle of loot. P. W No. 43, Sunder Das, pointed out Imam Gul as having had a gun on the *deorhi* roof as well as down below. As, however, this witness did not identify him in the Jail or in the Court of the Committing Magistrate, it is obvious that this identification at the trial can carry no weight. Here again there is no corroboration of the approvers' story, and we accept this appeal and acquit Imam Gul.

The next Pathan is Kadir, who has been sentenced to death under sections 148, 302 and 149, Indian Penal Code. There is against him the evidence of Takiullah and Farid, but no corroboration of any kind whatever. In his statement to Diwan Mahesh Das, Takiullah said that where the heaps of the dead bodies were burning two of the wounded Sikhs who were on the burning heaps got up and attempted to escape but were knocked down and killed, one by Farid and the other by Kadir. In the Court of the Committing Magistrate he said that Farid and Kadir were among those who killed wounded Sikhs (page 93). At the trial he stated that Kadir struck down a man who got up from the fire (page 87).

Farid, in his statement to Diwan Mahesh Das, stated that when the fire set to the dead had begun to burn, two Sikhs got up and tried to run away. At a distance of two paces, one was killed by him with a *danda*, and the other by Kadir. To the Committing Magistrate he said that when the bodies were set fire to two men supposed dead got up out of the heap but Kadir and he killed them (page 101). At the trial he stated the same thing saying that Kadir and he had attacked two men who stood up from the burning heap and knocked them down with sticks, the Mahant's men striking them with *chhavis*. It will thus be seen that both these approvers have been consistent in their accounts of the part taken by Kadir. As, however, these two approvers had ample opportunity to consult each other in the Central Jail, we cannot use the statement of one to support the statement of the other. We do not doubt that the incident related took place

and we think that both these approvers are speaking the truth, when they say that two Sikhs got up from the burning heaps and were knocked down by Farid and another. We think, however, that it would be unsafe to convict Kadir as being Farid's associate in this incident without some corroboration, and we accordingly feel constrained to accept his appeal and acquit him.

Nur Sadin. Finally, there is the case of Nur Sadir, who has also been sentenced to death. This appellant, according to Takiullah and Farid, was the only one of the Pathans who was armed with an axe, the axe belonging to him and not having been provided by the Mahant. In this connection we may refer to the evidence of Uttam Singh, P. W. No. 108, contractor and factory owner of Nankana. He says that on the 19th February, at 6 P. M., he went to the Darbar Sahib and found the Mahant distributing *chhavis* to his men. This evidence is not supported by anything on the record and is in flat contradiction of the story told by Takiullah and Farid, and we regard it as untrue. Takiullah and Farid both agree in saying that Nur Sadin had an axe. According to Takiullah, Nur Sadin went with all the Pathans first to the *Darshani deorhi*, which they found shut, and then on to the southern gate where Nur Sadin was one of those who went on the roof by means of a ladder. Later on, referring to the shooting of Mehnga Singh, he says that when Mehnga Singh fell, Nur Sadin attacked him with his axe. He places Nur Sadin inside at the *chaukhandi* incident and says that Nur Sadin cut holes in the western door with his axe (page 85), and later includes him in the number of those Pathans who dragged the corpses out of the *chaukhandi*. In his statement to the Committing Magistrate he makes Nur Sadin play the same part (pages 92, 93), and in his statement to Diwan Mahesh Das we find the same incident attributed to this appellant by this witness. Farid says that Nur Sadin made a hole with his axe in the western silver door (of the *chaukhandi*) and was one of those who dragged corpses out of the *chaukhandi*, and attacked the wounded Sikhs with an axe (pages 96, 97). To the Committing Magistrate he stated that Nur Sadin made a hole in the western door of the *chaukhandi* with *kulhari* (page 101). In his statement to Diwan Mahesh Das he says that Nur Sadin broke the silver plate of the western door (of the *chaukhandi*) with his hatchet and dragged corpses out of the *gaddi* of the Gurdwara. As in the case of Kadir, so in that of this appellant, these two witnesses have been consistent in their accounts of the part played by Nur Sadin. Ladha Ram identified Nur Sadin, at the jail parade, and in the Court of the Committing Magistrate as one of those who were trying to climb on to the roof at the southern gate (page 78). At the trial he picked him out as a man who killed men (page 70). In this statement to Diwan Mahesh Das, however, his statement in connection with the part played by the Pathans is somewhat different. According to him the Pathan went into the Gurdwara through the *Darshani deorhi* after that had been opened and it was the Pathans who were engaged in burning the dead bodies and killing any of the Sikhs who were still alive, the Pathans having *dangs* and *chhavis* with them. As, according to Takiullah and Farid, Nur Sadin was the only Pathan armed with an axe, it is curious that this fact was not mentioned by Ladha Ram.

Hari Nath in his confession states that a Pathan with his own *takwa* cut a hole into the western door of the *chaukhandi* obviously referring to the same incident as that deposed to by the two Pathan approvers. Doubtless this incident occurred, but there is only the evidence of Takiullah and Farid connecting Nur Sadin with it. We cannot accept the statements of these two approvers without corroboration, and as none is forthcoming, we feel constrained to accept this appeal and acquit Nur Sadin.

From our analysis of the evidence against the appellants individually it will be seen that we have given full effect to the maxim that the evidence of an accomplice must, as a rule, be considered untrustworthy unless it is corroborated in material particulars. At the same time we admit that the present case is an exceptional one inasmuch as Gomi and Ladha Ram had no opportunity of collaborating *inter se* before they were examined by Dewan Mahesh Das, or with the Pathan approvers before the latter were examined. But we cannot hold that the evidence of one approver can be said to corroborate another except where both have,

at the earliest opportunity, and before there has been any chance of collaboration, deposed to the same acts as having been committed by a particular accused person. The learned Sessions Judge has shown great care and diligence in his trial of a very difficult case, and has dealt with every point in his very exhaustive judgment, but we think that, as a matter of prudence, he should have insisted on there being unanimity as to the incidents deposed to, or a sufficient number of them, by two approvers before their uncorroborated testimony was deemed sufficient to warrant a conviction thereon.

He has also attached great weight to the opinion of the Assessors, and this he was certainly entitled to do. But we doubt whether Assessors, even the most intelligent, pay much attention to the aforesaid maxim, and their opinion cannot be taken as a substitute for untainted evidence where a prudent person would require it.

We direct that those appellants whose convictions we have set aside be released forthwith.

Z. K.

Order accordingly.

PATNA HIGH COURT.
FULL BENCH.
CRIMINAL REVISION No. 293 OF 1922.
June 19, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice Justice Sir B. K. Mullick, Kt., and Justice Sir Jwala Prasad, Kt.

SHEBALAK SINGH—PETITIONER

versus

KAMARUDDIN MANDAL AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144, scope of—Order under section, when may be rescinded—High Court, power of, to interfere—"Made under this section", meaning of—"Alter or rescind," meaning of—Possession, dispute as to, remedy, proper—Proceeding under s. 144—Magistrate, power of, to convert, into inquiry under s. 145—High Court, when to be resorted to—Interpretation of Statutes—Court, duty of.

Clause (4) of section 144 of the Criminal Procedure Code is not confined to cases where there has been a change of circumstances since the original order was made, and, although a Magistrate ought not to interfere with an order once made under the section unless very good reasons are disclosed for doing so, he may rescind such an order, if he is satisfied that it ought never to have been made. [p. 150, col. 2]

Per Mullick, J.—The expression "made under this section" in clause (4) of section 144 of the Criminal Procedure Code, means, "legally made or purporting to be made" under this section. [p. 152, col. 1.]

Section 144 of the Criminal Procedure Code is of general application and contains nothing which ousts the Magistrate's jurisdiction in cases of *bona fide* dispute as to possession of land. But where section 107 or section 145 will meet the requirements of the case, section 144 is not an appropriate remedy, and ought not to be used as a substitute for those sections. [p. 152, col. 2.]

The words "alter or rescind" in clause (4) of section 144, Criminal Procedure Code, clearly empower a District Magistrate to modify or cancel an order under that section upon any ground whatsoever. [p. 151, col. 2.]

Per Jwala Prasad, J.—When one party is clearly in the wrong and threatens to usurp the rights of another who is in actual possession of the land in dispute, the proper remedy is an order under section 144 or section 107 of the Criminal Procedure Code. [p. 154, col. 1.]

Gouri Dutt v. *Gobind Singh*, 53 Ind. Cas. 829; 1 P.L.T. 44; 20 Cr. L. J. 829, *Sukan Singh* v. *Prayag Singh*, 57 Ind. Cas 95; 1 P. L. T. 81; 2 U. P. L. R. (Pat) 35; (1920) Pat. 124; 21 Cr. L. J. 575, *Jhaman Mahton* v. *Thakuri Mahton*, 57 Ind. Cas. 449; 1 P. L. T. 369; 21 Cr L. J. 625; 2 U. P. L. R. (Pat.) 192, *Kali Pershad Gope* v. *Dhodhai Gope*, 62 Ind. Cas. 590; 22 Cr. L. J. 574 and *Nandkishore Sao* v. *Bikan Singh*, 65 Ind. Cas. 856; 3 P. L. T. 570; 23 Cr. L. J. 200, relied on.

Where in a proceeding under section 144, Criminal Procedure Code, a Magistrate comes to the conclusion that there is a *bona fide* dispute as to the possession of the parties, then he is bound to start an enquiry under section 145 either in continuation of his order under section 144 or in supersession thereof, for section 145 is the only section under which an enquiry in the case of a danger of a breach of the peace concerning a dispute as to land can be made. [p. 155, col. 1.]

The words "rescind or alter" in clause (4) of section 144 are wide enough to vest the Magistrates mentioned in that clause with unlimited power to deal with an order passed under clause (1) of the section on the question of jurisdiction as well as upon the merits. [p. 156, col. 1.]

Ordinarily, a party should exhaust all remedies in the Courts below before he comes to the High Court. This is a very desirable practice, but there is, however, no absolute bar in law to the party coming direct to the High Court under section 107 of the Government of India Act. [p. 156, col. 1.]

SHEBALAK SINGH v. KAMARUDDIN MANDAL.

It is not within the competence of any Court to usurp the functions of the Legislature, and a Court cannot in any way limit or extend the scope of any provision of the law on grounds of policy or other considerations [p. 151 col 1; p 5 , col.]

Parkar Mahton v. *Ram Khelwan*, C W. N. 271; 5 Cr. L. J. 76, *Kaniz Amina* v *Emperor*, 47 Ind. Cas. 65 3 P L J. 242; 4 P L W 254; 19 Cr L J. 869, *Tarapada Bhattacharji* v *Emperor*, 55 Ind Cas. 193; 1 P. L. T. 72; 21 Cr. L. J. 24 and *Joyanti Kumar Mookerjee* v *J. B Middleton*, 27 C. 75; 4 C. W. N. 562; 14 Ind Dec. (N. s.) 5 4, referred to

Reference made by Mr. Justice Coutts and Mr. Justice Das, against an order passed by the District Magistrate, Purnea, dated the rd May 1922, confirming the order of the Sub-Divisional Officer, Purnea, dated the 11th April 1922.

Mr. *G C. Pal*, for the Petitioner.

Mr. *Sultan Ahmad*, Government-Advocate, for the Opposite Party.

JUDGMENT.

MILLER, C. J.—The petitioner in this case moved the Sub-Divisional Magistrate to take action under section 144 of the Criminal Procedure Code against the opposite party and pass orders restraining them from interfering with his possession of certain land. The petitioner's case was that he purchased the land at a Court sale and obtained delivery of possession from the Court in August 1921 and that a speedy remedy was necessary to prevent him from being obstructed, annoyed or injured by the interference of his possession by the opposite party. When the parties presented themselves before the Magistrate it appeared that the opposite party were the usufructuary mortgagees of the land under a mortgage dated November 1920, and that the sale to the petitioner in 1921 had been declared at the time to be subject to the mortgage and that the mortgagees were in actual possession; and at the instance of the latter, who complained that their possession had been obstructed by the petitioner, the Magistrate passed an order under section 144 directing that the petitioner should abstain from interfering with the possession of the opposite party for a period of two months.

The petitioner then moved the District Magistrate to rescind or alter the order under clause (4) of the section. The grounds of the application, as stated by the District Magistrate, were, (1) that the order of the Sub Divisional Magistrate was not sound, and (2) that the Sub Divisional Magistrate should have referred the opposite party to the Civil Court and upheld the petitioner's possession.

The District Magistrate, in view of certain rulings of this Court, considered that he had no jurisdiction under section 144 (4) to interfere and refused to entertain the application. The rulings upon which he relied are to the effect that the powers conferred by the fourth clause of the section are only exercisable when it is shown that the circumstances existing at the time the order was made had changed rendering the order no longer necessary. The petitioner now moves this Court against the order. He does not contend before us that the District Magistrate had power to rescind the order of his subordinate; on the contrary, he says that the District Magistrate had no powers either of appeal or revision under section 144 (4), his powers of interference under the fourth clause being confined to cases where circumstances have arisen, since the original order was made, rendering the continuation of the order unnecessary or an alteration of its terms desirable, as laid down by the rulings referred to, and as no new circumstances have arisen in the present case he admits that the District Magistrate could not have taken any action. Why he approached the District Magistrate at all, if this contention is right, I have some difficulty in appreciating and no satisfactory explanation was forthcoming. The only reason that I can conceive for adopting the course taken is, that he apprehended that this Court might refuse to exercise its powers of superintendence until all possible remedies by a subordinate Court had been exhausted. For my own part, I can see no reason why the powers given in the fourth clause of the section should be confined to cases where there has been a change of circumstances since the original order was made. It seems to me that, if the Magistrate has power to rescind an order previously made by himself or his predecessor or his subordinate under the section because the circumstances no longer require it to remain in force, he should equally have power to rescind it if he is satisfied that it never ought to have been made. There is nothing

in the wording of the fourth clause which limits the powers of the Magistrate in the sense indicated, and I can see no valid reason why words of limitation should be read into the section which would have the effect suggested. It is clearly desirable that a Magistrate should not interfere with an order once made under the section unless very good reasons are disclosed for doing so. It may be equally desirable that those reasons should be clearly defined in the section itself, but that is a matter for the Legislature, and, as the section at present stands, the powers given are in no way limited to cases in which the circumstances have altered. To read into the section words limiting its operation in the sense contended for would be to usurp the functions of the Legislature, which it is not within the competence of this or any other Court to do.

It was argued before us, however, that the order originally made was one which was outside the scope of section 144 (1), and was made without jurisdiction, and that, in such circumstances, it should not be treated as an order made under that section at all, but as an unauthorised order made without jurisdiction, and that this Court should exercise its powers of superintendence under section 107 of the Government of India Act and set aside the order. No doubt this Court has interfered and exercised its jurisdiction in such cases, and if it could be shown that the order in the present case did not come within the powers conferred by the first clause of section 144 we would be entitled to interfere and set it aside.

It was also contended that an order which purported to be made under the first clause of the section but was not in fact authorised thereby could not be dealt with by the Magistrate under the fourth clause, not being an order made under the section at all, and that the Magistrate had no powers of revision in such a case. It is unnecessary to determine this question or even to determine the exact limits, if any, of the Magistrate's power under the fourth clause of the section, as, in my opinion, the order originally made appears to have been properly made under the powers granted by clause 1, and no ground for interference either by this Court or by the District Magistrate is made out. We might have sent the case back to be dealt with by the District Magistrate under the fourth clause, but as the order appears to have been properly made by the Sub-Divisional Magistrate, acting under the first clause of the section, and as no other ground for interference is made out it would be a waste of time to remand the case to the District Magistrate merely for him to refuse the application. In my opinion, this application should be rejected.

MULLICK, J.—I am of the same opinion. If I have understood correctly, the learned Vakil for the petitioner puts his argument in two alternative forms.

"First," he says, "assume that this was a case in which the Sub-Divisional Officer had jurisdiction to make an order under section 144, Criminal Procedure Code. In that event the District Magistrate had jurisdiction to alter or rescind that order and he having declined to hear the petitioner's application to this end, the Court might, but for the objection about to be mentioned, have sent back the case to him to be dealt with according to law. I admit that this course is in conformity with the practice of this Court which requires that the petitioner shall exhaust his remedies in the Courts below before invoking the aid of this Court. But in this case the District Magistrate had no jurisdiction to grant my prayer and so I have a right to come direct to the High Court. He only had jurisdiction to alter or rescind the order on the ground that there had been a change in the circumstances since the making of the order, but as I am attacking the propriety and legality of the order he had no jurisdiction to entertain my application."

The reply to these contentions appears to be this. It is true that there are some decisions of this Court which support the learned Vakil's construction of clause (4) of section 144, but I think, with the greatest respect, that they unduly restrict the plain and unambiguous terms of the Statute. The words "alter or rescind" clearly empower the District Magistrate to modify or cancel the order upon any ground whatsoever. I am not impressed by the argument that to give the District Magistrate the power to examine the propriety and legality of the order would be to confer upon him powers higher than the Code accords to the High Court. The Legislature has chosen, in appropriate language within the

section itself, to vest the District Magistrate with a wide and unrestricted power of review and to render him independent of the provisions relating to appeal and revision and it is not open to us by reference to questions of policy to endeavour to give that language an arbitrary and limited meaning. The High Court of Calcutta took a somewhat similar view in regard to section 125, Criminal Procedure Code, which relates to the cancellation by District Magistrates of bonds for keeping the peace. [*Nabu Sardar* v. *Emperor* (1)].

I think, therefore, that the District Magistrate had jurisdiction to entertain the petitioner's application, but as the whole case is before us we should, in order to avoid delay, deal with the application ourselves in exercise of our powers of superintendence.

The learned Vakil's alternative contention is that the Sub-Divisional Officer had no jurisdiction to make an order under section 144 in a case where there was a *bona fide* dispute between two parties as to possession; that his order in this case was not an order under the section and that he had no jurisdiction to alter or rescind it; in other words, the District Magistrate had no jurisdiction to cancel an order even if satisfied that it was made without jurisdiction.

The conclusion is startling, and is clearly not supported by the section. It would, indeed, be a strange result if the District Magistrate could interfere where his subordinate had acted with perfect regularity and not when he had been guilty of clear error and irregularity by assuming jurisdiction where he had no jurisdiction. The words "made under this section," in clause 4 of section 144, clearly mean "legally made or purporting to be made under this section."

No other interpretation would make the section intelligible.

As for the contention that a *bona fide* dispute as to possession ousts the jurisdiction of Magistrates to make an order under section 144, we have been referred to a number of decisions of this Court which may possibly seem to give some support to that view but in this particular case it cannot be said that the point directly arises. Here it is clear that there was no *bona fide* dispute as to possession and that the petitioner was acting unlawfully in attempting to disturb a *zurpeshgi* mortgagee whose interest had been declared not to have passed by the sale at which petitioner purchased.

But as the question has been argued at some length and is of some importance I think that I should state my view of the law.

Section 144 is of general application and contains nothing which ousts the Magistrate's jurisdiction in cases of *bona fide* dispute as to possession of land. But where section 107 or section 145 will meet the requirements of the case, section 144 is not an appropriate remedy, and if it is found that the danger was not so imminent that it could not be otherwise averted, an order under section 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another, whose claim to possession is a mere pretence, is threatening to interfere with that possession, the Magistrate is clearly entitled to resort to the special summary procedure of section 144, if immediate prevention or speedy remedy is desirable. Sometimes it may even be necessary to take action against the party who is actually in possession, but in every case it must be shown that the conditions required by the section exist. What the Court deprecates is the habitual and unjustifiable use of section 144 as a substitute for sections 107 and 145.

The expression *bona fide* dispute as to possession is ambiguous. A party may be acting with perfect *bona fides* in asserting a right to possession though he has no justification in law for doing so. On the other hand, the materials before the Magistrate may show that evidence of possession on both sides is more or less equally balanced and that both are acting *bona fide*. Though jurisdiction to issue an order under section 144 exists in either case the question will arise wether the issue of an order under section 144 will not involve the recognition of conditions which will coerce the Magistrate into taking action under section 145. The language of section 145 seems mandatory but on this point I need express no final opinion here.

(1) 34 C. 1; 11 C. W. N. 25; 4 C. L. J. 428; 4 Cr. L. 399; 1 M. L. T. 368 (F. B.).

It remains to consider what order should now be passed by us.

We have, as stated above, decided not to insist upon the petitioner's invoking the aid of the District Magistrate but to dispose of the whole matter ourselves. As to our jurisdiction there can be no doubt.

Now, if it had been shown that upon the information before the Magistrate, the conditions required by section 144 had not been established so that the use of section 144 instead of section 107 or section 145 was a mere abuse of the process of the Court or that though made with jurisdiction the order had resulted in something akin to the denial of the right of fair trial, we should certainly have interfered in exercise of our powers of superintendence.

But here the proceedings disclose no such defects and consequently there is no reason whatsoever to interfere.

JWALA PRASAD, J.—I would dismiss this application.

True, this Court has powers under section 107 of the Government of India Act to set aside an order passed under section 144 of the Code of Criminal Procedure if the order is outside the scope of section 144, clause (1), is *ultra vires* or has resulted in the denial of the right of fair trial, as my learned brother, Mullick, J., puts it. Mr. Pal, who has argued the case on behalf of the petitioner has failed to make out any such ground. He relies upon what he calls "the recent delivery of possession through the Civil Court" (to quote the words of ground No. 1 in his petition) as giving him *khas* possession of the land in dispute. The petitioner, however, purchased the property in execution of a money-decree obtained in a Small Cause Court. At the time of the sale the opposite party filed an usufructuary mortgage-deed, dated the 8th November 1920, on the basis of which he alleged that he was in possession of the property. The fact was noted, and the petitioner purchased the property subject to the usufructuary mortgage. He could not possibly, therefore, obtain *khas* possession under the writ of the Civil Court, dated the 17th August 1921. Mr. Pal contends that inasmuch as he had obtained possession under O. XXI, r. 95, of the Code of Civil Procedure he must be deemed to have been put in [*khas*] possession of the land by the Civil Court. Assuming for the sake of argument that the writ of the Civil Court, *dakhaldehani*, purported to have been executed under O. XXI, r. 95, it cannot possibly have the effect of ousting the mortgagee whose rights were expressly declared and protested at the time of the sale. The writ of the delivery of possession upon which the whole contention of Mr. Pal is founded is of no avail to him, inasmuch as no actual possession of the land was delivered to his client. Mr. Pal then says that the *dakhaldehani* at least raised a *bona fide* dispute as to the possession of the property in question, which can only be enquired into in a proceeding under section 145 of the Code of Criminal Procedure. There is no substance in this contention. The petitioner purchased the property with full knowledge of the possession of the opposite party. His initial move in the matter by petitioning the Magistrate to take action under section 144 of the Code of Criminal Procedure was obviously an attempt to obtain an order of the Magistrate with a view to interfere with the lawful possession of the opposite party. He must thank himself if the Magistrate finding that the opposite party, and not he, was in possession of the land, passed an order against him under section 144 restraining him from interfering with the possession of the opposite party. His claim for possession was, therefore, a mere pretence and with a view to interfere with the undoubted possession of the opposite party. There was, therefore, no dispute, not to speak of a *bona fide* dispute, as to the possession of the land in question. The case clearly comes within the observations made in the cases of *Gouri Dutt* v. *Gobind Singh* (2), *Lukan Singh* v. *Fryag Singh* (3), *Jhaman Mahton* v. *Thakuri Mahton* (4), *Kali Pershad Gope* v. *Dhodhai Gope* (5) and *Nandkishore Sao* v. *Bikan Singh* (6).

(2) 53 Ind. Cas. 829; 1 P. L. T. 44; 20 Cr. L. J. 859.
(3) 57 Ind. Cas. 95; 1 P. L. T. 81; 2 U. P. L. R. (Pat.) 35; (1920) Pat. 124; 2 Cr. L. J. 575.
(4) 57 Ind Cas. 449; 1 P. L. T. 361; 21 Cr. L. J. 625; 2 U. P. L R. (Pat) 192.
(5) 62 Ind. Cas. 590; 22 Cr. L. J. 574
(6) 63 Ind. Cas. 856; 3 P. L. T. 570; 23 Cr. L. J. 200.

SHIB LAL SINGH v. KAMARUDDIN MANDAL.

In those cases it has been laid down that when one party is clearly in the wrong and threatens to usurp the rights of another, who is in actual possession of the land in dispute, the proper remedy is an order under sections 144 or 107 of the Code of Criminal Procedure. In such a case section 145 has no application inasmuch as there is no dispute as to the possession of land. The petitioner has, therefore, failed to show that the Magistrate's order was without jurisdiction. He has equally failed to show that there was any denial of a fair trial of the case. The order sheet of the Magistrate shows that he passed the order in question after having heard the parties and considered the documents produced by them. The finding of the Magistrate that the opposite party was in actual possession, and not the petitioner, is unimpeachable.

In this view it is unnecessary to decide as to whether in a *bona fide* dispute as to possession of the land the jurisdiction of the Magistrate under section 144 is ousted and that the only section applicable is section 145 of the Code. The point has been strenuously argued at the Bar and we have been invited to give our opinion. My learned brother, Mullick, J., has gone into this question. I would venture to give my own view on the point.

To me it appears that when in the course of a proceeding under section 144 of the Code of Criminal Procedure the Magistrate finds that there is a *bona fide* dispute as to possession of a land likely to cause a breach of the peace he is bound to immediately take action under section 145. Chapter XII comprising that section is headed, "Disputes as to immoveable property."

The section says:—

"Whenever a District Magistrate...is satisfied from a Police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof... .....he shall make an order in writing," and enquire into the fact of actual possession of the subject matter in dispute. The word "shall" is mandatory. Therefore, when the conditions laid down in the section, namely, (1) that a dispute likely to cause a breach of the peace exists, and (2) that the dispute is with respect to any land or water, the Magistrate is bound to take action under section 145 and to declare that the party found in possession shall be so maintained until evicted therefrom in due course of law, or if he is unable to decide which of the parties is in possession, to attach the subject matter under section 146. The object of section 145 is to provide effectively against a breach of the peace by making a permanent order regarding the possession of the parties.

Section 144 is a temporary measure which the Magistrate in his discretion may adopt for the immediate prevention, amongst others, of "a disturbance of the public tranquility, or a riot, or an affray." Now, the threatened breach of the peace may be in connection with land. In this sense the Magistrate may, in the first instance, pass an order under section 144 against both or any one of the parties threatening to commit a breach of the peace in connection with the possession of land. Therefore, the real question is not as to the power of the Magistrate in the first instance to issue an order under section 144 to prevent a breach of the peace concerning any land, but that what action the Magistrate ought to take after he comes to know at any stage of the proceeding under section 144 that the danger of a breach of the peace is due to a *bona fide* dispute and not a mere pretense as to the possession of land. The answer is that the Magistrate must then at once start an enquiry, under section 145 of the Code, either in continuation of the order passed under section 144 or in supersession thereof, inasmuch as the condition laid down for an enquiry under section 145 "that a dispute likely to cause a breach of the peace exists concerning any land," to quote the words of the section, will then have been satisfied. The section is imperative and enjoins upon the Magistrate to start an enquiry under that section whenever (directly) he "is satisfied from the Police report or otherwise, such as an enquiry under section 144, that a dispute (real and *bona fide*, and not a mere pretense) exists."

The Magistrate cannot refuse in such a case to initiate a proceeding under section 145, for in that case he will be refusing to

exercise jurisdiction vested in him by law and shirking the duty enjoined upon him by the section; in such a case the retention of the order under section 144 must lead to an irreparable injury to one of the parties who must be in actual possession of the land by his possession being interfered with, though for a temporary period, for one of the objects of section 144 is to prevent an obstruction, annoyance or injury, etc, to "any person lawfully employed." There will then be obviously an improper use of section 144 and an abuse of the process of the Court, which my learned brother, Mullick, J., lays down as affording valid grounds to vacate an order of a Magistrate under section 144. Therefore, though the Magistrate may initiate a proceeding under section 144 and issue an order under that section in disputes concerning land, he will be justified in converting the proceeding into an enquiry under section 145 when he finds that there is a *bona fide* dispute concerning the possession of land. In this case the Magistrate was informed by the petitioner that there was a danger of a breach of the peace concerning the possession of the land in dispute. He issued notice and made an enquiry as to possession on the date fixed. He came to the conclusion that the opposite party was in undoubted possession of the land and there was no dispute as to possession of the land in question. He, therefore, properly made his order under section 144 as against the petitioner. If, on the other hand, he had upon the evidence placed before him by the parties come to the conclusion that there was a *bona fide* dispute as to the possession of the parties, then he was bound to start an enquiry under section 145 either in continuation of his order under section 144 or in supersession thereof, for section 145 is the only section under which an enquiry in such a case, *i.e.*, where there is a danger of a breach of the peace concerning a dispute as to land, could be made. The continuance of the order under section 144, without forthwith instituting proceedings under section 145, as observed above, would then have been an improper use of section 144 and an abuse of the process of the Court and a refusal to exercise jurisdiction vested by Statute, and we would have directed the Magistrate to exercise his jurisdiction under section 145 of the Code. Section 144 is a larger and more general section than section 145. An order under that section can be made under various circumstances including a danger of a breach of the peace. Section 145 is of limited scope and applies only when there is a danger of a breach of the peace.

The former is discretionary; the latter is mandatory The latter provides for a thorough enquiry into the dispute as to possession of the parties which tends to a breach of the peace. Therefore, when the special condition of section 145 is fulfilled, section 144 then yields to section 145 in the same sense that when he finds that there is a real dispute tending to a breach of the peace the Magistrate is bound to institute a proceeding under section 145 and enquire into the possession of the parties irrespective of any order that he might have originally passed under section 144. This is a legal obligation cast upon the Magistrate under section 145.

I have carefully considered the authorities on the subject and particularly the language of sections 144 and 145, and the above appears to me to be the true scope and meaning of these sections. The language is clear and unambiguous. We have simply to interpret the sections as they are and cannot in any way limit or extend their scope on grounds of policy and other considerations which my learned brother, Mullick, J. rightly deprecates and which is not our function but that of the Legislature. In addition to the authorities already quoted, the following may also be referred to: *Parkar Mahton* v. *Ram Khelwan* (7), *Kanis Amina* v. *Emperor* (8), *Tarapada Bhattacharji* v. *Emperor* (9) and *Joyanti Kumar Mookerjee* v. *J. B. Middleton* (10).

The next question raised by Mr. Pal is as to power of the Magistrate under clause (4) of section 144 to rescind or alter any order made under clause (1) of the section by himself or any Magistrate subordinate to him or his predecessor-in-office. This question

(7) 11 C. W. N. 271; 5 Cr. L. J. 76.

(8) 47 Ind. Cas. 65; 3 P. L. J. 243; 4 P. L. W. 354; 19 Cr. L. J. 859.

(9) 55 Ind Cas. 193; 1 P. L. T. 72; 21 Cr. L. J. 241.

(10) 27 C. 780; 4 C. W. N. 562; 14 Ind. Dec. (N. S.) 514.

also does not really arise, for Mr. Pal did invoke the power of the Distrtiet Magistrate who refused to interfere with the order passed by the Sub-Divisional Magistrate. He has come to this Court. We have, no doubt, jurisdiction to deal with the order of the Magistrate and to interfere or set it aside in case it was without jurisdiction or resulted in a denial of a fair trial. No doubt, we insist that a party should exhaust all his remedies in the Courts below before he comes to this Court. This only is a practice and a very desirable one; but there is no absolute bar in law to the party coming direct to us under section 107 of the Government of India Act when there is no right of appeal. Even if it was necessary that Mr. Pal should have gone to the District Magistrate, which he actually did, and the District Magistrate, whether for reasons good or bad, refused to interfere, I do not know why he has raised this question now. In ground No. 2 of his petition to this Court he has attacked the order of the District Magistarte of the 3rd of May as being without jurisdiction and has urged that "the learned District Magistrgte ought to have interfered under section 144, clause (4) of the Code of Criminal Prosedure even on the merits of the case," to use the exact wording of the petition; yet Mr. Pal curiously enough argues that the District Magistrate had no power to interfere with the order of the Sub-Divisional Magistrate inasmuch as the order was attacked as being without jurisdiction. Why Mr. Pal is anxious to limit the power of the District Magistrate is better known to himself, but the words in that section "rescind or alter" are wide enough to vest the District Magistrates mentioned in that clause with unlimited power to deal with an order passed under clause (1) of the section on the question of jurisdiction as well as upon the merits. Mr. Pal was trying to limit the meaning of the word "rescind" which it naturally bears. The word "rescind" literally means "*re*" again, "*scindere*" to cut off, to cut short, to remove. In the Imperial Dictionary the word "rescind" is said to bear the following meaning: "to abrogate, to revoke, to annul, to re-call, to reverse, to vacate, by the enacting authority or by superior authority; as to rescind a law, a resolution or a vote; to rescind an edict or decree, to rescind a judgment." This makes quite clear the sense in which the word has been used in clause (4) of section 144 of the Code of Criminal Procedure. The Magistrate himself who passes an order under clause (1) of the section, or his superior authority can set aside or vacate the order when it is found to be void *ab initio* for want of jurisdiction, or is bad on merits or is rendered unnecessary by subsequent event, such as the danger of a breach of the peace ceasing or for any other cause. Under this clause the Magistrate, who issues an order under clause (1) in the first instance, often discharges or sets aside the same against both or one of the parties as the case may be, or alters by drawing up a proceeding under section 145 of the Code when he finds that the case is a fit one for an enquiry under that section. The clause, therefore, is not capable of bearing the limited meaning sought to be imposed upon it by Mr. Pal. I confess that I had not so clear a view of the clause when in the case of *Madan Lal* v. *Fulchand Ram* (11) I followed the view expressed in the case of *Lala Gopal Nath Sahi* v. *Rai Bahadur Baldeo Das Birla*, Criminal Revision No. 299 of 1919. The point arose only incidentally in that case and my attention was not drawn to the Full Bench decision of the Calcutta High Court in the case of *Nabu Sardar* v. *Emperor* (12) and the case of *Mare Gowd*, *In re* (12), where a similar clause in section 107 of the Code of Criminal Procedure has been interpreted to have a wide meaning. I, therefore, agree with the view of the learned Chief Justice and Mullick, J., on this point.

W. C. A.

Rule discharged.

(11) 63 Ind. Cas. 621; 2 P. L. T. 484; 22 Cr. L. J. 685.

(12) 21 Ind. Cas. 146; 37 M. 125; 25 M. L. J. 450; 14 Cr. L. J. 548; (1913) M. W. N. 715; 14 M. L. T. 328.

LOCAL GOVERNMENT, C. P. v. MADHOPATWARI,

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 21 B OF 1922.

July 10, 1922.

Present :—Mr. Batten, J. C.

LOCAL GOVERNMENT, C. P.—APPELLANT

versus

MADHO PATWARI—ACCUSED.

Penal Code (Act XLV of 1860), ss. 21 (10), 24, 403, 405—"Wrongful loss"—"Wrongful gain"—Temporary wrongful loss or gain, meaning of—Criminal breach of trust, what constitutes—Patwari, whether "public servant."

Temporary wrongful loss and temporary wrongful gain are within the meaning of "wrongful loss" and "wrongful gain", contained in section 24 of the Penal Code. [p. 58, col. 1.]

Reading sections 403 and 405 of the Penal Code together, it is clear that criminal breach of trust is a species of criminal misappropriation, being a criminal misappropriation by a person entrusted with the property misappropriated, and as regards criminal misappropriation, a dishonest misappropriation for a time only is misappropriation. The same principle applies to temporary misappropriation [p. 15, cols. 1 & 2]

Emperor v. *Tulsidas Chhaganlal*, 8 Bom. L. R. 951; 5 Cr. L. J. 5, referred to.

Under section 158, Land Revenue Code, cesses can be collected as if they were land revenue, and as it is within the duties of a *Patwari* to collect land revenue and cesses due on land in his village he is a public servant within the meaning of section 21, clause (10) of the Penal Code. [p. 159, col. 1.]

Appeal from the judgment and finding of the Sessions Judge, Akola, in Criminal Appeal No. 289 of 1921, dated the 15th March 1922.

Mr. G. P. Dick, for the Appellant.

Messrs. *A. V. Khare* and *D.T. Mangalmurti*, for the Accused.

JUDGMENT.—This is an appeal under section 417, Criminal Procedure Code, made under the directions of the Local Government against the order of the Additional Sessions Judge, Akola, in appeal, acquitting Madhorao *Patwari* of the offences under section 409, Indian Penal Code, of which he had been convicted by the Sub-Divisional Magistrate.

Madhorao, or Madho son of Trimbak was *Patwari* of Kuram, a village on the Railway in Murtizapur Taluk. The charge against him was of three offences under section 409, Indian Penal Code. The first charge was that he collected Rs. 16-0-3 cesses and process-fee from Abdul Aziz on 21st August 1921 but failed to remit the money to the Treasury, and did not pay it until 20th October 1921 when he paid the money to the Tahsildar. The second charge relates to a sum of Rs. 9-5-9 collected from Mohammad Khan on 21st August, but not paid until 20th October when the money was paid to the Tahsildar. The third charge relates to a sum of Rs. 2-14-6 collected from Ismail Beg and paid by Madho to the Tahsildar on 20th October. This amount is said to have been collected from Ismail Beg about the 15th August. Madho admits that the amounts covered by the first two charges were collected by him on the 21st August, but as regards the money collected from Ismail Beg he says it was collected only a few days before he paid it to the Tahsildar. The Additional Sessions Judge finds that the accused did spend the money for his own use but that this action cannot be called dishonest. The learned Judge says: "I have read Exhibit P-12 and Exhibit P 13 and do not find anything therein to show that the accused admitted that he committed criminal breach of trust. In these letters he asked for mercy and in the first letter he begs to be excused till Dasera is over. He obviously suggested that he would pay up the amount after Dasera is over. Exhibit P 3 inquiry papers purport to contain statement of the accused before the Tahsildar. The statement is not formally proved and it cannot, therefore, be admitted in evidence but section 91 of the Evidense Act is no bar to admit Tahsildar's statement which proves appellant's admission to him with rerpect to having spent the money for his own use. Exhibits P-12 and P 13 would seem to suggest that the accused was in pecuniary difficulty and had probably spent the amount for his personal use, but they do not go to show that he had spent the amount for his own use dishonestly within the meaning of the term as defined in section 24, Indian Penal Code. There is nothing to show that he had a dishonest intention when he spent the money for his own use. He could, no doubt, retain the money realized with him for some time before depositing it in the Treasury. If he thus in the meantime spends the amount for

his own use intending to make the deposit out of the money he may have or expect to get shortly after, it could not be said that he committed criminal breach of trust if he made the deposit in time. Similarly, if he for any reason was unable to get the money expected or to raise any expected loan for making the deposit and there occurred some delay could it be said that the offence of criminal breach of trust was committed. In my opinion no dishonest intention can be safely attributed to the appellant simply because he retained money for two months in the absence of any distinct act showing such intention and in the absence of any rule or order requiring him to pay the amount to the Patel or to deposit it in the Treasury within a specified period."

In other words, the Additional Sessions Judge has held that the accused did temporarily appropriate the money to his own use but that, as it is not proved that he intended to misappropriate the money permanently, his conduct was not dishonest and does not amount to criminal breach of trust. This is a most dangerous doctrine, and would excuse the theft of money if the thief intended or hoped to replace it. In appeal it is urged on behalf of the Local Government "that the view of the law laid down by the learned (Additional) Sessions Judge is wrong to the effect that if a person entrusted with money is in pecuniary difficulty and uses the trust money for himself, that is not using it dishonestly."

Within the meaning of section 24, Indian Penal Code, wrongful loss covers temporary wrongful loss, and wrongful gain covers temporary wrongful gain. As a matter of fact, the record of the proceedings before the Tahsildar is formally proved. The accused has distinctly admitted to the Tahsildar and in his letter to the Naib Tahsildar, Exhibit 14, which was written before he paid up the money to the Tahsildar, that he had spent the money which he was holding as trustee for the Local Board. If he had died before he refunded the money there would have been a total loss of the money to its rightful owner. If sections 403 and 405 of the Penal Code be read together, it will be seen that criminal breach of trust is a species of criminal misappropriation, being criminal misappropriation by a person entrusted with the property misappropriated, and as regards criminal misappropriation it is distinctly laid down that a dishonest misappropriation for a time only is misappropriation. The same principle applies to temporary misappropriation by a person entrusted with the property. In *Emperor* v. *Tulsidas Chhaganlal* (1) it has been held that the offence of criminal breach of trust is committed even when the act of the accused was to cause wrongful loss for a time only.

For the accused it is urged that mere delay in remitting money to the Treasury does not necessarily involve breach of trust, and rulings to that effect have been cited. These rulings refer to cases where the delay was put forward as the sole proof of dishonest intention, but in this case we have the clear admission that the accused used the money for his own expenses, which in itself amounts to dishonest use of the money. For the time the money was not available to its rightful owner It is, therefore, clear to me that as regards the money to which these admissions relate the accused Madho is guilty of the offence of criminal breach of trust. There is no doubt that the admissions cover the money referred to in the first two heads of the charge and the accused is guilty of criminal breach of trust as regards these sums. As regards the third head of the charge the circumstances are different. The money paid by Ismail Beg was for cesses of 1921-22, and the enquiry of the Naib-Tahsildar on 5th September was only as regards the arrears of cesses of 1920-21. The letter to the Naib Tahsildar Exhibit P.-12, did not relate to this item, the man who had paid this money was not examined by the Naib-Tahsildar and produced no receipt, and the Tahsildar on the 20th October made no enquiry about this item, and the admission to the Tahsildar did not refer to this amount. It was the accused who volunteered to the Tahsildar that he had collected this amount and not yet paid it in. Moreover, on carefully examining the evidence I am not satisfied that the money was paid to the accused before

(1) 8 Bom. L. R. 951; 5 Cr. L. J. 5.

LOCAL GOVERNMENT, C. P. v. MADHO PATWARI.

the date on which he admits it was paid. The money not being the arrear of the previous year the Naib-Tahsildar had not passed any special order regarding it, it was paid voluntarily by Ismail Beg, and as there is no written record of the date of collection, the receipt admittedly given by the accused being lost, I do not consider the evidence that it was paid long before the 20th October is convincing. I decline to interfere with the order of acquittal as regards this head of the charge.

The argument in the lower Appellate Court that the offence does not amount to criminal breach of trust by a public servant has not been repeated in this Court. The question is somewhat academical since the offence could be sufficiently punished under section 406, Indian Penal Code. But I have no doubt that the offence was committed by the accused in his capacity of a public servant. Cesses can, under the Land Revenue Code, section 158, be collected as if they were land revenue, and it is within the duties of a *Patwari* to collect land revenue and cesses due on land in his village. Under the tenth clause of section 21, Indian Penal Code, an officer whose duty it is to collect cesses is a public servant. Though it may not have been the express duty of the accused to collect cesses from people resident in his village for lands belonging to other village, yet under the orders of the Naib-Tahsildar the accused accepted this function and the person who paid him the cesses paid them to him in his capacity of a public servant. Moreover, and this is a point not noticed by the lower Courts, of the cesses collected by the accused the sum of Rs. 1-0-3 included in the second head of the charge, was cess due on land in the accused's own village. It may be noted that Exhibit P-14 refers to this item and the fact that this money was due for Kuram explains the fact that the letter does not refer to the other sums collected on the same date. It is explained in this Court, no doubt truly, that when writing Exhibit P-14 the accused forgot that the money collected from Mohammad Khan included cesses due for 1921 22 on land in Kuram.

All the circumstances mentioned in the judgment of the Additional Sessions Judge, though not grounds for acquittal, are grounds for holding that a very serious view need not be taken of the conduct of the accused. It is quite certain that he did not intend permanently to misappropriate the money. He had given receipts for it, and if he had been present on the 5th September and the Naib-Tahsildar had questioned him, he would have admitted having collected the money, and would probably have been able to raise the money just as he did on the 20th October when he paid it to the Tahsildar. The Tahsildar has not been carefully questioned, but it would appear that though the appellant had not the money with him when questioned by the Tahsildar, he produced it at the Railway Station before the Tahsildar left. The Magistrate's main reason for imposing so heavy a sentence as rigorous imprisonment for one year appears to have been his belief that the accused showed Abdul Aziz and Mohammad Khan as defaulters for the cesses of 1920 21 in the list said to have been given to the Naib-Tahsildar on 5th September. As the learned Standing Counsel admits, there is no evidence whatever that this was the case, and as the Additional Sessions Judge points out it is extremely unlikely that the accused would have shown them as defaulters on 5th September when he knew he had given them receipts on 21st August. But the occasion of the accused acting as he did was the irregular action of the Naib-Tahsildar, apparently approved by the Tahsildar, in throwing on the *Patwari* of Kuram the task of collecting cesses not due on lands in his village. The collection of such cesses was not within his regular duties, and the returns he had to render were not designed to cover such collections. There is no evidence, moreover, that between the 21st August and 20th October the accused made any remittances to the Treasury in which he omitted to include the cesses recovered from these two persons.

The duties of *Patwaris* are prescribed by Notification under the Patels and Patwaris Law and are to be found in Berar Revenue Book, Circular V. 4 (page 219, Berar Land Revenue Manual, Volume II). The wording of the rules is not very precise, but it seems to be meant that a *Patwari* has no responsibility for any work arising outside his circle. Naosal, the village for which the cesses in question (except Re. 1 0-3) were recovered, is not one of the accused's villages.

He was, therefore, not legally bound to recover these cesses.

Land revenue and cesses are recoverable under section 119, Berar Land Revenue Code, the rules being at pages 144 onwards of Volume I of the Berar Land Revenue Manual. Regular cases were stated for the recovery of the cesses in arrears for 1920-21, but though the Tahsildar says the records are complete, it is clear from the evidence of the Naib Tahsildar that the recoveries were made by "executive action," that is, the *Potwari* was ordered in writing (orders not produced) and verbally to recover the amounts without reference to the revenue cases and to the processes authorised by law. I am informed that this is a practice which is much too common in Berar.

The main object of this appeal has been effected by it being laid down that the view of the law taken by the Additional Sessions Judge is wrong and dangerous. A severe sentence is not in the circumstances called for, especially as the *Patwari* has lost his appointment. The accused has already suffered imprisonment under his sentence for one day. In addition to this he has been 47 days under arrest, 41 days before conviction and 6 days after appeal. I convict the accused, Madho, son of Trimbak, under section 409, Indian Penal Code, for the two offences contained in the first two heads of the charge, and sentence him to suffer the period of the imprisonment already undergone, *viz.*, one day under each head, the sentences to run concurrently. He will also pay a fine of Rs. 25 under each of the first two heads of the charge, namely, Rs. 50 in all, or in default will suffer rigorous imprisonment for one month for each offence.

G. R. D. & W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1718 OF 1919.

March 29, 1920.

Present:—Mr. Justice Wilberforce.

MUHAMMAD HUSSAIN—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Jurisdiction—Non-British subject retaining stolen property in Native State—Theft committed in British India—Criminal Procedure Code (Act V of 1898), s. 180, application of.

A non-British subject retaining property in a Native State, stolen from British India, is not amenable to the jurisdiction of British Courts, and section 180 of the Criminal Procedure Code does not confer any such jurisdiction on them.

Queen-Empress v. *Kirpal Singh*, 9 A. 523; A. W. N. (1887) 131; 5 Ind. Dec. (N. S.) 787, *Samanda* v. *Empress*, 22 P. R. 1888 Cr, *Hazarmir* v. *Empress*, 16 P. R. 1880 Cr. followed.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Jullundur, dated the 16th October 1919, modifying that of the Magistrate, First Class, Jullundur, dated the 29th September 1919.

Mr. *Ghulam Rasul*, for the Petitioner.

JUDGMENT.—In this case one Muhammad Hussain was prosecuted under section 457, Indian Penal Code, for an offense of house-breaking which took place in Jullundur District. The learned Sessions Judge considered that no offense of house-breaking was made out but that the accused was guilty of an offence under section 411. The applicant is a subject of the Kapurthala State and the stolen property was found in his possession in that State. He has applied for revision of the order of the Sessions Judge on the ground that the British Courts had no jurisdiction.

The Sessions Judge was of opinion that section 180 of the Criminal Procedure Code conferred such jurisdiction. I can, however, find no authority in support of the view that a non-British subject retaining stolen property in a Native State is amenable to British Courts. There are many clear authorities to the contrary, namely, *Queen-Empress* v. *Kirpal Singh* (1), *Samanda* v. *Empress* (2) and *Hazarmir* v. *Empress* (3).

On these authorities I am compelled to hold that the Jullundur Courts had no jurisdiction and accept the application and acquit the accused.

R. N.

Revision accepted.

(1) 9 A. 523; A. W. N. (1887) 131; 5 Ind. Dec. (N. S.) 787.
(2) 22 P. R. 1888 Cr.
(3) 16 P. R. 1880 Cr.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 931 OF 1920.

February 10, 1922.

Present :—Mr. Justice Suhrawardy and Mr. Justice Cuming.

RAM TARAN TEWARY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Srimati KUMEDA DASI—DEFENDANT—RESPONDENT.

Abwab—*Stipulation for delivery of* ghee *and goat contained in* mourasi mokurrari kabuliyat, *if enforceable—"Goat and* ghee" *forming no part of the rent payable—Bengal Putni Taluks Regulation (VIII of* 1819*)*, *s.* 3—"*Engagements*," *meaning of.*

A registered *mourasi mokurrari kabuliyat* executed in 1877 recited that "within the aforesaid Mouza you have granted me a *potta* of 12 *bighas* of land at an annual *jama* of Rs. 6 and Rs. 24 as premium," and after reciting how the money should be paid and in what instalments, the *kabuliyat* stated that the landlord should have right to the minerals, etc, and lastly there was the following clause:—"Also it should appear that I would deliver 1 seer of *Shyama ghee* and one kid every year." No amount was mentioned as payable in lieu of the *ghee* and goat in case of default. In a suit for rent on the basis of the *kabuliyat* :

Held, (on the assumption that Regulation VIII of 1819 controlled all the incidents of the tenure in question) that the stipulation regarding the *ghee* and goat was, in its term and effect, the imposition of an *abwab* and as such not enforceable. [p. 164, col. 2.]

That the "goat and *ghee*" did not form part of the rent and the stipulation regarding delivery thereof was not legalised by Regulation VIII of 1819, but was subject to the law relating to '*abwabs*' in force at the time of the creation of the lease. [p. 163, col. 2.]

The word "engagements" mentioned in section 3 of the Bengal Putni Taluks Regulation connotes engagements as to rent and other terms connected therewith. [p. 163, col. 2.]

Appeal against a decree of the Subordinate Judge, Assansole, Burdwan, dated the 13th of January 1920, affirming that of the Munsif, Assansole, dated the 5th of December 1918.

FACTS appear from the judgment.

Babu *Pyari Mohan Chatterjee*, for the Appellants.—The plaintiffs are the appellants. The appeal arises out of a suit for a rent. Both Courts have given a partial decree. The suit was brought on the basis of a *mourasi mokurrari kabuliyat* of the year 1877. Rent was fixed at an annual *jama* of Rs. 6 and also the tenant agreed to pay that he would deliver 1 seer of *ghee* and one kid every year.

I submit the *ghee* and the goat are not *abwabs* but are part of the consideration for which the lease was granted. The tenancy is governed by section 3 of Regulation VIII of 1819 as we are *putnidars*. The lease was created before the Bengal Tenancy Act came into being. Therefore, although section 179 of that Act does not apply, still our position is the same even if the *ghee* and the goat be considered *abwabs*. We would be entitled to them. Section 3 of the Putni Regulation makes all engagements between a *putnidar* and his lessees on whatever terms, binding on the parties. Refers to *Ebbs* v. *Boulnois* (1). Section 3 of the Putni Regulation creates an exception to the general rule against *abwabs*. Refers to *Assanulla Khan Bahadur* v. *Tarthabashini* (2), *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (3).

Babu *Kanai Lal Shaha*, for the Respondent.—The stipulation for the payment of *ghee* and goat are clearly illegal. I submit all impositions upon all classes of tenants, including a permanent tenure-holder, in excess of the specified rent are illegal. Payments over and above the actual rent fixed are *abwabs*. Refers to *Aparna Charan Ghose* v. *Karam Ali* (4), *Tilukhdari Singh* v. *Chulhan Mahton* (5), *Radha Prosad Singh* v. *Bal Kowar Koeri* (6).

As regards their second point I submit the case is not governed by section 3 of the Putni Regulation but by section 3 of Regulation V of 1812. The plaintiffs have not proved their status as *putnidars*. Refers to *Beejoy Singh* v. *Krishna Behari Biswas* (7). The Legislature clearly did not intend that the Putni Regulation should restrict the application of the general law of *abwabs* as laid down in section 3 of Regulation V of 1812. I submit the appeal ought to be dismissed.

Babu *Pyari Mohan Chatterjee* replied in brief.

(1) (1875) 10 Ch. App. 479 at pp. 484; 44 L. J. Ch. 691; 33 L. T. 342; 23 W. R. 820.
(2) 22 C. 680; 11 Ind. Dec. (N. S.) 453.
(3) 26 C. 611; 3 C. W. N. 603; 13 Ind. Dec. (N. S.) 993.
(4) 4 C. L. J. 527; 10 C. W. N. 527.
(5) 17 C. 131; 16 I. A. 152; 13 Ind. Jur. 251; 5 Sar. P. C. J. 408; 8 Ind. Dec. (N. S.) 625 (P. C.).
(6) 17 C. 725; 8 Ind. Dec. (N. S.) 1026.
(7) 41 Ind. Cas. 561; 21 C. W. N. 959; 45 C. 259.

RAM TARAN TEWARY v. KUMEDA DASI.

JUDGMENT.—The facts of this appeal are these.

The plaintiffs sued to recover arrears of rent for the years 1321 to 1324 B. S. with cesses and damages on a registered *mauras mokurrari kabuliyat* executed in 1877.

The lease recites that "within the aforesaid Mouza you have granted me a *patta* of 12 *bighas* of land at an annual *jama* of Rs 6 and Rs. 24 as premium." After reciting how the money should be paid and in what instalments, the lease states that the landlord should have right to the minerals, etc., and, lastly, the words appear: "Also it should appear that I would deliver 1 seer of *shyama ghee* and one kid every year." No amount is mentioned as payable in lieu of the *ghee* and goat in case of default.

The Trial Court held that the plaintiff was entitled to recover rent at the rate of Rs. 6 per annum and that he was not entitled to recover the *ghee* and the goat.

This finding was upheld by the Appellate Court on the ground that the *ghee* and goat are not mentioned as part of the rent.

The plaintiffs have appealed.

They contend that the *ghee* and goat are part of the consideration for which the lease is granted and are not *abwabs*. They argue that they are *patnidars* and so the tenancy is governed by terms of section 3 of Regulation VIII of 1819 and that, therefore, though section 179 of the Bengal Tenancy Act does not help them, because the lease was created before the passing of the Tenancy Act, still their position under the Putni Regulation is the same as it would be under the Tenancy Act. So that, even if it be considered as an *abwab* and not part of the rent, they are still entitled to get it.

The respondent contends that the case is not governed by section 3 of the Regulation referred to but by section 3 of Regulation V of 1812 and that there is nothing to show that the plaintiffs are *putnidars*. With regard to the last objection of the respondent it appears that in the plaint the plaintiffs describe themselves as *putnidars* which averment has not been traversed in the written statement. We, therefore, accept the plaintiffs' statement that they are *putnidars* and proceed to determine the case on that basis.

A number of cases have been cited at the Bar, of which we will notice the following:—

In the case of *Krishna Chandra Sen* v. *Sushila Soondury Dassee* (3), it was held that, even if the imposition were an *abwab* still it was recoverable. This case was governed by the Bengal Tenancy Act and it was held that section 74 did not control section 179 of the Act. This case has no application to the present case.

The next case we have been referred to is the case of *Aparna Charan Ghose* v. *Karam Ali* (4). This was a case of a permanent tenancy created by a lease dated 1260. In that case it was held that section 10 of Act X of 1859 or section 3 of Regulation V of 1812 made all impositions upon all classes of tenants, including a permanent tenure-holder, in excess of the specified rent illegal.

The next case to be considered is the case of *Tilukhdari Singh* v. *Chuthan Mahton* (5), a decision of the Privy Council. In that case it was decided that payments over and above the rent were *abwabs* and could not be recovered. The Judicial Committee do not seem to make any distinction between what was arbitrary or uncertain and what was not.

This case was discussed in the case of *Radha Prosad Singh* v. *Bal Kowar Koeri* (6), and Sir Comer Petheram, C. J., (page 740*), considered that the meaning of section 74 of the Bengal Tenancy Act was that no imposition under any name whatever shall be recovered from the tenant for or in respect of the occupation or tenure beyond the sum fixed for rent. O'Kinealy, J., in considering the meanig of the expression "*abwab*," states: (page 745*) "this, too, I think, is the sense in which *abwabs* were considered as arbitrary or indefinite in the old Regulations —arbitrary, in the sense they were unauthorized by law,—indefinite, in the sense that, though levied in a certain proportion to and upon the original assessment,...there was no definite rule guiding the Zemindar in fixing the proportion they bore to the produce of the land."

All these cases discussed and determined the law relating to *abwabs* and illegal taxations and are of not much help to us

*Pages of 17 C.—[*Ed.*].

in the consideration of the question of the correct interpretation of section 3 of Regulation VIII of 1819 with reference to the law then in force prohibiting illegal impositions.

We may note that when the lease in the present case was created, *i.e.*, in 1877, the law relating to illegal impositions was contained in sections 54 and 55 of Regulation VIII of 1793, section 3 of Regulation V of 1812, section 10 of Act X of 1859 and section 11 of Bengal Act III of 1869.

The appellants submit that the second clause of section 3 of the Patni Regulation overrides all previous prohibitions against such imposition and makes all engagement between a *putnidar* and his lessees, on whatever terms, binding on the parties to the same and hence even the stipulation regarding the payment of *abwabs* is enforceable as against the latter, being one of the terms on which the lands are let out. It is contended, on the principle that a special provision qualifies a general one [*Ebbs* v. *Boulnois* (1)], that this clause by its general terms abrogated all previous restrictions as to *abwabs* so far as relating to *putni* tenures. We may mention here that it is not seriously contended, in view of the clause imposing the delivery of the goat and *ghee* standing so completely isolated from the terms relating to the rent proper, its mode of payment and the penalty attaching to non payment, and appearing in the lease by way of post script as it were, that the goat and *ghee* are part of the rent as such, payable in respect of the demised premises, but it is urged that being part of the consideration of letting such stipulation is enforceable by virtue of the second clause of section 3 of Regulation VIII of 1819.

Regulation VIII of 1819 was enacted to govern a class of tenures known as *putni taluks*, the nature of which the preamble to the Regulation describes in these terms: "The character of which tenure is that it is a *taluk* created by the Zamindar, to be held at a rent fixed in perpetuity by the lessee and his heirs for ever." Section 2 of the Regulation validates leases fixing *rent* in perpetuity though in contravention of the provisions of Regulation XLIV, 1793. This is followed by section 3 which confers on the Zamindar and the *putnidar* the right of letting and under-letting on any terms. Clause 1 of the section recognizes the validity of "the terms of the engagements" between the Zamindar and the *putnidar* and clause 2 makes any engagements between the *putnidar* and his sub-lessee binding on both parties. Section 8 of the Regulation authorises the Zamindar to bring the *taluk* to sale for "any arrear of *rent*." There is no provision in the Regulation for enforcing any "terms of engagement" other than the payment of rent. Reading the Regulation as a whole, and considering its policy and scheme, it seems to us that the "engagements" mentioned in section 3 of the Regulation connotes engagements as to rent and other terms connected therewith. If the "goat and *ghee*" mentioned in the lease under consideration is not part of rent, as we hold it is not, the stipulation regarding delivery thereof is not legalized by Regulation VIII of 1819 but is subject to the law relating to "*abwabs*" in force at the time of the creation of the lease. It is hardly necessary to observe that if the above articles are not to be considered rent or part of the rent reserved by the lease, they are *abwab* or illegal cess.

The question as to whether section 3 of the Patni Regulation creates an exception to the general rule against *abwabs* as enunciated by Regulation V of 1812 and other enactments has not been yet directly raised in this Court. The reason for it may be that the answer to it was deemed too obvious for serious consideration. There have been cases in this Court in which the question whether certain impositions in a *putni* lease were *abwab* or not came up for consideration and was elaborately discussed. It will suffice to notice two of them.

In the case of *Assanulla Khan Bahadur* v. *Tirthabashini* (2) the question was whether *chaukidari* tax payable by the *putnidar* under the Patni Settlement is an illegal cess. After a careful review of various enactments relating to *abwabs* and the case-law on the point, it was held by Macpherson and Banerjee, JJ., that as *chaukidari* tax was part of the ground rent quite as much as the actual rent, it was not an *abwab* and was, therefore, recoverable. At page 633* of the Report their Lordships remark as follows:—"A stipulation for the payment of such an amount cannot, we think, be regarded as one for the

*Page of 22 C.—[*Ed.*]

'imposition of an arbitrary or indefinite cess' within the meaning of section 3 of Regulation V of 1812, or for an imposition 'under the denomination of *abwab mathaut* or other like appellation in addition to the actual rent' within the meaning of section 74 of the Bengal Tenancy Act, for this simple reason, that the imposition here depends primarily, not upon the will of the Zemindar, but upon law of the land (Bengal Act VI of 1870). It is this Act which imposes the liability on the Zemindar, and the Zemindar merely stipulates with the *putnidar* when granting the *putni* that the latter should, among other sums, regularly pay him the amount levied from him under the Act." These observations clearly indicate that, had the imposition been one dependent upon the will of the Zemindar it would have been an imposition of an arbitrary or indefinite cess illegalised by Regulation V of 1812. It was not contended there that that Regulation was superseded by the Putni Regulation.

The next case demanding reference is the case of *Bejoy Singh* v. *Krishna Behari Biswas* (7). In that case the tenant, in the *kabuliyat* which was in respect of a *putni* tenure executed in the year 1882, stipulated to pay a sum of Rs. 15 every year in the month of Bhadra as the *mamuli* (usual) for the Iswar Thakur. This covenant was contained in a clause separate from that stipulating the yearly rent. The question was whether this sum of Rs. 15 was an *abwab* and irrecoverable. The Court held that this sum was not intended to be part of the consideration for the use and occupation of the land or as part of the rent and being an *abwab* was irrecoverable. As appears from the judgment of the Chief Justice it was agreed by both sides that the matter was governed by section 3 of Regulation V of 1812. Chatterjee, J., in a considered judgment in that case, held that the sum of Rs. 15 mentioned in the *kabuliyat* did not form part of the consideration for the lease, and even if it did, it did not form part of the rent. This observation affords an answer to the contention of the appellants before us that the stipulation for the delivery of the goat and *ghee* is a part of the consideration though not of rent.

Subsequent to Regulation VIII of 1819 the law against illegal cesses was re-enacted, though in indirect terms by section 10, Act X of 1859 and section 11, Bengal Act VIII of 1869. Both these Acts were of general application and having made no reservation in cases of Putni Settlements, there is no reason for holding that they did not apply to tenures or holdings created under the Putni Regulation. These enactments furnish ample ground to strengthen the supposition that the Legislature did not intend that the Putni Regulation should restrict the application of the general law against *abwabs* as embodied in section 3 of Regulation V of 1812. Even if it were otherwise, the provisions of Act X of 1859 and Act VIII of 1869, Bengal Council, which were applicable to permanent leases [*Aparna Charan Ghose* v. *Karam Ali* (4)] would govern section 3 of the Putni Regulation.

It is to be understood that we have proceeded on the assumption that Regulation VIII of 1819 controls all the incidents of the tenure in question, a point which, in view of the interpretation we put on the law, we have considered unnecessary to discuss.

For the reasons above, we hold that the stipulation regarding the *ghee* and goat is, in its term and effect, the imposition of an *abwab* and as such not enforceable.

The result is, that this appeal fails and is dismissed with costs.

B. N. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 70 OF 1921.

February 2, 1922.

Present:—Pandit Kanhaiya Lal, J. C.

DARYAO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALI SINGH—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Mortgage—Legal necessity—Necessity for particular rate of interest and terms—Onus—Redemption postponed for long period—Reversioners of widow's husband, if bound—Suit before expiry of period, if competent.

In case of a mortgage made by a Hindu widow of her deceased husband's immoveable property, it is incumbent on the mortgagee to show not only that there was a necessity to borrow but also that it was

not unreasonable to borrow at some such high rate and upon such terms, and if this is not shown, the rate and terms would not stand, even though the charge might be upheld. [p. 166, col. 2; p. 167, col. 1.]

Nawab Nazir Begam v. *Rao Raghunath Singh*, 50 Ind Cas. 434; 17 A. L. J. 591; 36 M. L. J. 521; 23 C. W. N. 700; 21 Bom L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49; 46 I. A. 145; (P. C.), relied upon.

Where in a mortgage executed by a widow the terms and conditions are such as to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor and in fact to render redemption practically impossible, they are clearly oppressive and unreasonable, intended more to fetter the right of redemption than to secure any advantage to the mortgagor and a reversioner of widow's husband is not bound by them and can bring a redemption suit before the expiry of the stipulated period. [p. 167, col. 1.]

Nabakishore Mandal v. *Upendrakishore Mandal*, 65 Ind Cas. 305, 20A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311 (P. C.), referred to.

Appeal from a decree of the Subordinate Judge, Sitapur, dated the 18th October 1921.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the Appellants.

Mr. *J. P. C. Bhattacharji*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to a two-annas share of the village Raipur, which belonged to Sheo Singh. On the 27th June 1883 Sheo Singh and his brother, Madho Singh, mortgaged their four-annas share of the village Raipur and one-anna share of the village Phulpur in favour of Jawahir Singh for Rs. 1,800, which was repayable with interest at 1 per cent. per mensem within ten years. It was agreed that, if the interest actually accruing due was not paid at the end of every year or if the entire money due on the mortgage was not re-paid within ten years, the mortgagee would be entitled to obtain possession of the mortgaged property (Exhibit 1). Sheo Singh subsequently died and was succeeded by his widow, *Musammat* Bitana. *Musammat* Bitana and Madho Singh paid up a portion of the money due on the mortgage by a sale of their share in the village Phulpur (Exhibit A 2). A sum of Rs. 900 still remained due by them, for the satisfaction of which they executed a fresh deed of mortgage in favour of Jawahir Singh on the 15th July 1890, mortgaging a one-anna share of the village Raipur and agreeing to re-pay the same with interest at 1 per cent. per mensem within two years and in case of failure to deliver possession of the mortgaged property (Exhibit 2).

On 5th December 1896 Madho Singh executed a fresh mortgage-deed in favour of Jawahir Singh about his half share of the money due on the above mortgage (Exhibit 3). Jawahir Singh sued *Musammat* Bitana for the remainder of the money due on that mortgage and obtained a decree on the 12th December 1898 for the sale of a six-pies share of the village Raipur (Exhibit 4). The amount due on that decree was Rs. 1,268-4-0. On the 15th June 1899 *Musammat* Bitana executed a deed of mortgage in favour of her brother, Kali Singh, for Rs. 1,300 to pay up the money due on account of the said decree (Exhibit A-3). In that mortgage-deed she mortgaged her entire two-annas share in the village Raipur. The effect of this mortgage was that the six-pies share of the village Raipur, which was liable to sale in execution of the above decree, was saved from sale at the expense of the entire two-annas share hypothecated in the new mortgage. Another result of this transaction was that the mortgaged property became liable for the payment of interest at Rs. 1-8-0 per cent. per mensem, compoundable half-yearly in lieu of the rate originally payable to Jawahir Singh. The amount due on that mortgage swelled up to Rs. 5,186-11-5 within a few years. In order to re pay that amount *Musammat* Bitana executed a fresh mortgage in favour of her brother Kali Singh on the 22nd June 1907, agreeing to deliver possession over a two-annas share of the village Raipur in lieu of interest on Rs. 3,000 and to pay interest on the remaining Rs. 2,255, which included some small amount received by her in cash, at 1 per cent. per mensem, compoundable yearly (Exhibit A-4). By virtue of this mortgage she agreed to allow the mortgagee to remain in possession of the mortgaged property for 40 years and undertook to redeem the mortgage after the expiry of that period on the last day of Jeth or in default to forego her equity of redemption and permit the mortgage to operate as a sale. In 1909 Kali Singh filed a suit for the recovery of possession of the mortgaged property and obtained a

decree, in execution of which he got possession.

Musammat Bitana died on the 5th November 1920. The present suit was thereupon filed by the plaintiffs, who claim to be the nearest reversionary heirs of Sheo Singh, for possession of the mortgaged property on the ground that the mortgage in question was made without any legal necessity and was not binding on them. They further averred that the conditions entered in the mortgage-deed were unreasonable and oppressive.

The Court below found that there was a legal necessity for the mortgage to the extent of Rs. 3,250, representing the debt due to Jawahir Singh, with interest thereon on such debt at 1 per cent. per mensem, compoundable yearly. It, however, dismissed the claim on the ground that the terms and conditions entered in the mortgage-deed were fair and reasonable and binding on the plaintiffs and that the suit for possession of the mortgaged property was premature. The right of the plaintiffs to succeed *Musammat* Bitana as the nearest reversionary heir of her husband was found in their favour and the correctness of that finding is not challenged here.

The first question for consideration in this appeal is, whether the finding of the Court below on the question of legal necessity was correct. There can be no question that *Musammat* Bitana was liable for Rs. 1,268 4 0 to Jawahir Singh under the decree obtained by him on the 12th December 1898 (Exhibit 4). That decree represented a debt which was originally due by her husband and had been renewed from time to time after his death by his widow. There can also be no question that *Musammat* Bitana was not in a position to re-pay that debt except perhaps by the sale of the whole or a portion of the property hypothecated in that decree. In order to re-pay that debt she mortgaged the entire two-annas share in favour of her brother for Rs. 1,300 and undertook to pay interest at 1-8-0 per cent. per mensem, compoundable half-yearly. Madho Singh had managed to pay the money due to Jawahir Singh by executing another mortgage on the 5th December 1896, by which interest at only 6 per cent. per annum was payable (Exhibit 3). It cannot be said that *Musammat* Bitana could not have obtained a loan on similar terms from Jawahir Singh. At all events, there was no necessity for her to have mortgaged the entire two annas share, much less for agreeing to pay interest at 1-8 0 per cent. per mensem, compoundable half-yearly, in lieu of 1 per cent. per mensem, which the mortgage of Jawahir Singh originally bore. It might equally have been possible for her to have obtained the required money by a sale of the six-pies share or by a possessory mortgage of that share, so that the remaining share might have remained unincumbered. She made no effort to pay the interest which accrued due on that mortgage, although she was in possession of the entire two-annas share which yielded, according to the Court below, a net profit of Rs. 127 a year. It is possible that she might have needed that amount for her maintenance in addition to the *sir* land in her cultivation, but she had in any case no justification for making a fresh mortgage of a two annas share on the 27th June 1907 for Rs. 5,255 on terms which were still more onerous. By virtue of that mortgage she agreed to her brother remaining in possession of the mortgaged property for forty years certain, knowing full well that she could not expect to remain alive for such a long period and that she would be succeeded by persons who would not be bound by her acts, unless they were justified by legal necessity. She further agreed to restrict her right of redemption to one particular day in the month of Jeth in one particular year and to forego her right of redemption, if she failed to exercise that right on that particular day. As pointed out by their Lordships of the Privy Council in *Nabakishore Mandal* v. *Upendrakishore Mandal* (1), a person who deals with a Hindu widow, having a limited estate, is bound to establish the facts, which justified the transactions under which he claims. In the case of a mortgage made by the manager of a joint Hindu family, it was held in *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2) that it was incumbent on the mortgagee to show not only that there was a necessity to borrow but also that it was not unreasonable to borrow at some such high rate and

(1) 65 Ind. Cas. 305; 20 A. L. J. 22; (1922) M. W. N. 93; 26 C. W. N. 22; 35 C. L. J. 116; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. J. 311.

(2) 50 Ind. Cas. 434; 17 A. L. J. 591; 36 M. L. J. 521; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. (P. C.) 49; 46 I. A. 145 (P. C.).

upon such terms, and that if this was not shown, the rate and terms would not stand, even though the charge might be upheld. The same principle applies to dealings with Hindu widows having a limited interest. A mortgage may be wholly or in part necessary and yet the terms and conditions entered therein may be unreasonable and oppressive, and the reversioners may not be bound by them. Such is the case here. The mortgage was executed by the lady in favour of her brother and the terms and conditions, which the mortgagee got the lady to agree to, were such as to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor and in fact to render redemption practically impossible. The terms were clearly oppressive and unreasonable, intended more to fetter the right of redemption than to secure any advantage to the mortgagor, and the plaintiffs are not bound by them.

The only other question for consideration is, whether in view of these facts the plaintiffs should be allowed to avoid the mortgage by paying such money as was really taken for legal necessity. Out of Rs. 5,255 the amount taken for legal necessity, as found by the Court below was Rs. 3,250. The mortgagee has been in possession of the mortgaged property. He was given possession in lieu of Rs. 3,000 at 1 per cent. per mensem compoundable yearly till the date of suit. The covenant postponing redemption for 40 years being oppressive and unreasonable is not enforceable as against the plaintiffs. The suit is not premature.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed for possession of the disputed property subject to the payment of Rs. 3,000, in lieu of which the mortgagee is in possession, and another sum of Rs. 250 with interest thereon at 1 per cent. per mensem compoundable yearly, from the 27th June 1907 to the date of the suit within six months from this date. The latter portion of the decree will carry simple interest thereafter at 1 per cent. per mensem, till payment. In case of non payment the suit will stand dismissed. The defendant-respondent will get two-thirds of his costs here and hitherto from the plaintiffs appellants, who will bear their own costs throughout.

B. N. & N. H. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 859, 860 AND 439 OF 1921.

December 20, 1921.

Present:—Mr. Justice Odgers.

S. RAMAKRISHNA PILLAI—DEFENDANT—PETITIONER

versus

KRISHNASWAMI PILLAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XIV, r. 2, O. XV, r. 3 (1)—Selection of preliminary issues for determination—Interlocutory order—Revision—High Court, interference by—Amendment of plaint not changing character of suit, if to be allowed.

A Court has power to select issues of law for determination as preliminary issues even after the date of the first hearing, specially when nothing is done in the suit beyond the settlement of issues and there has not been an actual first hearing [p. 169, col 1: p. 70, col. 2.]

Yatindra Nath v. *Hari Charan*, 26 Ind. Cas. 954; 20 C. L. J. 426, not followed.

Kuarmani Singha v. *Wasif Ali*, 28 Ind. Cas. 818; 19 C W N. 1193, referred to.

As a general rule, the High Court does not in revision interfere with interlocutory orders But no hard and fast rule can be laid down as interference may be justified when the order sought to be revised is in fact perverse or irreparable injury would be caused if the order were allowed to stand [p. 170, col 2.]

Nizam of Hyderabad, In re, 9 M. 256; 3 Ind Dec. (N. S.) 575, *Chinnu* v. *Sambanda Moorthi*, 23 Ind. Cas 522; 15 M. L. T. 339, *Yatindra Nath* v. *Hari Charan*, 26 Ind. Cas. 954; 20 C. L. J. 426, *Sitaramaya* v. *Ramappaya*, 39 Ind. Cas. 160; 5 L. W. 207, *Venkatachallam Pattar* v. *Parasu Pattar*, 26 Ind. Cas. 08; (1914) M. W. N. 614; 16 M. L. T. 156, *British India Steam Navigation Co.* v. *Secretary of State for India*, 8 Ind Cas. 107; 12 C. L. J. 505; 15 C. W. N. 87; 38 C. 230, *Amjad Ali* v. *Ali Hussain*, 6 Ind. Cas. 674; 12 C. L. J. 519; 15 C. W. N. 353, *Khirode Chandra Ghoshal* v. *Saroda Prosad*, 7 Ind. Cas. 436; 12 C. L. J. 525, *Charu Chandra Dutt* v. *Sarat Chandra Singh*, 8 Ind. Cas. 87; 12 C. L. J. 537, *Vuppuluri Atchayya* v. *Sri Seetharamachandra*, 18 Ind Cas. 555; 39 M. 95; 13 M. L. T. 60; 24 M. L. J. 112, *Buddhoo Lal* v. *Mewa Ram*, 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558 and *Kumar Chandra Kishore Roy* v. *Basat Ali*, 44 Ind. Cas 763; 27 C. L. J. 418; 22 C. W. N. 627, reviewed and discussed.

The mere fact that an interlocutory order may possibly result in inconvenience and expense to a party to the suit is not a sufficient ground for interference by the High Court in revision. [p 171, col. 1.]

A Court has discretion to allow an amendment of plaint and the High Court will not interfere in revision where the amendment does not change the nature of the suit or involve any material injustice to the defendant [p. 172, col. 1.]

Penumarli Vasantarayadu v. *Reddi Subbamma*, 22 Ind. Cas 39; 14 M. L. T. 588; (1914) 1 M. W. N. 98 and *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Mahapatrulu*, 24 M. 387; 6 C. W. N. 545; 28

RAMAKRISHNA PILLAI v. KRISHNASWAMI PILLAI.

I. A. 81; 3 Bom. L. R. 203; 7 Sar. P. C. J. 819 (P. C.), referred to.

Petitionr, under section 115 of Act V of 1908, and section 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge, Mayavaram, dated the 12th of November 1921, the 29th of November 1921 and 25th of February 1921 in Interlocutory Application No. 88 of 1921, respsetively, in Original Suit No. 56 of 1920.

FACTS appear from the judgment.

Mr. *T. R. Ramachandra Iyer*, for the Petitioner.—These petitions are against the orders passed by the Subordinate Judge in a pending suit, to the effect that certain Issues Nos. 3, 4 and 9 should be tried first as preliminary issues. These orders are irregularly made without jurisdiction and if those issues are tried first, that will seriously prejudice me. Order XIV, r. 2 and O. XV, r. 3 (1) deal with trial "on preliminary issues," Order XIV, r. 2, clearly applies only when the Court thinks on settlement of issues there are questions of law upon which the case could be disposed of. Order XV, r. 3 (1) applies after issues on the first hearing. So after that day is passed, the Court has no power to select issues of law as preliminary issues for determination *vide Yatindra Nath* v. *Hari Charan* (1), a case of the Calcutta High Court. Secondly, these orders were passed without hearing my Vakil in the lower Court. And lastly if those issues are tried first, I shall suffer serious injury. Issues Nos. 1 and 5 are as preliminary as the other issues. They also should have been selected. My next submission is that the trial of this suit cannot go on, until Original Suit No. 8 of 1917 is disposed of. Section 10 of Civil Procedure Code is a bar to the trial of this suit. *Vide Wahid-un nissa Bibi* v. *Zamin Ali Shah* (2) and *Sivaprosad Ram* v. *Tricomdas* (3).

Mr. *T. R. Venkatarama Sastri*, for the Respondent.—This Court has no jurisdiction to interfere with interlocutory orders *Nizam of Hyderabad, In re* (4) and *Ohinnu* v. *Sambanda Moorthi* (5). Where there is an appeal against the decree where the aggrieved party could attack the orders, no revision lies against them, *Buddhoo Lal* v. *Mewa Ram* (6), *Ventala Verrarazu* v. *Kuruvela Subbarayudu* (7). Secondly, even if your Lordship has power to interfere, only in exceptional circumstances, should that power be exercised. There are no such circumstances in the present case.

As to the bar of section 10 of Civil Procedure Code, the second suit here is not between the same parties as to attract the provisions of section 10. *Sultanat Jahan Begam* v. *Sundar Lal* (8), *Penumarti Vasantarayadu* v. *Reddi Subbamma* (9).

Mr. *T. R. Ramachandra Iyer*, in reply.—This Court has jurisdiction to interfere with interlocutory orders if irreparable injury will result by non-interference. *Yatindra Nath* v. *Hari Charan* (1), *Sitaramayya* v. *Ramappayya* (10), *Venkatachallam Pattar* v. *Parasu Pattar* (11), *Vuppuluri Atchayya* v. *Sri Seetharamachandra* (12).

JUDGMENT.

C. R. Ps. Nos. 859 AND 860 OF 1921.

These civil revision petitions relate to two orders passed by the Subordinate Judge of Mayavaram, dated, respectively, 12th November 1921 and 29th November 1921, which run as follows:—

"It is argued on behalf of the plaintiff that Issues Nos. 3, 4 and 9 being preliminary Issues should be tried first. The case was being posted along with Original Suit No. 8 of 1917 on the belief that the parties in this suit will agree to the evidence recorded in Original Suit No. 8 of 1917 being treated as evidence in this suit also. But the learned Vakil for the plaintiff in this suit urges that on the pleadings without any further evidence being let in he is prepared to substantiate his case as against the defendant on Issues Nos. 3, 4 and 9 and I cannot say that he had no right so to contend.

"The suit is posted for argument on Issues Nos. 3, 4 and 9 to 1st December.

"NOTE:—The plaintiff's Vakil states that he does not give up thereby the other issues."

(1) 26 Ind. Cas. 954; 20 C. L. J. 426.
(2) 55 Ind Cas. 89; 42 A. 240; 18 A. L. J. 145.
(3) 27 Ind. Cas. 917; 42 C. 926.
(4) 9 M 256; 3 Ind. Dec. (N. s.) 575.
(5) 23 Ind. Cas. 522; 15 M. L. T. 339.
(6) 63 Ind. Cas. 15; 43 A. 561; 19 A. L. J. 558.
(7) 64 Ind. Cas. 493; 41 M. L. J. 378; (1921) M. W. N. 507.
(8) 58 Ind. Cas 90; 42 A. 409; 18 A. L. J. 431.
(9) 22 Ind Cas. 39; 14 M. L. T. 588; (1914) M. W. N. 98.
(10) 39 Ind. Cas. 160; 5 L. W. 207.
(11) 26 Ind. Cas. 106; (1914) M. W. N. 614; 16 M. L. T. 156.
(12) 18 Ind. Cas. 555; 39 M. 195; 13 M. L. T. 60; 24 M. L. J. 112.

and 2. "This is opposed by plaintiff. The suit is posted for preliminary argument to 1st December after consideration. I see no reason to reconsider my order already passed. Rejected."

The suit in which they were passed is Original Suit No. 56 of 1920 and is brought by the plaintiff, a son, against his father, for the recovery of certain land which had come to the latter under a so-called "deed of indenture" dated 11th May 1905. This deed was made between one Tirunarayana Pillai and the present petitioner and recites that Tirunarayana had become entitled to certain properties as reversionary heir of one Venkatakrishna Pillai on the death of the latter's mother in 1905; that plaintiff (herein) contended that the mother of Venkatakrishna Pillai had adopted him, which adoption was admittedly not valid as no authority had been given by the *sapindas*. The father took possession of the properties given by the indenture on behalf of his son. In 1906 the father discovered that Tirunarayana was not an heir of the deceased Venkatakrishna Pillai at all and he thereupon instituted a Suit No. 8 of 1917 for, *inter alia*, setting aside the deed of indenture as having been executed by him owing to the fraud of Tirunarayana This suit has been partly heard but according to the note of the Subordinate Judge it has been adjourned from time to time along with the present suit and on 4th October 1921 an order was passed adjourning Original Suit No. 56 of 1920 to 1st November 1921 for arguments and orders whether this is to go with Original Suit No. 8 of 1917 or to be tried separately. The order was passed on 12th November 1921 and is one of those now sought to be revised. There has been a very full argument before me on both sides and the complaint of the defendant (father) in the suit is that not only was the order irregularly made but the action of the Subordinate Judge in directing Issues Nos. 3, 4 and 9 to be tried as preliminary issues will seriously prejudice him. The issues in question are as follows:—

"3. Whether the defendant is entitled to rely upon any such possession even after the deed of indenture dated 11th May 1905 and whether the defendant is not estopped from setting up such possession in his own right as against the plaintiff?

"4. Whether the defendant is estopped from setting up a title to the properties in himself by reason of the indenture?

"9. Whether the plaintiff has acquired a title by prescription by the properties having been held by his guardian on his behalf for over 12 years?"

Mr. Ramachandra Iyer for defendant complains that Issues Nos. 1 and 5 have been omitted, these being in character quite as preliminary as those selected by the Subordinate Judge.

The power to order trial on preliminary issues is contained in O. XIV, r. 2 and O. XV, r. 3 (1). Order XIV, r. 2 clearly applies when on settlement of issues the Court thinks there are issues of law upon which the case or some part thereof may be disposed of, then those issues are to be tried first and settlement of issues of fact may be postponed.

O. XV, r. 3 (1) applies after issues have been framed and allows the Court to determine issues of law, if satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit. If, however, the finding on those is not sufficient for decision, the Court shall postpone further hearing of the suit. Mr. T. R. Ramachandra Iyer argues that the former rule is prior to issues, the latter applies to the first hearing only and when that day is passed, the Court has no power to select issues of law for determination as preliminary issues. Reliance is placed on a judgment of Mr. Justice Mookerjee in *Yatindra Nath* v. *Hari Charan* (1), which held that an application to try certain issues first which was made long after the date for first hearing took it out of the application of O. XV, r. 3. As against this there was the ruling in *Kuarmani Singha* v. *Wasif Ali* (13), which lays down that O. XIV, r. 2 may be applied also when the settlement of issues of fact have not been postponed. I may add that, in my opinion, there is no reason that I can see to confine the application to try certain issues as questions of law to the date of first hearing, and especially to insist on that rule in the case of adjourned hearings, for it is common ground that only issues have been settled in this

(13) 28 Ind. Cas. 818; 19 C. W. N. 1193.

suit and the orders now sought to be revised made and there has been no actual first hearing so far. The question really is, (1). Can I interfere? (2). If I can, ought I to do so under the circumstances of the present case? As to (1) the older view here is expressed by Muttusami Iyear, J. in *Nizam of Hyderabad, In re* (4) and was against interference with interlocutory orders. See also *Chinnu* v. *Sambanda Moorthi* (5) which, however, excepted a wanton abuse of the powers of the Court. In *Yatindra Nath* v. *Hari Charan* (9) it was said that Court could interfere in very exceptional cases. In *Sitaramayya* v. *Ramappaya* (10) it was held that the Court can interfere if manifest injustice would otherwise be done; the question being one of jurisdiction, and the fact that there is a final appeal would not prevent interference. Here, as pointed out by Mr. Venkatarama Sastri, the question was the addition of a party and the matter was actually one of jurisdiction. In *Venkatachalam Pattar* v. *Parasu Pattar* (11) it was held that there might be interference for perversity, *i.e.*, conscious deviation from rules of law or procedure. *British India Steam Navigation Co.* v. *Secretary of State for India* (14), *Amjad Ali* v. *Ali Hussain* (15), *Khirode Chandra Ghoshal* v. *Saroda Prosad* (16), *Charu Chandra Dutt* v. *Sarat Chandra Singh* (17) are a series of cases to all of which Mookerjee, J., was a party. The first of these cases lays down that the High Court is competent to set matters right when an interlocutory order has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants. In the second case the same test of irreparable injury is applied. In the third and fourth cases the jurisdiction of the High Court to interfere with the interlocutory order is affirmed, if such interference is necessary in the interests of justice. In *Vuppuluri Atchayya* v. *Sri Seetharamachandra* (12) the Munsif had returned a plaint on the ground that a Civil Court had no jurisdiction. On appeal the Subordinate Judge restored the suit to the Munsif's file. Held in revision by the majority, that the High Court could interfere under section 115 of the Code of Civil Procedure as the Appellate Court had erroneously decided in the exercise of its jurisdiction as an Appellate Court that Munsif had or had not jurisdiction. I doubt if this has any application to the facts of the present case. Wallis, C. J., based his decision on the third part of section 115 while Sundara Iyer, J., based his on the first. In *Buddhoo Lal* v. *Mewa Ram* (6) the majority of the Full Bench held that where one of several issues in a suit had been decided and there was a remedy by appeal no revision lay as there was no case within section 115 of the Code of Civil Procedure and in *Kumar Chandra Kishore Roy* v. *Basat Ali* (18) the majority of the Calcutta High Court held that the Court cannot, by exercising its powers under section 15 of the Charter Act interfere with a decision of a Subordinate Court from which no appeal or revision under section 115 of the Code of Civil Procedure lies to High Court.

I have purposely refrained from citing all the cases that were quoted before me but I have attempted to make a selection which will give a fair view of the somewhat divergent opinions that have been expressed by the various High Courts.

It seems to me, as a fair result of these opinions, impossible to say that in no case whatever will the Court interfere with an interlocutory order, but that that interference must be exercised with extreme diligence, the general rule being against such interference. The latter may be justified when the order sought to be revised is in fact perverse or irreparable injury will be caused unless the revision is allowed. I, therefore, proceed to the second point.

The first objection is, that the order was made without hearing the Vakil for the defendant on a suggestion by Mr. T. R. Venkatarama Sastri to the lower Court. Under O. XV, r. 3 (1), the satisfaction of the Court can only be *prima facie*, otherwise there would be no scope for sub-rule (2). It appears, however, from the affidavit of the defendant that his Vakil did argue the question and I cannot say that the order is illegal or irregular on that ground. The next and much more serious argument is that defend-

(14) 8 Ind Cas. 107; 12 C. L. J. 505; 15 C. W. N. 87; 38 C. 230.

(15) 6 Ind. Cas. 574; 12 C. L. J. 519; 15 C. W. N. 353.

(16) 7 Ind. Cas. 436; 12 C. L. J. 525.

(17) 8 Ind Cas. 87; 12 C. L. J. 537.

(18) 44 Ind. Cas 768; 27 C. L. J. 418; 22 C. W. N. 627.

ant will suffer irreparable injury by the determination of Issues Nos. 3, 4 and 9 as preliminary issues. The contention of petitioner is that Issue (5) which is admittedly a question of mixed law and fact—being estoppel by conduct—will conclude the case one way or other, also that Issue No. 1 should have been included. This issue involves the question of invalidity of Tirunarayana's adoption which he had set up as entitling him as a reversioner to the property and also the invalidity of the deed of indenture. Issues Nos. 3 and 4, both flow from the indenture. The defendant put forward prior to the indenture a claim of adoption on behalf of the plaintiff by the mother of Venkata Krishna Pillai in order to make him a nearer agnate than Tirunarayana whose alleged adoption was to Venkatakrishna Pillai himself. The adoption of plaintiff is disclaimed in the indenture by his guardian (defendant) and the argument is to be that defendant cannot be heard to say that he has a prior and better title in himself. It is also to be argued that defendant by his execution of the deed of indenture is estopped. Defendant will admittedly have a right of appeal, however the decision on those preliminary issues goes. His complaint is that he will be put to inconvenience and expense by possibly having to file several appeals. But this is anticipating that the decision of the Court will be against him on those preliminary issues, or one or more of them. I do not think that I am warranted in making such assumption at the present time. I have in *Ventala Verrarazu* v. *Kuruvella Subbarayudu* (7) expressed the opinion that this Court will not interfere in revision where the party has a separate remedy. Can I say that the Court below acted perversely or in a way to cause irreparable loss to defendant? The issues selected are very material to the case; and I cannot find that, because it would suit the defendant better to have Issues Nos. 1 and 5 decided before the others, the order is perverse or is likely to cause injury which cannot be largely remedied by costs if he succeeds. There is no fear that his issues will not be eventually tried if the decision of the others is not sufficient to dispose of the case. If the Subordinate Judge comes to that opinion the defendant has the right of appeal. The Subordinate Judge certainly had, in my view, and for the reasons given, jurisdiction to make the order he did, and the fact that it may possibly result in inconvenience and expense to defendant is not a ground to interfere in revision. I cannot say there is any injury to defendant in the actual selection of those issues as preliminary and as I have said, it seems to me I cannot anticipate the possible consequences of a decision on them adverse to him. I, therefore, think that on this point defendant's petitions fail.

The next point argued is, that section 10 of the Code of Civil Procedure is a bar to the trial of this suit till No. 8 of 1917 is determined. It is said that Issues Nos. 1, 3 and 5 in that suit involve the determination of Issue No. 1 in the present suit. That suit as stated is between the present defendant as plaintiff and Tirunarayana Pillai. It is, therefore, not between the same parties as the present suit. Section 10 speaks of a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title; no argument has been addressed to me to show that the present suit and No. 8 of 1917 would fall under the latter words of the clause, but I am referred to a judgment of Spencer and Ramesam, JJ., in Civil Revision Petition No. 657 of 1920 [*Ramakrishna Pillai* v. *Balakrishna Aiyar* (19)] which dealt with the propriety of certain Vakils appearing for the defendant in this suit, they having already acted for him in No. 8 of 1917 where he is the plaintiff. It is there said that in both suits questions arise as to the validity of the indenture and its binding character on defendant and also of estoppel. No doubt, some of the questions in the two suits are the same but the learned Judges had not to deal with the applicability of section 10 of the Code of Civil Procedure. Mr T. R. Ramachandra Iyer relies on *Wahid-un nissa Bibi* v. *Zamin Ali Shah* (2) and *Sivaprasad Ram* v. *Trincomdas* (3). In the former case it was held that the widow was claiming in both suits on the same title and that the Court below had done right in staying one of the suits. In *Sultan-t Jahan Begam* v *Sundar Lal* (8) it was held that an application under section 10 of the

(19) 62 Ind. Cas. 712; 13 L. W. 541; 41 M. L. J. 60; (1921) M. W. N. 646.

SUBBARAYA PILLAI v. VENKATA PERUMAL.

Code of Civil Procedure is not a case and that no revision would lie under section 115 of the Code of Civil Procedure. In *Sivaprasad Ram* v. *Tricomdas* (3) the jurisdiction under section 10 is limited to stopping a suit if the circumstances mentioned in the section are found to exist. On the materials before me I clearly cannot so find here. In that case the Judge (page 931*) had come to no finding as to whether the parties were litigating under the same title but proceeded to decide the question of *res judicata* which was clearly materially irregular. Under these circumstances, I cannot say that section 10 applies here, and I must find this point against the defendant and these civil revision petitions must be dismissed with costs.

C. R. P. No. 439 of 1921.

This is a revision petition against the amendment of plaint and consequent settlement of an additional Issue No. 9 on 7th April 1921. The amendment is as to prescriptive title based on possession of defendant *benami* for plaintiff. It appears to me that Issue No. 3, is involved in Issue No. 9. If plaintiff is wrong on No. 3, he will go. In *Penumalri Vasantarayadu* v. *Reddi Subbamma* (9) it was held that the Court would not interfere with an order refusing amendment, as the plaintiff could attack the order on appeal if the decision was against him. In *Vasudeva Padhi Khadanga Garu* v. *Magini Devin Bakshi Mahapatrulu Garu* (20), it was remarked that prescriptive title need not be expressly pleaded as it is only evidence of a party's title.

The amendment was within the discretion of the Court (O. VI, r. 17), and for the reasons stated above I am unable to say that this amendment is a matter which I should deal with in revision. It has not been argued that the amendment changes the character of the suit or would involve any material injustice to the defendant. This civil revision petition must, therefore, be dismissed with costs.

K. C. P.

Petitions dismissed.

(20) 24 M. 387 at p. 388; 5 C. W. N. 545; 28 I. A. 81; 3 Bom. L. R. 303; 7 Sar. P. C. J. 819 (P. C.).

*Page of 42 C. [*Ed.*].

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 31, 1922.

Present:—Lord Phillimore, Lord Carson and Sir John Edge.

E. SUBBARAYA PILLAI, SINCE DECEASED (NOW REPRESENTED BY SUBRAMANIA PILLAI AND OTHERS) AND OTHERS—DEFENDANTS—APPELLANTS

versus

Rajah Kumara VENKATA PERUMAL RAJU BAHADUR VARU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Document—Construction—Sale by legal and beneficial owner—Suit for specific performance—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 113.

The suit villages originally belonged to the plaintiff's deceased father. They were sold in Court auction in 1879 and purchased by the defendant. The plaintiff alleged that this purchase was made on behalf of the plaintiff's father, that a part of the purchase-money was paid out of his funds and the balance obtained from one *K* to whom the suit villages were sold by the defendant subject to a condition of re-conveyance on payment of a stipulated sum. A suit to compel such re-conveyance was instituted and a decree directing the re-conveyance obtained in 1889. In 1883 during the pendency of the suit an agreement was entered into between the plaintiff's father and the first defendant which recited:—

"Under these circumstances, under the orders of *M.* (plaintiff's father) the accounts were looked into in respect of items due to *S.* (first defendant) relating to the said villages, and also relating to the transactions between *S.* and *M.* On looking into the accounts the amount found due to *S.* was Rs. 99,568-15-6. *S.* consented to receive the same and sell the aforesaid villages to *M.*" The agreement further stated that on the defendant's succeeding in his suit against *K.* he should sell the suit property to the plaintiff's father on payment of the sum found due to the defendant. There was also a stipulation in the contract for the payment of interest until payment of the sum above mentioned and for the plaintiff's father's giving a mortgage to the defendant to secure the payment of the sum. The plaintiff in 1900 instituted the present suit for possession of the villages on payment of such sum, if any, as may be found due:

Held, that whatever might have been the nature of the original purchase by the defendant, the contract of 1883 treated him as the beneficial and legal owner and the plaintiff's suit, being one for the specific performance of a contract, was barred by Art. 113 of the Indian Limitation Act. [p. 173, col. 2; p. 174, col. 1.]

Appeal against the judgment and decree of the Madras High Court (Abdur Rahim and Phillips, JJ.), in Appeal Suit No. 167 of 1901, reported as 35 Ind. Cas. 893, preferred against the decree of the Court of the Subordinate Judge, North Arcot, in Original Suit No. 25 of 1900.

Mr. *DeGruyther*, *K. C.*, and Mr. *Dube*, for the Appellants.

Mr. *J. M. Parikh*, for the Respondents.

JUDGMENT.

LORD CARSON.—In this suit the present Rajah of Karvetnagar seeks to recover possession from the defendants of certain villages on payment of such sum, if any, as may be found due.

Both the Subordinate Judge of North Arcot and the Judges of the High Court of Judicature at Madras were in agreement that the legal relation between the plaintiff and the first defendant is settled and determined by a contract in relation to the said villages entered into on the 25th August 1888 between Sri Maharajulangaru, the plaintiff's father, and the first defendant. Saravana Pillai, who was the first defendant, is now dead, but is represented in this appeal. The remaining defendants claimed to be *bona fide* purchasers for value from the first defendant without notice of any claim by the plaintiff. The Subordinate Judge held that upon the construction of the said contract Saravana Pillai was the owner of the villages, and agreed to sell the same to the plaintiff for a consideration of Rs. 99,568-15-6, to be paid or secured as stated in the fifth paragraph of the said contract of the 25th August 1888. The High Court, on the other hand, held that upon the true construction of the contract the plaintiff was the beneficial owner of the villages and Saravana Pillai only the legal owner, and that in the matter of pecuniary obligations incurred by Saravana Pillai in connection with the purchase of the villages, and in the matter of the other money dealings between him and the plaintiff, there was found due from the plaintiff a sum of Rs. 99,568-15-6 in settlement of accounts. It is admitted in the judgments of the High Court that if the said contract were a contract for sale the suit would essentially be one for the specific performance of a contract, and in that case it would be clearly barred under Article 113 of the Limitation Act. It is well to bear in mind that the terms of this section relate to any contract.

On the view taken by the High Court of the contract, however, it was held that the suit is really one for the possession of immoveable property by a beneficial owner thereof against the legal owner on payment, if necessary, of such sum, if any, as may be found due; that the execution of a conveyance by the first defendant to the plaintiff was not essential and is unnecessary if he gets a decree for the recovery of the villages as beneficial owner.

The villages in question originally belonged to the plaintiff's late father—the then Zemindar of Karvetnagar. They were sold in 1883 in Court auction in Original Suit No. 5 of 1879, and purchased by the first defendant as stated in the contract. It is alleged by the plaintiff that this purchase was made on behalf of the plaintiff's father, that a part of the purchase-money was paid out of his funds and the balance obtained from one Krishnama Chari, to whom the villages appear to have been sold by the first defendant subject to a condition of re-conveyance on payment of a stipulated sum. A suit to compel such re-conveyance was instituted in the High Court at Madras, and on the 16th October 1889 a decree directing reconveyance was made. In pursuance thereof a conveyance was duly executed on the 7th February 1890 and since that date the first defendant had, until he died, been in possession of the villages, acting as the absolute owner thereof. The contract of the 28th August, 1888, was entered into during the pending of the original suit. It recites briefly the facts above stated and refers to the pendency of the said suit, and then proceeds as follows:—

"Under these circumstances, under the order of Sri Maharajulangaru the accounts were looked into in their presence in respect of items due to the said Saravana Pillai relating to the said villages, and also relating to all money transactions between Saravana Pillai and Sri Maharajulangaru. On looking into the accounts the amount found due to the said Saravana Pillai was Rs. 99,568 15 6. Saravana Pillai consented to receive this sum of rupees, etc., and sell the aforesaid villages to Sri Maharajulangaru."

Whatever may have been the original nature of the purchase by Pillai or the arrangements entered into to raise the

purchase-money this contract was a settlement of questions of account in relation to the said villages and other matters, and under the terms of it Pillai is treated as the legal and beneficial owner. The second clause of the contract further strengthens this construction. It provides that as soon as Pillai obtains a decree in the suit already referred to (which, as pointed out, he did obtain), he should sell the villages to Maharajulangaru, and the said Maharajulangaru should purchase the same for the sum of Rs. 99,568 15-6. "He should not sell to others without the consent of the Maharajulangaru"—a provision which would be meaningless unless he was the legal and beneficial owner. The fifth clause of the agreement provides for payment of interest on the purchase-money until paid, and that until the principal and interest are paid the Maharajulangaru should mortgage the villages "which Saravana Pillai has consented to sell, or other villages, etc."—properties which are acceptable to Saravana Pillai as security for the said principal and interest—and executed a document therefor. The plaintiff took no further action in the terms of the said contract. In the year 1899 his estate was taken under the management of the Court of Wards, and this suit was instituted by the Manager appointed by the Court of Wards on the 24th August 1900. Before instituting this suit, it is to be observed that on the 23rd August 1900, the Acting Secretary to the Court of Wards, by a notice in writing, called upon the first defendant to execute a conveyance of the villages to him on behalf of the plaintiff and to tender a mortgage for execution by him on behalf of the plaintiff.

Their Lordships agree with the Subordinate Judge that no charge is created by the contract over the villages in question, and that the plaintiff had no right to recover possession of the property absolutely or conditionally on his executing a mortgage-deed or making a payment to the first defendant.

The suit, therefore, becomes one for the specific performance of a contract which is barred by the section of the Limitation Act already referred to.

This Board are, for the reasons stated, of opinion that this appeal should be allowed and the judgment of the Subordinate Judge restored, and that the appellants should have their costs in the Courts below and of the appeal. It is unnecessary, having regard to this conclusion, to consider the case of the respondents, the legal representatives of defendant No. 3—for whom Mr. Parikh appeared—further than to say that it was agreed in the course of the argument by Mr. DeGruyther, Counsel on behalf of the appellants, that the interests of Mr Parikh's clients should not be affected by any question of any Statute of Limitation which might be raised in answer to their claim, owing to the delay which has been occasioned by the institution and the carrying out of the proceedings in this suit, and their Lordships so determine.

Their Lordships will humbly advise His Majesty accordingly.

R. N.

Appeal allowed.

Solicitors for the Appellants.—Messrs. *Barrow Rogers* and *Nevill.*

Solicitors for the Respondent.—Mr. *John Josselyn.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 7 B OF 1922.

August 8, 1922.

Present:—Mr. Kotval, A. J. C.

MISS A. K. SINGH—PLAINTIFF—APPLICANT

versus

RAMPRASAD—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 100, application under—Person in joint possession with judgment-debtor.

A claimant who has an interest in land of which possession has been delivered in execution of a decree, either as a member of a family or otherwise, and who is affected by the delivery of possession, can claim to be in possession on his own account within the meaning of O. XXI, r. 100 of the Civil Procedure Code, and is entitled to maintain an application under the rule and claim to be in joint possession of the property with the auction-purchaser. [p 175, col 1]

Govinda Nair v. *Kesava*, 3 M. 81; 5 Ind. Jur. 132; 1 Ind Dec (N. s. 613, followed.

Cooverji Hirji v. *Dewsey Bhoja*, 17 B. 718; 9 Ind. Dec N. s) 471, disapproved

Radha Gobinda Missir v. *Raghunath Missir*, 20 Ind. Cas. 253; 18 C. W. N. 695; 18 C. L. J. 188, referred to,

KALLU MAL v. KASHI NATH.

Application for revision against the order of the Munsif, Amraoti, in Miscellaneous Case No. 57 of 1921, dated the 30th November 1921.

Messrs. *K. G. Deshpande* and *R. R. Jaiwant*, for the Applicant.

Mr. *C. B. Parakh*, for the Non-Applicant.

JUDGMENT.—The applicant, Miss A. K. Singh, obtained a decree for certain house property and adjacent land against one Baktavar and in execution thereof took possession of the same. Ramprasad, the uncle of Baktavar, alleging that he and Baktavar were members of a joint Hindu family and were jointly in possession of the property filed an application under O. XXI, r. 100, First Schedule, Civil Procedure Code, claiming to be put in possession of a half-share in the property. The lower Court held that Ramprasad had only a one-third share and directed him to be put in joint possession of it. The plaintiff seeks revision of the lower Court's order on the ground that, as Ramprasad's possession was joint with that of the judgment-debtor, Baktavar, he cannot be said to be in possession on his own account and no application by him lay under O. XXI, r. 100. Reliance is placed upon *Coover i Hirji* v. *Dewsey Bhoja* (1) in support of this plea but, in so far as that ruling lays down that a person who is in joint possession is not in possession on his own account, it has been held to be open to criticism: *Radha Gobinda Missir* v. *Raghunath Missir* (2). In the case last cited it was held, following *Govinda Nair* v. *Kesava* (3), that a claimant who has an interest in the land of which possession has been delivered in execution of a decree either as a member of a family or otherwise and who is affected by the delivery of possession can claim to be in possession of the property on his own account within the meaning of section 331 of the Code of 1882 corresponding to O. XXI, r. 100 of the First Schedule of the new Civil Procedure Code. I agree with the view taken in the Calcutta case. If the one taken in the Bombay case were followed, the result would be that a member of a joint Hindu family would be excluded from resorting to the remedy provided by O. XXI, r. 100. I hold that Ramprasad had the right to apply under O. XXI, r. 100, and that the lower Court had jurisdiction to entertain his application. This application fails and is dismissed with costs. Pleader's fee Rs. 15.

G. R. D. & W. C. A.

Application dismissed.

(1) 17 B. 718; 9 Ind. Dec. (N. S.) 471.
(2) 20 Ind. Cas. 253; 18 C. W. N. 685; 19 C. L. J. 138.
(3) 3 M. 81; 5 Ind. Jur. 132; 1 Ind. Dec. (N. S.) 613.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 211 OF 1921.

May 11, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

KALLU MAL—PLAINTIFF—APPELLANT

versus

KASHI NATH AND OTHERS—DEFENDANTS RESPONDENTS.

Execution proceedings, revival of—Execution, application for, defective—Defect immaterial—Application returned for amendment—Re-filed after expiry of limitation—Decree-holder prepared to fall back on previous application—Previous application, whether revives.

On 24th September 1915 a preliminary decree for sale was passed. On 11th December 918 the decree-holder made an application for the preparation of a final decree for sale, but since it was not correct, the Court returned it to the decree-holder on 21st December 1918 for amendment, without fixing any time for its presentation after amendment The only amendment needed in the application was in respect of the amount claimable under the decree, which was entered less than what was actually due to the decree-holder, and a defective description of the mortgaged property. The decree-holder did not file the application after amendment till 29th May 1919, but was, however, prepared to accept a decree for the amount stated in the original application:

Held, that in view of the decree-holder's attitude the application dated 29th May 1919 was in any case an application for the continuation or revival of the previous application and was, as such, not barred by time. [p. 176, col. 2.]

Second appeal from a decree of the District Judge, Saharanpur.

Mr. *Pearey Lal Banerji*, for the Appellant.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This is an appeal from an order, rejecting an application for the preparation of a final decree for sale. The preliminary decree for sale was passed on the

24th September 1915. It allowed time for the payment of the decretal money till the 24th March 1916. On the 11th December 1918 an application was made by the decree-holder for the preparation of a final decree for sale. On the same date the office reported that the amount of demand entered in the application was not correct and that some portion of the mortgaged property had also been omitted. On the 13th December 1918 the Court passed an order returning the application to the decree-holder for amendment without fixing any time for its presentation after amendment. The decree-holder received back the application on the 21st December 1918, but did not file it after amendment till the 29th May 1919. On the 6th March 1918 the Court ordered that, as the application had not been filed after amendment, the papers should be consigned to the record room.

The question for consideration in this appeal is, whether the amended application should be treated as a fresh application for the preparation of a final decree for sale, in which case it would be barred by time, or as a continuation of the previous application which was filed within time. The Courts below took the former view and held that it was barred by time. It is not clear under what provision the application was returned for amendment to the decree-holder. If the Court of first instance followed the analogy of the provision contained in O. XXI, r. 17 of the Code of Civil Procedure, it was bound to fix a time for amendment, and the effect of the amendment, if made, would have been to render the application valid as from the date on which it was first presented. That provision, however, applies to an application for execution. If the Court directed the amendment under section 153 or O. VI, r. 17 of the Code of Civil Procedure, it should have kept the application pending and required the decree-holder to amend it within a certain time or at all events within 14 days from the date of the order. The penalty for not making such an amendment under O. VII, r. 18 would have been to deprive the decree-holder of his right to make the amendment thereafter, unless the time was extended by the Court, leaving the application in that event to be dealt with on its merits.

When first presented, the application was a good application, so far as it asked for the preparation of a final decree for sale for the amount entered therein. The only amendment needed in the application was in respect of the amount claimable under the decree, which was entered less than what was actually due to the decree-holder, and a defective description of the mortgaged property, as the name of the village had been omitted and a small share in a certain house had also been left out. If these defects are left out of account, there would still be a valid application to the Court for the preparation of a final decree to the extent of the amount for which a final decree was claimed. The learned Counsel, who appears for the decree-holder, states that he is prepared to accept a decree for the amount entered in the original application. In regard to the mistake in the description of the mortgaged property, that could easily have been rectified at any time before the preparation of the final decree; and we do not consider that it was a defect which ought to have stood in the way of the application being accepted and acted on for the preparation of a final decree. In any case the Court was to blame for not fixing a time for amendment as much as the decree-holder for the delay in presenting it after amendment; and considering all the circumstances, we are disposed to treat the application, presented after amendment, as a continuation of the previous application. It was, in any case, an application for the continuation or revival of the same proceeding and as such it was not barred by time.

We allow this appeal accordingly, set aside the orders of the Courts below and direct the Court of first instance to reinstate the application under its original number and to dispose of it according to law.

As the decree-holder is content to ask for the sum entered in the original application, he should not be allowed to take out a final decree for a larger amount. We do not allow him any costs here or in the Court below. In view of the circumstances the judgment-debtors shall also bear their own costs throughout.

N. H.

Appeal allowed.

CHANAN SINGH v. SALIG RAM.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1221 OF 1920.

March 8, 1922.

Present :—Justice Sir William Chevis, KT.

Sardar CHANAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SALIG RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 141, 144—*Suit by reversioners for possession of immoveable property—Adverse possession—Limitation.*

A suit by the reversioners of a deceased person, for possession of immoveable property originally owned by him, against the person in occupation, would be governed by Art 141 of the Limitation Act, unless the defendant could show that adverse possession started in the lifetime of the deceased.

Second appeal from a decree of the Additional Judge, Jullundar at Ludhiana, dated the 7th February 1920, reversing that of the Munsif, First Class, Nakodar, District Jullundur, dated the 20th August 1918.

Lala *Jagan Nath*, for the Appellants.

Pandit *Sheo Narain*, R. B., for the Respondents.

JUDGMENT.—The plaintiffs in this case are some of the reversioners of Sardar Bhup Singh, who died in 1850, or 1851 leaving two widows, *Musammat* Chand Kaur and *Musammat* Kishen Kaur. *Musammat* Chand Kaur died about 25 years prior to suit but *Musammat* Kishen Kaur died only on the 30th of January 1906. The plaintiffs sued for possession of the certain site and obtained a decree from the First Court, the defendants, Salig Ram, etc., being allowed three months for removal of *malba*. The lower Appellate Court has dismissed the suit, holding that it is time-barred by reason of long adverse possession.

It has been found by the lower Courts that the site in question is part of a field which was the property of Sardar Bhup Singh. For some years past there has been a building on the site. Suba was the first person who occupied the building, and on behalf of the defendants it is pleaded that Suba sold it to Dasaundhi, who in turn sold it to Ram Lal, and in execution of the decree against Ram Lal it was bought by Salig Ram, etc. The learned District Judge has apparently applied Article 144 of the Schedule to the Limitation Act, but, unless the defendants can show that adverse possession commenced in the lifetime of Sardar Bhup Singh, the Article applicable is clearly Article 141, as is admitted by Rai Bahadur Sheo Narain, and this suit having been brought within twelve years of the death of *Musammat* Kishen Kaur, must be regarded as within time.

Mr. Sheo Narain, however, contends that there is no finding by the lower Appellate Court as to whether Suba held adverse possession even in the lifetime of Bhup Singh. The matter is, however, covered by the 4th issue framed by the Trial Court and I am myself come to a decision on the evidence on the record. The onus of proving adverse possession prior to the death of Sardar Bhup Singh lies on the defendants, but the evidence produced by them is that of three witnesses, two of whom were not even alive at the time of Sardar Bhup Singh's death while the third, an old man, who gives his age as 80, does not say that Suba held possession in Sardar Bhup Singh's lifetime, but, on the contrary, says, that Bhup Singh died before the witness's earliest recollections (*meri hosh se pehle*). Thus, there is no proof that Suba held adverse possession in the lifetime of Sardar Bhup Singh. The case is, therefore, governed by Article 141 and is within time.

Another point raised by Mr. Sheo Narain is that the plaintiffs are only some of the reversioners of Sardar Bhup Singh, defendants Nos 5 to 11 being also reversioners, and Mr. Sheo Narain urges, therefore, that the plaintiffs can only get a decree for possession of their shares and not for the whole site. No such contention, however, was raised in either of the lower Courts and I consider it is too late to raise it now.

Mr. Sheo Narain lastly contends that fresh time must now be given to the defendants for removal of the *malba*, the period originally allowed by the First Court having long since elapsed. This last plea is perfectly reasonable and is not contested by Lala Jagan Nath. The defendants, Salig Ram, Kushal Chand and Moti Ram, will be allowed three months from the date of this decree for the

removal of the materials now standing on the site.

I accept this appeal and reversing the decree of the lower Appellate Court I give the plaintiffs a decree for possesion of the site in dispute. Plaintiffs will recover costs in all Courts from Salig Ram, Kushal Chand and Moti Ram, defendants-respondents. The same respondents are allowed three months from date for removal of their materials.

B. N.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 62-B OF 1921.
September 22, 1921.
Present:—Mr. Dhobley, A. J. C.

YESHWANT—DEFENDANT—APPELLANT
versus
SHIWAPPA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Berar Land Revenue Code, s. 78 (2)—Tenant of antiquity—Origin of tenancy traceable—Tenant neither proved to be perpetual nor ante-jagir—*Presumption—Notice to quit—Delay in suing for ejectment, effect of—Fresh notice not necessary.*

The protection afforded by section 78 (2) of the Berar Land Revenue Code is not available to a tenant the origin of whose tenancy is known, or can be proved to have commenced after a certain point of time; that section applies only where by reason of antiquity, evidence of the commencement of a tenancy is lost [p. 178, col. 2; p 179, col 1.]

Parashram v. *Bapu*, 42 Ind. Cas. 631; 14 N. L. R. 111, followed.

In the absence of any proof that a tenancy is perpetual or that the tenant is an *ante-jagir* tenant, it must be assumed that he is an annual tenant. [p. 179, col. 1.]

Where a notice to quit is served upon a tenant his possession thereafter is that of a trespasser. Mere inaction on the part of a landlord to sue for ejectment after a notice to quit has been served on a tenant, does not amount to acquiescence of his possession as a tenant on the part of the landlord, as no fresh notice is necessary. [p. 179, col. 1.]

Appeal from a decree of the Additional District Judge, Amraoti, dated the 30th November 1920, in Civil Appeal No. 90 of 1920.

Mr. *W. H. Dhobe*, for the Appellant.
Mr. *A. V. Khare*, for the Respondents.

JUDGMENT.—The plaintiffs were the *izara* proprietors of the village where the fields in suit were situate, and their suit, out of which this appeal arises, was for the defendant's ejectment from those fields on the ground that he was only an annual tenant of theirs and that his tenancy had terminated by a notice in writing given by them to him. The defence was that the tenancy was a perpetual one and that the defendant was a tenant of antiquity, and was not hence liable to be ejected. It was also urged in defence that the notice given to the defendant was not valid and sufficient. All these pleas taken in defence were found against the defendant and the plaintiffs were given a decree for possession of the fields.

2. In this second appeal the appellant confines his defence only in respect of field No. 2. In respect of the remaining two fields the concurrent finding of the Courts below is that the defendant's tenancy commenced in 1893 and it is admitted that this finding of fact is not open to any interference by this Court on second appeal. We are, therefore, in this appeal concerned with the plaintiffs' claim only in respect of field No. 2. It is urged for the appellant that as there was no evidence to show when the tenancy of this field commenced, the case should have been held as being governed by section 78, clauses (2) and (3) of the Berar Land Revenue Code, and that the defendant should have been held as not being liable to ejectment. The finding of the two Courts is that the defendant's tenancy of this field was in existence in the year 1873, and that it had commenced prior to that year. From this finding it is attempted to be shown that the origin and the commencement of the tenancy was uncertain. In this case there is no uncertainty on the point, as the defendant himself admitted that the lease of this field was given to his predecessors first about 45 or 50 years ago. This statement was made by him in 1918, and thus, according to the defendant himself, the tenancy could not have commenced before 1868. We cannot, therefore, say that the origin of the tenancy was unknown. If it can be proved with certainty

that the tenancy did not commence till after a certain point of time, then it cannot be said of such a tenancy that evidence of its commencement has been lost by reason of its antiquity. A tenant of such holding is not, therefore, protected by section 78, clause (2) : see *Parashram* v. *Bapu* (1). In the absence of any proof that the tenancy was perpetual, or that the defendant was an *ante jogir* tenant, it must be assumed that he was an annual tenant. This disposes of grounds Nos. 1 to 4 of the appeal.

3. It is said that the notice to quit issued by the plaintiffs to the defendant was not proper and had exhausted itself, inasmuch as the plaintiffs permitted the defendant to continue in possession for two years afterwards and not sued him for ejectment so long. This, according to the contention of the defendant, amounted to an acquiescence of his possession as a tenant on the plaintiffs' part. It is admitted that for the subsequent years the defendant did not pay any rent nor was it accepted by the plaintiffs. There can, therefore, be no waiver, and as the defendant's possession was after the notice as a trespasser, no fresh notice was necessary. The notice was a perfectly valid and effective one. This disposes of the remaining grounds of appeal.

The plaintiffs were rightly given a decree for ejectment of the defendant, and the defendant's appeal is dismissed with all costs on him.

W. C. A.

Appeal dismissed.

(1) 42 Ind. Cas. 631; 14 N. L. R. 111.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 283 OF 1920.

March 31, 1920.

Present:—Mr. Justice Chevis, Acting Chief Justice.

SHIB CHARAN—APPELLANT

versus

Sheikh MUHAMMAD ISMAIL—OFFICIAL RECEIVER—RESPONDENT.

Hindu Law—Joint family—Father adjudged insolvent Son's estate, whether can be dealt with by Receiver.

Where the father of a joint Hindu family is adjudged an insolvent, the estate of the sons cannot be dealt with by the Receiver.

Sahaj Narayan Sahi v. *Wajid Hussain*, 49 Ind. Cas. 848, followed.

Miscellaneous first appeal from an order of the District Judge, Hissar, dated the 10th November 1919.

Lala *Rama Nand*, for the Appellant.

JUDGMENT.—Ram Chandar, now deceased, was declared an insolvent. His sons, Shib Charn, major, and Tilok Chand, minor, objected to sale of their interests in ancestral house and shop being sold. Their objections being overruled they appeal to this Court. The Receiver has not appeared here.

The objections are, (1) that the family is a joint Hindu family, and (2) that the sons' estate is not liable as the debts incurred were *badni* transactions.

I need not consider ground (2). As to ground (1) there is authority [*Sahaj Narayan Sahi* v. *Wajid Hussain* (1)] for holding that the estate of the sons cannot be dealt with by the Receiver.

Another ground of appeal is that the late insolvent's mother has a right of residence. But she can reside in the son's share.

I accept this appeal and direct that the sale to be effected by the Receiver shall be limited to the insolvent's share in the estate.

W. C. A.

Appeal accepted.

(1) 49 Ind. Cas. 848.

BABA SAH v. MAHOMED HUSAIN SAHIB.

MADRAS HIGH COURT.
ORIGINAL SIDE APPEAL No. 31 OF 1920.
September 22, 1921.
Present:—Sir William Ayling, KT., Officiating Chief Justice, and Mr. Justice Odgers.

P. BABA SAH AND OTHERS, TRUSTEES AND DHARMAKARTHAS OF SRI BALASUBRAMANI SWAMI TEMPLE —PLAINTIFFS—APPELLANTS

versus

K. G. MAHOMED HUSSAIN SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Cause of action—Criminal Procedure Code (Act V of 1898), s. 144, notifications and orders under—Denial of right by persons securing the orders—Right of persons prejudiced by orders—Suit for declaration of right and injunction, maintainability of—Prayer to declare notifications and orders ultra vires, *whether competent.*

A suit for a declaration that certain orders and notifications passed under section 144 prejudicially affecting plaintiff's rights were *ultra vires* is not maintainable, except perhaps in a properly framed suit in which Government and its officers are impleaded. The proper way to question such orders is by moving the High Court in revision. [p. 181, col. 1.]

A suit, however, does lie against the persons who procured the orders to declare plaintiff's rights as against the defendants in so far as the orders constitute an infringement of plaintiff's rights. [p. 182, col. 1.]

Valan Pakkiri Taragan v. *Subbayan Samban*, 49 Ind. Cas. 533; (1919) M. W. N. 46; 42 M. 271; 25 M. L. T. 39; 6 M. L. J. 79; 9 L. W. 208 (F. B.), followed.

Madhab Chandra Guho v. *Kamala Kant Chuckerbutty*, 6 B. L. R. 643; 15 W. R. 293, distinguished.

Appeal from a decree and judgment of Mr. Justice Bakewell, dated the 6th February 1920, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court made in Civil Suit No. 484 of 1918.

FACTS appear from the judgment.

Mr. *G. Krishnaswamy Iyer*, for the Appellants.—The learned Trial Judge erred in dismissing the plaintiffs' suit *in toto*. The orders of the Presidency Magistrate under section 144, Criminal Procedure Code, do give the plaintiffs a cause of action in so far as such orders infringe their rights. Defendants are persons interested in denying plaintiffs' rights. *Valan Pakkiri Taragan* v. *Subbayan Samban* (1). Though the orders under section 144, Criminal Procedure Code, will stand notwithstanding the decision in this case, that does not affect plaintiffs' right to a declaration, as a decree upholding their claim might induce Government to cancel the orders.

Mr. *V. V. Srinivasa Iyengar* (with him Mr. *Mohamed Ibrahim Sahib*), for the Respondents.—The defendants have not denied the rights of the plaintiffs.

The plaintiffs have not moved the High Court to revise the orders under section 144, Criminal Procedure Code. They cannot now ask to declare the orders *ultra vires*, especially where the Government is not impleaded as a party.

After all the granting of a declaratory decree is in the discretion of the Judge and there is no reason why the Trial Judge's discretion should be interfered with. *Valan Pakkiri Taragan* v. *Subbayan Samban* (1).

JUDGMENT.

AYLING, OFFG. C. J.—The facts of the case are so succinctly stated in the first paragraph of the judgment of the learned Trial Judge that I cannot do better than quote therefrom:

"The plaintiffs are the trustees of a Hindu temple and the defendants are the worshippers at a neighbouring Muhammadan mosque. Between the two buildings there were formerly a lane and some other buildings. The latter have been acquired by the Temple trustees who desire to adopt and use these buildings for religious purposes. The worshippers at the Mosque, who, by the plaintiffs' acquisition of the intervening buildings, have been brought into proximity to the Temple, complained to the Police of the acts of the plaintiffs, in connection with the new buildings acquired by them. The Police took action under section 144, Criminal Procedure Code. Orders were passed by the Magistrate and notifications were made by the Local Government under sub-section 5. These orders and notifications are set out in paragraph 22 of the plaint as constituting the plaintiffs' cause of action together with certain further proceedings under the Magistrate's orders."

The reliefs claimed by plaintiffs are:—

1. A declaration that they are entitled to use the plaint property in any way they like for purposes connected with the Temple.

2. A perpetual injunction restraining defendants from interfering with them in so doing.

(1) 49 Ind. Cas. 533; (1919) M. W. N. 46; 42 M. 271; 25 M. L. T. 39; 36 M. L. J. 79; 9 L. W. 208 (F. B.).

3. A declaration that the orders of the Chief Presidency Magistrate and Government are *ultra vires* and illegal.

The suit has been dismissed on the grounds (1) that plaintiffs have no cause of action, and (2) that the validity of the orders of the Chief Presidency Magistrate and Government cannot be enquired into in a suit to which only plaintiffs and defendants are parties.

As far as the third prayer is concerned, the dismissal of the suit is certainly justified. The orders in question were passed under section 144, Criminal Procedure Code, and if they were illegal or *ultra vires* the proper way to question them is by a criminal revision petition to the High Court. A perusal of them shows that they were passed in the interests of the public peace and without particular reference to the civil rights of the parties to the dispute; and even if it were possible to question their validity in a properly framed suit to which Government and its officers were parties, it is clearly impossible to do so in the present array of parties.

But, with all respect, it seems to me that the dismissal of the suit altogether is not justified. I do not think it can be said that plaintiffs have no cause of action or that the existence of the criminal orders justifies a refusal on the part of the Court to enquire into the civil rights of the parties.

It is not denied that the orders under section 144 were passed on the representations of the defendants, and their effect is to absolutely stand in the way of the exercise by plaintiffs of the rights they claim. It is, to my mind, impossible to hold that defendants are not persons denying or interested to deny plaintiffs' title to the right sought to be declared in their first plaint prayer: and the Full Bench decision in *Valan Pakkiri Taragan* v. *Subbayan Samban* (1) seems to me authority for treating the orders referred to as a good cause of action.

Mr. V. V. Srinivasa Iyengar for respondents has argued rather tentatively that there has been no denial by defendants of plaintiffs' rights, in spite of their representation to the Magistrate that those rights should be interdicted. I do not think this position is tenable. It is clear from Exhibit W, a magisterial order, dated 25th May 1902, in the early stage of the dispute that the Muhammadans then proposed themselves to file a civil suit against the Temple Dharmakarthas, obviously to restrain the latter from erecting a *mantapam* on the plaint site and though this was never done, yet the fact that this intention was recorded and the passing of orders delayed for sometime to enable the suit to be filed, shows that the defendants' party were actually denying plaintiffs' right. In the present suit, we have in paragraph 20 of the plaint an assertion of plaintiffs' right to use the property for any purpose connected with the temple. This right is specifically denied in paragraph 18 of the written statement, and on this denial, issue No. 4 has been framed in the suit:—Have the plaintiffs acquired the right claimed in the plaint, in respect of the use of the Temple properties, as against the defendants? In these circumstances, the view of the learned Trial Judge that, "Defendants do not, in fact, deny the right of the plaintiffs to act in that manner if it is otherwise (*i.e.*, apart from the orders under section 144, Criminal Procedure Code) lawful to do so," appears to be wrong.

It seems clear that before they secured the orders under section 144, Criminal Procedure Code in their favour, defendants did, in fact, deny plaintiffs' right to use the property in the manner desired by them; and that they still do so even in the present suit.

Lastly, it is argued that the grant of declaration is always discretionary and that, in the present case, in the face of the orders under section 144, it would be waste paper. I do not agree with this It is quite true that the orders under section 144 will still remain in force unaffected by any declaratory decree in this suit. But such orders are always open to re consideration by Government, and if the result of this suit should be to establish plaintiffs' right it will be open to plaintiffs to go to Government and ask that it should be re-considered, whether in view of this adjudication the interest of the public tranquillity demand their permanent deprivation of the said right. I do not presume to say what answer would be given; but neither can I assume that the application would necessarily be infructuous.

We have been referred to *Mathab Chandra Guro* v. *Kamala Kant Chuckerbutty* (2) as

(2) 6 B. L. R. 643; 15 W. R. 293.

authority in defendants' favour on this point. I have carefully considered the judgment in that case, and note that it proceeds very largely on the distinction between the bridge which had been removed under the magisterial order and any subsequent bridge which the plaintiff in that case might erect. That is a possible ground for distinction; but in so far as the judgment is relied on, as laying down a principle applicable to the present case, I must respectfully dissent from it.

I am, therefore, of opinion that the dismissal of the suit should be set aside, and that it should be remanded for trial, as regards plaint prayers (*a*) and (*b*) only.

The costs of this appeal should be provided for in the decree to be passed.

ODGERS, J.—I agree. There has clearly been no decision on the rights of the parties in the orders issued by the Chief Presidency Magistrate and by the Government, and there is equally no doubt that these rights have been put in issue in the suit under appeal. (*Cf.* plaint paragraph 20 and written statement paragraph 18.)

I think the case decided by the Full Bench in *Velan Pakkiri Tarogan* v. *Subbayan Samban* (1) is clear authority that the existence of the magisterial orders which, as here, the plaintiffs contend, constitute an infringement of their civil rights, gives a cause of action. With regard to the case in *Madhab Chandra Guho* v. *Kamala Kant Chuckerbutty* (2), which does not appear to have been considered by the Full Bench of this Court in *Velan Pakkiri Tarogan* v. *Subbayan Samban* (1), I think this case may be distinguished from the present. Macpherson, J., seems to have decided the case on the ground that a mere declaratory decree giving no consequential relief and from which in fact no relief could be obtained should not be given, and a suit for that purpose would not lie. Mookerjee, J., was of opinion that as the Magistrate's order was passed with jurisdiction, it could not be questioned in a civil suit and the latter should have been dismissed. With this latter I agree, and it may well be that a declaration, which is discretionary, should not be made, whereas in the Bengal case it would be useless. In the case before us, however, I am not clear that a declaration would be useless, especially as it is coupled with a prayer for consequential relief (*i.e.*) an injunction. This is sufficient to distinguish that case from the present.

I, therefore, think the learned Trial Judge was wrong in dismissing plaintiffs' suit and it must be restored and go back on prayers (*a*) and (*b*) only.

M. C. P.

Appeal allowed: Case remanded.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 37 OF 1920.

June 26, 1920.

Present:—Mr. Justice Leslie Jones and Mr. Justice Dundas.

JAUHRI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PEMAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 35 (2), 36—Execution proceedings—Persons particularly concerned aware of such proceedings—Publicity, law as to, whether complied with.

Where persons particularly concerned in execution proceedings have been made aware of those proceedings, and publicity thereof has thus been achieved, the provisions of the law contained in O. XXI, rr. 35 (2) and 36 of the Civil Procedure Code should be deemed to have been substantially complied with. [p. 183, col. 1.]

Letters Patent Appeal against the order of Mr. Justice Scott-Smith, passed on the 22nd January 1920, in Civil Appeal No. 1229 of 1919, reported as 55 Ind. Cas. 19.

Mr. *N. C. Pandit*, for the Appellants.

Chaudhri *Zaffar Ullah Khan*, for the Respondents.

JUDGMENT.—In 1902 the plaintiffs bought a half share in certain land from Peman and Kallu, and in 1909 they obtained a decree for possession on the basis of the deed of sale. Execution was taken out and in May 1909 the *Girdawar Kanungo* was ordered to go to the spot. According to his report, the accuracy of which is not in dispute, symbolical possession was given to the decree-holders when both Kallu and Peman were present and a proclamation was made in the village by beat of drum. Kallu and Peman, however, objected at the time that posses-

sion should not be given because they had filed an appeal which was still pending. Subsequently, the plaintiffs filed the present suit alleging that after they were thus granted possession they were dispossessed by the judgment-debtors.

The fact that they are not now in possession is not denied but their suit has been dismissed as unmaintainable on the ground that, as there were other co-sharers and also a tenant in possession, a copy of a warrant should have been affixed in some conspicuous place on the property and that the failure to comply with this provision of O. XXI, rr. 35 (2) and 36 is a fatal defect, authority followed being *Khub Ram* v. *Surat* (1). In the case there under discussion there was no finding that the judgment debtors had knowledge of execution. The co-sharers are not parties to the present dispute, and it appears to us that where the persons particularly concerned have been made aware of the execution proceedings and the publicity, which is the object of the provisions of the law, has been clearly achieved, it must be held that there has been substantial compliance with it, and on this ground we regard the present case as distinguishable from *Khub Ram* v. *Surat* (1). We note that the Judge who delivered that ruling was one of the Judges who admitted this appeal and was apparently prepared to take the same view.

Accordingly, we allow the appeal and, setting aside the decree, remand the suit to the Court of first instance for disposal according to law. Costs will be costs in the cause.

W. C. A. *Appeal accepted.*

(1) 39 Ind. Cas. 753; 20 P. R. 1917; 22 P. W. R. 1917; 26 P. L. R. 1917.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 717 OF 1920.

January 11, 1922.

Present:—Mr. Justice Devadoss.

Sree VANAMAMALAI JEER SWAMIGAL, THROUGH HIS AUTHORISED AGENT S. V. KALLABIRAN PILLAI—DEFENDANT—PETITIONER

versus

K. PERIA VENKATARAMANA CHARIAR AND OTHERS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 9—Archaka of Temple, suit by, against trustee for possession, maintainability of—Master and servant, relationship of, as between trustee and archaka.

Though hereditary *archakaship* is treated under Hindu law as immoveable property divisible among co-parceners, it is not immoveable property under section 9 of the Specific Relief Act. [p. 184, col. 2.]

Ghelabhai Gavrishankar v. *Hargovan Ramji*, 12 Ind. Cas. 928; 36 B. 94; 13 Bom L. R. 1171 and *Girjashankar Daji* v. *Murlidhar Narayan*, 59 Ind. Cas. 271; 45 B. 234; 22 Bom. L. R. 1202, explained

An *archaka* of a Temple who has been dispossessed by the trustee cannot maintain a suit against the latter for possession. [p. 184, col. 2.]

Seshadri Aiyangar v. *Ranga Bhattar*, 10 Ind. Cas. 548; 35 M. 631; 10 M. L. T. 14; 21 M. L. J. 580 and *Para Koothan* v. *Para Kulla Vandu*, 31 Ind. Cas. 720; 29 M. L. J. 760, referred to.

Section 9 of the Specific Relief Act does not confer on a servant a right of suit against his master. [p. 185, col. 1.]

Obiter.—Joint possession cannot be given under section 9 of the Specific Relief Act. [p. 185, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Temporary Subordinate Judge, Tinnevelly, in Original Suit No. 50 of 1919, dated the 23rd December 1919.

FACTS appear from the judgment.

Mr *T. Narasimha Aiyangar* (with him Mr. *T. Nallosivam Pillai*), for the Petitioner.—The suit is not maintainable. An Archaka of a temple is not the owner of temple property. His possession is that of the trustee. When the trustee removes him from office he cannot file a suit against the trustee under section 9 of the Specific Relief Act. His position is that of a servant. He is not a co-owner with the trustee. *Para Koothan* v. *Para Kulla Vandu* (1) and *Seshadri Aiyangar* v. *Ranga Bhattar* (2).

Mr. *T. M. Ramaswami Aiyar*, for the Respondents.—Hereditary Archakaship is im-

(1) 31 Ind Cas. 720; 29 M. L J. 760.

(2) 10 Ind. Cas. 548; 35 M. 631; 10 M. L. T. 14; 21 M L. J. 580.

moveable property under Hindu Law. *Ghelabhai Gavrishankar* v. *Hargovan Ramji* (3) and *Girjashankar Doji* v. *Murlidhar Narayan* (4). Possession may be given under section 9 of the Specific Relief Act. At any rate joint possession may be given with the trustee. *Aiman Bibi* v. *Reasat Sheikh* (5).

JUDGMENT.—This is an application to revise the order of the Subordinate Judge of Tinnevelly under section 115 of the Civil Procedure Code. In this case, the plaintiffs brought a suit under section 9 of the Specific Relief Act to recover possession of a temple building on the strength of title as trustees from the Varamamalai Jeer and his servants who dispossessed them. The defendants contended "that the plaintiffs were neither trustees of the temple nor the hereditary Archakas of temple, that they were merely ordinary servants in Perumal temple" and the shrines attached thereto and that they were removed for misconduct by the first defendant, the Jeer, and that they were not entitled to recover possession of the temple.

The Subordinate Judge held that the plaintiffs were not the trustees of the plaint temple and that first defendant was the trustee and that the Archakaship of the plaint Hanumar temple was hereditarily vested in the plaintiffs' family. He also found that "the plaintiffs were in possession as Archakas and in the exercise of their right as Archakas and not as trustees of the temple" and that "they were in a sense dispossessed within six months prior to suit."

The decretal portion of the judgment runs thus: "There will be a decree only for qualified possession and not exclusive absolute possession, namely, possession which Archakas are entitled by law to have for the proper discharge of their duties."

It is contended before me by Mr. Narasimha Aiyengar for the first defendant, that possession contemplated by section 9 of the Specific Relief Act is not the possession of a servant or joint possession of co owners. The first paragraph of section 9 reads thus, "if any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit." This section is intended to provide a summary remedy for cases of dispossession of immoveable property, except in the course of law, on proof of dispossession within six months, the Court will direct the restoration of possession irrespective of the title of the parties. What the first defendant, the trustee, has done is to dismiss the plaintiffs who are only Archakas. It has been decided that hereditary Archakas are only servants of the temple subject to the disciplinary jurisdiction of the trustee: *Seshadri Aiyangar* v. *Ranga Bhattar* (2). They have a right of suit if they are improperly prevented from performing the duties of their office or dismissed without good and proper reasons. The possession, therefore, of the Archakas of the temple is only that of servants. The trustee is entitled to the possession of the trust property and an Archaka, or any other servant of the temple, has possession on behalf of the trustee or by his leave or license, implied or express. The learned Subordinate Judge has erred in thinking that he had jurisdiction to entertain a suit under section 9 of the Specific Relief Act by a servant against a master, no doubt the finding that plaintiffs are only Archakas was arrived at after the whole of the evidence was recorded. The Subordinate Judge should have dismissed the suit on this ground alone. The respondents' Vakil relies on *Ghelabhai Gavrishankar* v. *Hargovan Ramji* (3) and *Girjashankar Doji* v. *Murlidhar Narayan* (4) for the contention that hereditary Archakaship is immoveable property under the Hindu Law. No doubt, the Hindu Law treats hereditary Archakasbip and hereditary priesthood as immoveable property and divisible among co-parceners. In Southern India, village barbers when they effect a division in their family, divide the village into so many shares among the co parceners. Such a custom is recognised by the Hindu Law. This fact would not make hereditary Archakaship or any other office immoveable property under section 9 of the Specific Relief Act.

The petitioner contends that joint possession cannot be given *vide Para Koothan* v. *Para Kulla Vandu* (1) and the respondent relies on

(3) 12 Ind. Cas. 928; 36 B. 94; 13 Bom. L. R. 1171.
(4) 56 Ind Cas. 271; 43 B. 234; 22 Bom L. R. 1202.
(5) 28 Ind. Cas. 670; 19 C. W. N. 1117.

Ajiman Bibi v. *Reasat Sheikh* (5) for the position that joint possession could be given under section 9 of the Act. Sitting as a Single Judge I am bound by a decision of a Bench of this Court in *Para Koothan* v. *Para Kulla Vandu* (1). But I do not decide this case on this point. I hold that section 9 of the Specific Relief Act is not applicable to a case like the present. Moreover, it is difficult to see how the decree could be executed effectively. Both the plaintiffs and the defendants put their case too high before the Subordinate Judge and the consequence was that a lot of evidence was adduced and the Court had to record its findings on the points raised.

Considering that there is a remedy open to the parties and that the findings of the Subordinate Judge are evidently just, I am not prepared to exercise my discretion under section 115 in favour of the first defendant. The petitioner and the other defendants were responsible for an elaborate enquiry in consequence of their denial of the plaintiffs' right to hereditary Archakaship. In the result I dismiss the petition without costs.

M. C. P.

Petition dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2517 OF 1915.

July 12, 1920.

Present:—Mr. Justice Leslie-Jones and Mr. Justice Dundas.

ANANT RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

INAYAT ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Mortgage—Bond executed subsequently acknowledging liability to pay interest—Acknowledgment, whether extends to mortgagor's obligations under mortgage-deed—Limitation, law of, method of construing.

An admission of liability to pay interest due on a mortgage-deed, contained in bonds executed subsequently, amounts to an acknowledgment of liability under the mortgage, including liability to give possession to the mortgagee. [p. 187, col. 1.]

Sukhamoni Chowdhrani v. *Ishan Chandra Roy*, 25 C. 844; 25 I. A. 95; 2 C. W. N. 402; 7 Sar. P. C. J. 284; 13 Ind. Dec. (N. S.) 550 (P. C.) and *Basant Singh* v. *Thakur Rampal Singh*, 51 Ind. Cas. 985; 6 O. L. J. 248; 1 U. P. L. R. P. C. 45, referred to.

Inasmuch as the Law of Limitation restricts the enforcement of rights, it should be construed strictly, and if there is any doubt, the interpretation should be in favour of the right to proceed. [p. 187, col. 1.]

Second appeal from a decree of the District Judge, Jullundur, dated the 1st July 1915, affirming that of the Subordinate Judge, First Class, Jullundur, dated the 14th December 1914.

Bakshi *Tek Chand*, for the Appellants.

The Hon'ble Mian *Fazal-i-Hussain*, K. B., for the Respondents.

JUDGMENT.—The plaintiffs-appellants brought a suit on the 15th June 1914 for possession of certain land which had been mortgaged to them by Inayat Ali Khan, respondent, by a registered deed of the 26th August 1895, but their suit has been dismissed in the First Court and in the lower Appellate Court on the ground that it is time-barred under Art. 135 of the Limitation Act as being brought more than 12 years after the time when the mortgagor's right to possession determined. The plaintiffs have preferred a second appeal on the ground that they are entitled to an extended period by reason of the existence of certain acknowledgments by the mortgagor admissible for the purpose of extending the time under section 19 of the Act. It should be remarked that some of the land mortgaged is now in the possession of third parties under subsequent transfers, and in this Court in order to avoid complication the appellants are only proceeding against such land as may be found to be still in the possession of Inayat Ali Khan, the original mortgagor, and they abandon their claim against all the remaining defendants. It is an admitted fact that the mortgage-deed provided for the mortgagees taking possession on default by the mortgagor in payment of interest and that such default was made in the year 1896. Consequently, the mortgagors' right to possession determined at that time and the suit instituted in 1914 is obviously time barred unless the plaintiffs can claim an extended period. This extension is claimed on the basis of acknowledgments contained in bonds dated 17th April 1899 and 7th January 1903 executed by Inayat Ali Khan in the plaintiffs' favour. In these bonds part of con-

sideration is entered as being the interest due to the plaintiffs on the mortgage now in suit. The First Court did not consider that the fact that part of the consideration of the bonds was interest on the mortgage amounted to an acknowledgment of liability to give possession to the mortgagee. The Subordinate Judge remarked :—

"As to section 19 the mortgagor never made an acknowledgment of liability of the mortgagee's right to the mortgaged land. He simply admitted his liability to pay the interest due under the registered mortgage-deed sued upon. This section, therefore, does not apply to the present case."

The point was again taken in appeal to the District Judge and he has agreed that the suit is time barred, though he does not give any specific reasons for his finding. The only question before us is whether these bonds do amount to acknowledgments sufficient to extend the period for a suit for possession.

Now, in two bonds of the 17th January 1899 consideration is the balance of interest due on the registered deed of the 26th August 1895, *i. e.*, on the mortgage now in suit. The bond of the 7th January 1903 for Rs. 168 contains an item of Rs. 23 on account of interest on the registered deed and Inayat Ali Khan admits that this refers to the deed of 1895. It is argued that though these recitals do amount to acknowledgments of liability to pay interest on the mortgage-deed, they did not amount to acknowledgments of the plaintiff's right to take possession and, therefore, fall short of being acknowledgments of liability in respect of such right. We have not been shown any authority exactly in point. The Privy Council has, however, held that it is not required that acknowledgment within the Statute shall specify every legal consequence of the thing acknowledged. The case reported is *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (1) in which the plaintiff claimed from the defendant contribution to payments made by him in satisfaction of the joint debt and based his claim to an extended period of limitation on an admission made by the defendant in a petition to the District Judge that she was a joint debtor in certain of the debts paid. The Privy Council remarked as follows :—

"That is a distinct acknowledgment that the total of the debts comprised in the list is a joint debt. The Subordinate Judge held that the defendant did not thereby admit any liability to the plaintiff, or promise to pay him anything. But it is not required that an acknowledgment within the Statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as joint debtor with the plaintiff, one of which is that he may sue her for contribution."

This judgment was referred to in *Basant Singh* v. *Thakur Rampal Singh* (2) a judgment of a Division Bench of the Oudh Judicial Commissioner's Court. In that a mortgagee brought a suit for possession of the property mortgaged and relied to save limitation on two admissions of the existence of the mortgage made by the defendant in petitions addressed to the Deputy Commissioner. The Judicial Commissioners remarked that "the only serious objection taken by the appellant to these acknowledgments is that they do not in terms admit the plaintiff's rights to take possession under the mortgage-deed. The appellant seeks to draw a distinction between an admission of his liability under the mortgage and an admission of a particular remedy to which the mortgagee might be entitled under it. This distinction is, in our opinion, without validity. The right which was in question and which the appellant acknowledged was the plaintiff's right as mortgagee under the terms of the mortgage, and the right necessarily carries with it the power to claim the particular reliefs to which the provisions of the deed entitled him."

This reasoning appears to us to be sound and applicable to the present case. The bond of 1903 certainly contains an admission of the existence of the registered deed now in suit as well as that the respondent is liable to pay interest under its terms. In the absence of any definite indication to the contrary, we think that this

(1) 25 C. 844; 25 I. A. 95; 2 C. W. N. 402; 7 Sar. P. C. J. 294; 13 Ind. Dec. (N. s.) 550 (P. C.).

(2) 51 Ind. Cas. 985; 6 O. L. J. 243; 1 U. P. L. R. (J. C.) 45.

must be regarded as an admission made by the respondent in favour of the plaintiff of respondent's obligations under the deed. The plea that the respondent only admitted his liability to pay interest and that he cannot be supposed to have also admitted his general liability under the deed appears to plase an interpretation upon his act for which there is no apparent justification. One object of the Law of Limitation is to prevent claims being preferred after such a time that the real character of the transaction can no longer be cleared up, but section 19 provides that an acknowledgment of the existence of a liability will give a fresh term, and it may be presumed that in such a case it is considered that the object of the Law of Limitation has been attained. But as the Law of Limitation restricts a man from enforcing his rights, it must receive strict construction, and if there be any doubt, the interpretation placed upon the law should be in favour of the right to proceed. The interpretation of what constitutes an acknowledgment under section 19 is as wide as it can possibly be. It is laid down that "the acknowledgment is sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment is not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right." The tenor of the section is certainly strongly against a narrow interpretation of what constitutes an acknowledgment. In America it has been held that an acknowledgment of the existence of the mortgage-debt extends time for a suit for ejectment brought by the mortgagee, and this is exactly the plaintiff's contention in the present case.

In our opinion, therefore, the admission of liability to pay interest under the mortgage contained in the bonds of 1899 and 1903 amounts to an acknowledgment of liability under the mortgage including liability to give possession to the mortgagee, and the suit is not, therefore, barred by time. We must, therefore, accept the appeal and decree the claim as laid against Inayat Ali Khan to the extent of such portion of the mortgaged land as may still be found to be in his possession together with the costs of the case.

W. C. A.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 58 OF 1921.

November 28, 1921.

Present:—Mr. Justice Le Rossignol and Mr. Justice Campbell.

THE FIRM HIRA NAND-MURLI DHAR OF AMRITSAR, THROUGH MURLI DHAR —PLAINTIFF—APPELLANT

versus

THE FIRM FLEMING SHAW & Co., OF AMRITSAR AND KARACHI—DEFENDANT —RESPONDENTS.

Arbitration Act (IX of 1899), s. 14—Specific Relief Act (I of 1877), s. 42—Award not filed in Court—Suit for declaration that award not binding, nature of.

The Arbitration Act prescribes the manner in which an award may be enforced, and section 14 of the Act details the courses open to a Court after an award has been filed in Court, but the Act has no bearing on a suit for a declaration that a certain award by arbitrators is not binding on a plaintiff. Such a suit falls under section 42 of the Specific Relief Act.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, First Class, Amritsar, dated the 15th December 1920.

Dr. *Nand Lal*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—This appeal arises out of a suit for a declaration that a certain award by arbitrators is not binding on the plaintiff.

The Court below has decided nothing but that the suit is one falling under section 14 of the Indian Arbitration Act, IX of 1899, and, therefore, the only Court having jurisdiction is that of a District Judge. As the Court below was that of a Subordinate Judge, it returned the plaint.

The plaintiff appeals and in our opinion must succeed.

BANSILAL v. SITARAM.

The Indian Arbitration Act prescribes the manner in which an award may be enforced, and section 14 details the courses open to the Court after an award has been filed in Court, but the Act has no bearing on a suit of the nature of that now under consideration.

No award has been filed in Court, and that on which defendants rely may never be filed in Court; had it been filed in Court, section 14 of the Indian Arbitration Act would have applied, but the plaintiff is not bound to wait for his opponents to take action under that Act.

His present suit falls under section 42 of the Specific Relief Act and not under the Indian Arbitration Act.

Accordingly we hold that the Subordinate Judge had jurisdiction; we set aside his order and direct him to re-admit the plaint and decide the case on the merits. Costs to be cost in the cause.

Z. K.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 235-B OF 1920.

July 25, 1922.

Present:—Mr. Kotval, A. J. C.

BANSILAL—DEFENDANT No. 1—APPELLANT

versus

SITARAM AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 2 TO 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, Sch. I, O. XXXVIII, r. 5, Sch. III, para. 11—Attachment before judgment—Property under control of Collector—"Attachment," meaning of—Non-compliance with r. 5, O. XXXVIII, effect of.

Paragraph 11 (1) of the Third Schedule to the Civil Procedure Code does not stand in the way of an attachment before judgment of the property of a judgment-debtor while the property is under the control of a Collector, because such an attachment is not a process in execution of a decree. [p. 189, col. 1.]

The object of the provision in the latter part of paragraph 11 of the Third Schedule to the Civil Procedure Code is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object, for by such attachmen alone the property is not exposed to the risk of such loss [p. 189, col. 1.]

The term "attachment" in section 64 of the Civil Procedure Code covers an attachment before judgment. Consequently, an attachment before judgment and an attachment in execution of a decree have the same effect for the purpose of binding the property so as to prevent private alienations. [p. 189, col. 1.]

Ganu Singh v. *Jangi Lal*, 26 C. 531; 13 Ind. Dec. (N. S.) 941, followed.

An order directing the attachment before judgment of the property of a judgment-debtor without complying with the requirements of r. 5 of O. XXXVIII, is *ultra vires*, and an attachment in consequence of such an order is void and cannot be relied upon to defeat an alienation of that property. [p. 189, col. 2.]

Appeal against a decree of the Additional District Judge, Amraoti, dated the 23rd April 1920, in Civil Appeal No. 164 of 1919.

Mr. *W. H. Dhabe*, for the Appellant.

Mr. *V. V. Ohitale*, for the Respondents.

JUDGMENT.—Ghisulal, the deceased father of defendant No. 1, obtained decrees in two suits, Nos. 870 of 1915 and 871 of 1917, against defendants Nos. 2 to 4. The decree in Suit No. 870 of 1915 was transferred to the Collector for execution and field No. 59 was attached and put up for sale. The decree was satisfied by a payment of the decretal amount on the 26th April 1918. This amount was paid out of a loan borrowed on a mortgage of the attached field executed by the judgment-debtors in favour of the plaintiff on the same day.

In execution of the decree in Civil Suit No. 871 of 1917 Ghisulal got the same field attached by the Civil Court and purchased it himself in auction on the 17th September 1918.

The plaintiff filed the present suit for a declaration that the field is subject to his mortgage and that defendant No. 1 is liable for the mortgage debt. Defendant No. 1 denied knowledge of the mortgage. He also pleaded that as in Suit No 871 of 1917 a prohibitory order was passed on the 17th December 1917 and attachment was made on the 8th January 1918, the plaintiff's mortgage was void as made pending attachment. The plaintiff pleaded that the attachment in Suit No. 871 of 1917 was void under paragraph 11, Third Schedule, Civil Procedure Code, as it was made while the property was under the Collector's control in Suit No. 870 of 1915.

BANSILAL v. SITARAM.

The lower Courts have held that the attachment in Suit No. 871 of 1917 was void under paragraph 11, Third Schedule, Civil Procedure Code, and have decreed the plaintiff's claim. This finding is now challenged in second appeal.

It is urged that, under paragraph 11, Third Schedule, Civil Procedure Code, it is the issue of process in execution of a decree that is prohibited, and that, as attachment before judgment is not such process, that paragraph does not render the attachment void. It is further urged that if the attachment is valid, section 64, Civil Procedure Code, renders the mortgage in favour of the plaintiff void as against the defendant. The contention that the attachment is not void under paragraph 11 appears to be correct. Attachment before judgment is not a process in execution of a decree, for, at the time of the attachment, there is no decree and, therefore, there can be no process that could be issued in execution of the same. There is no force in the argument that if attachment before judgment made while the estate is still under the Collector's control is held not to be void under paragraph 11, the object of the provision in the latter part of paragraph 11 (.) will fail. The object is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object, for by such attachment alone the property is not exposed to the risk of such loss.

The attachment before judgment not being void under the provisions of paragraph 11, the question of the applicability of section 64, Civil Procedure Code, remains. It has been held in *Ganu Singh* v. *Jangi Lal* (1) that an attachment before judgment and an attachment in execution of a decree have the same effect for the purpose of binding the property so as to prevent private alienations. One of the objects of granting attachment before judgment is the same as that of section 64, Civil Procedure Code, namely, the protection of the decree-holder by prohibiting private alienations of the judgment-debtor's property and that object would fail if "attachment" in section 64 did not cover attachment before judgment. The plaintiff's mortgage would, in my opinion, be void as against the defendant if there was a valid attachment before judgment.

It appears, however, that there has been no valid attachment before judgment in this case. The record of Suit No. 871 of 1917 which was sent for at the instance of the defendant shows that on the 17th December 1917 Ghisulal put in an application expressly asking for attachment as provided by O. XXI, r. 54 and O. XXXVIII, r. 7, First Schedule, Civil Procedure Code. The Court thereupon issued the order prayed for in Form No. 24, Appendix E, Civil Procedure Code, and the property was actually attached on the 7th January 1918. O. XXXVIII, r 5, provides that the Court may, if it is satisfied on certain points, direct the defendant to furnish security, to produce and place at the disposal of the Court when required the whole or part of his property or the value of the same or to appear and show cause why he should not furnish security, and may also in the order direct the conditional attachment of the property. Neither had Ghisulal asked for nor did the Court issue any order under this section. Action was asked to be taken and was taken apparently under rule 6. But it was *ultra vires*, for no order could be passed under this rule until the defendant had been asked to furnish the security as in rule 5 or show cause why he should not furnish it and had failed to do either. The attachment ordered was, therefore, *ultra vires* and void and the defendant cannot rely upon it to defeat the alienation in favour of the plaintiff. The appeal, therefore, fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 26 C. 531; 13 Ind. Dec. (N. S.) 941.

SISTLA SUBBAYYA v. PATA PITCHANNA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1236 OF 1920.

December 13, 1921.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

SISTLA SUBBAYYA—DEFENDANT—APPELLANT

versus

PATA PITCHANNA *alias* PITCHAYYA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 116—Vendor and purchaser—Sale-deed, construction of—Covenant for title and quiet enjoyment, breach of—Damages, suit for—Limitation, starting point of—Cause of action.

A sale-deed executed by defendant and another to plaintiff contained the following covenant: "If there is any dispute in respect of this by Gnatis, Samantas and others etc, we shall settle them out of our expense and we shall be bound to carry out this sale without obstruction" The other vendor's son sued plaintiff for recovery of half the land comprised in the sale and obtained a decree in 1913 The present suit was filed by plaintiff in 1917 for recovery of half the sale price:

Held, that even assuming that there was no covenant for quiet enjoyment there was clearly a covenant for title and the suit would be governed by Article 116 of the Limitation Act. [p 191, col. 1]

Mahomed Ali Sheriff v. *Venkatapathi Raju*, 60 Ind. Cas. 235; 39 M. L. J. 449; 11 L. W. 537; 27 M. L. T. 304, referred to.

Second appeal against a decree of the Court of the Third Temporary Subordinate Judge, Guntur, in Appeal Suit No. 133 of 1919 (Appeal Suit No. 192 of 1919, on the file of the District Court, Guntur), preferred against the decree of the Court of the Additional District Munsif, Bapatla, in Original Suit No. 407 of 1917, (Original Suit No. 678 of 1916, on the file of the Court of the Principal District Munsif, Bapatla).

FACTS appear from the judgment.

Mr. *A. Krishnaswami Aiyar*, for the Appellant.—The suit was barred. Time runs from the date of the decree against the plaintiff in Original Suit No. 885 of 1909. That decree declared the sale-deed invalid in respect of a moiety of the property and the suit should have been brought within three years from the date of that decree. The cause of action does not arise from the date of dispossession.

Mr. *B. Somayya*, for the Respondent.—The suit, in effect, was based on the breach of the covenant for title and quiet enjoyment contained in the sale deed. The vendors agree to indemnify the vendee against disputes by gnatis. Article 116 of the Limitation Act applies. See *Mahomed Ali Sheriff* v *Venkatapathi Raju* (1).

JUDGMENT.—The only question raised in this second appeal is whether the plaintiff's suit to recover part of the purchase money paid by him in respect of a property purchased by him is barred by limitation. The purchase by the plaintiff was under a sale-deed dated the 1st of October 1905 executed by the defendant and another in favour of the plaintiff. The son of the other vendor filed Original Suit No. 885 of 1909, to set aside the sale so far as the share of his father was concerned and obtained a decree in 1913 for possession of the half share belonging to the other vendor. This suit was filed in 1917. The lower Appellate Court held that the plaintiff was entitled to recover Rs. 300, half the price paid by him, and that the suit was not barred by limitation, as the starting point of limitation was the date of dispossession and that the suit was within three years from that date.

The contention for the appellant is that the suit not having been brought within three years from the date of the decree which declared that the sale-deed in respect of one-half of the property is invalid, is barred by limitation and that the date of dispossession does not give the starting point of limitation. The question is whether this is to be treated as a claim to recover money on account of failure of consideration owing to the vendor having had no title to convey one half of the property or whether it is to be treated as a suit for damages for breach of covenant for title or for breach of covenant for quiet enjoyment. If the suit can be brought under the two latter heads, it is clear that Article 116 of the Limitation Act would apply, the sale-deed having been registered, and the party would have six years and the suit would not, in any event, be barred. The material part of the sale deed, Exhibit A, runs as follows:—" In respect of the above sale Rs. 325 has been received in cash and a promissory-note for Rs. 275 is executed by you in favour of Subbayya out of us in all

(1) 60 Ind. Cas. 235; 39 M. L. J. 449; 11 L. W. 537; 27 M. L. T. 304.

amounting to Rs. 600 and the sale price has been received in this manner. If there is any dispute in respect of this by Gnatis, Samantas and others, etc., we shall settle them out of our own expense and we shall be bound to carry out this sale without obstruction." In *Mahmed Ali Sheriff* v. *Venkatapathi Raju* (1), it was held that a similar covenant in a sale-deed amounted to a covenant for quiet enjoyment and that Article 116 applied to a breach of such covenant. Even assuming that there is no covenant for quiet enjoyment under the document, there is clearly a covenant for title and a breach of that covenant will, under Article 116, gives the plaintiff six years to sue from the date when the covenant is broken. In the view we take it is unnecessary to consider whether if the suit is to be treated as one to recover money on account of failure of consideration. Limitation would run from the date of the decree declaring that one of the plaintiff's vendors had no title or from the date of dispossession, a question on which there is a conflict of authority.

The second appeal fails and is dismissed with costs

The memorandum of objections as regards mesne profits is allowed and appellant will pay respondents Rs. 140.

M. C. P.

Appeal dismissed;
Memo. of objections allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 211-B OF 1920.

July 21, 1922.

Present:—Mr. Prideaux, A. J. C.

BALKRISHNA—PLAINTIFF—APPELLANT

versus

LAKHU AND OTHERS—DEFENDANTS—RESPONDENTS.

*Minor, sale in favour of, validity of—Minor, whether can sue for possession of property sold—*Benamidar, *right of, to sue—*Benami *transaction—Duty of Court to give effect to—*Benamidar, *status of.*

There is nothing in the law to prevent a minor becoming a transferee of immoveable property and a minor in whose favour a valid deed of sale has been executed is competent to sue for possession of the property conveyed thereby. [p. 193, col. 1.]

Navikoti Narayana Chetty v. *Loyalinga Chetty*, 4 Ind. Cas. 383; 33 M. 312; 7 M. L. T. 234; 19 M. L. J. 752, referred to.

Raghava Chariar v. *Srinivasa Raghava Chariar*, 36 Ind. Cas 921; 40 M. 308 at p. 312; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363, *Munni Koer* v. *Madan Gopal*, 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1034, *Narain Das* v. *Dhania*, 35 Ind. Cas 23; 38 A. 154; 14 A. L. J. 65, *Muniya Konan* v. *Perumal Konan*, 18 Ind. Cas. 963; 24 M. L. J. 352; 13 M. L. T. 311, relied on.

A *benamidar* can sue in his own name. [p. 192, col. 1.]

Gur Narayan v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W 335; 23 C.W. N. 621; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.), *Vaithesware Iyer* v. *Srinivasa Raghava Iyengar*, 50 Ind. Cas. 309; 42 M. 349; 36 M. L. J. 296; 9 L. W. 362; 25 M. L. T. 351; (1919) M. W. N. 299 (F. B.), *Thakur Rohini Singh* v. *Vishwanath Brahmin*, 13 C. P. L. R 33 at p. 37, relied on.

If a *benami* transaction does not contravene the provisions of law, Courts are bound to give effect to it. [p 193, col. 1.]

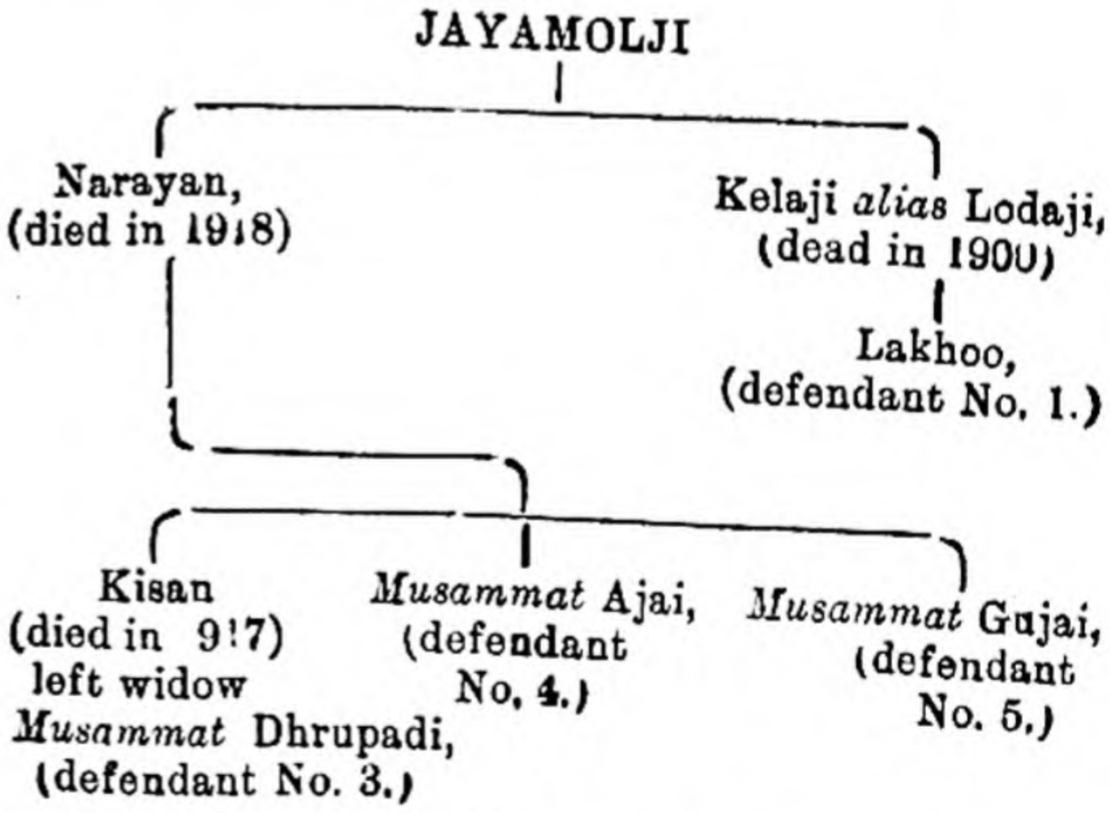
A *benamidar*, though he has no beneficial interest in the property, represents in fact the real owner, and so far as their relative position is concerned is a mere trustee for him. [p. 193, cols. 1 & 2.]

Appeal against a decree of the District Judge, Akola, dated the 10th April 1920, in Civil Appeal No. 10 of 1919.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—The following genealogical tree helps to explain a part of the case:—



The present case is brought by plaintiff, a minor, by next friend and maternal uncle Govinda. His story is that the field in suit Survey No. 17, *pot hissa* No. 3 of Shelu Khurd was the property of Narayan, who died in 1918. He had been separate in estate from

his brother, Kelaji, for some 35 years at the time of his death. His son, Kisan, having predeceased him, his two daughters, defendants Nos. 4 and 5, succeeded to his estate and they and defendant No 3 sold the field and its crop by a registered sale-deed for Rs. 1,500 on the 19th August 1918. The consideration was paid by plaintiff's father and guardian, Ambadas, who was then alive, but by a mistake of the writer this was not entered in the document which is in the name of the plaintiff. Plaintiff complains that, from the 29th August 1918, defendants Nos. 1 and 2 wrongfully dispossessed him. He asked for a declaration of title and for possession and Rs. 1,000 damages from defendants Nos. 1 and 2; that, further, as by mistake in the sale-deed the field is shown as being situate in Shelu Buzruk while it is really situated at Morza Shelu Khurd, he asked for a correction. Defendants Nos. 3 and 4 admitted plaintiff's allegations and his claim. Defendant No. 3 denied that he was liable for damages. Defendants Nos. 1, 2 and 4 denied that there was any partition between the two brothers, Narayan and Kelaji; that these two and defendant No. 1, son of Kelaji, were all along joint in estate and held possession of the field in suit jointly; that defendant No. 1 is now sole owner of the field by survivorship, and that the crop of 1918-19 was sown by defendant No. 2 as lessee of defendant No. 1 and that these crops were not worth more than Rs. 175. It was contended that the alleged sale in favour of the plaintiff was a fraudulent and bogus transaction; that no consideration has been paid and the plaintiff being a minor was incompetent to purchase a property in his own name as he could not contract, that the next friend, Govinda, got the document fraudulently executed in the name of the plaintiff as a *benami* transaction in order to bring the present suit. Defendant No. 2 denied liability for damages. Dealing with the plaintiff's sale-deed the Judge of the Trial Court finds that its execution by defendants Nos. 3, 4 and 5 had been duly proved and that consideration passed. It was found that the purchase of the field in suit was not made by the plaintiff's father and natural guardian, Ambadas. There was no omission, therefore, of his name in the document. The sale being to a minor the Judge held, on the authority of *Nava-koti Narayana Chetty* v. *Loyalinga Chetty* (1), that the sale in favour of the minor was totally void, a minor being incompetent to contract under the Indian Contract Act. The field was found to have been purchased in the name of Narayan about the year 1898 for Rs. 150 from one Soorajabhan Chandrabhan, and that Narayan and his brother were joint at the time, there being no partition between them, and that Narayan died when in a state of jointness with the first defendant. It was further held that the purchaser of the field from defendants Nos. 3, 4 and 5 was not the plaintiff or his father, Ambadas, but plaintiff's next friend, Govinda. The plaintiff's suit was dismissed. On appeal the District Judge, West Berar, confirms the finding that the sale-deed in favour of a minor was invalid under the authority of *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (1). During the pendency of these proceedings, the plaintiff had taken another sale-deed in his name under the guardianship of Govinda, and it was contended before the District Judge that this made the transfer valid, but the Court finds that the purchase was made by Govinda *benami* in the name of the plaintiff with Govinda's money. The plaintiff was not shown as a minor in the purchase-deed intentionally and, therefore, there was no question of mistake, nor could the document be rectified. As regards the second sale-deed, the Judge thinks that as it was not the basis of this suit and not executed until the case was nearly closed, the plaintiff could not be given a decree on it, and he should be left to file a separate suit. The appeal was disposed of on the point of the minority of the plaintiff, the lower Appellate Court not going into the question whether Narayan and Kelaji were or were not united. In *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (1) it was doubtless held that a sale in favour of a minor is void but that decision was overruled in *Raghava Charair* v. *Srinivasa Raghava Chariar* (2) where it was held that a mortgage executed in favour of a minor who has advanced

(1) 4 Ind. Cas. 383; 33 M. 312; 7 M. L. T. 233; 19 M. L. J. 752.

(2) 36 Ind. Cas. 921; 40 M. 308 at p. 312; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363.

the whole of the mortgage money is enforceable by him or by any person on his behalf and the sale to a minor under similar conditions is equally good and in *Munni Koer* v. *Madan Gopal* (3 it was held that there was nothing in the law to prevent a minor becoming a transferee of immoveable property and a minor in whose favour a valid deed of sale has been executed is competent to sue for possession of the property conveyed thereby, and that decision was affirmed in *Narain Das* v. *Dhania* (4). The High Court at Madras in *Muniya Konan* v. *Perumal Konan* (5) comes to a similar conclusion. It is thus clear that the case relied on by both the lower Courts for holding that a sale to a minor is void has been overruled and is no longer good law. A new case has been started for the appellant plaintiff in this Court on the concurrent findings that the plaintiff was a mere *benamidar* for Govinda. This was not the plaintiff's case in either of the Courts below, for the plaint itself stated that the field had been purchased by Ambadas, the minor plaintiff's father, for him, while Govinda's story is that the consideration for the field was paid by Ambadas, but the concurrent finding of fact must stand, and it must be held that plaintiff was a *benamidar* for Govinda. On this finding it is contended that plaintiff had the right to sue, and in support of this proposition *Gur Narayan* v. *Sheo Lal Singh* (6), *Vaitheswara Aiyar* v. *Srinivasa Raghava Iyengar* (7) and *Thakur Rohini Singh* v. *Vishwanath Brahmin* (8) are quoted. It is clear that a *benamidar* can sue. This system under which property is acquired and held in names other than those of the real owner is a common practice in this country and if a *benami* transaction does not contravene the provisions of law, Courts are bound to give effect to it. It has been held that a *benamidar*, though he has no beneficial interest in the property, represents in fact the real owner and as far as their relative position is concerned is a mere trustee for him. But it is here contended that as Govinda is the next friend and as, under O. XXXII, r. 4, no next friend's interest can be adverse to that of the minor and, as in the present case, the next friend's interests as regards the field in suit are adverse, the suit in its present form cannot lie, and a decree as *benamidar* cannot be given to the plaintiff. It is contended that the story of plaintiff being a *benamidar* changes the nature of the suit. If the minor in the present case is, as he has been held to be, a *benamidar*, then he holds as a trustee for Govinda and the interests of the minor and Govinda cannot be said to be different. In this view of the law, and looking to the fact that I have found the lower Appellate Court wrong in holding that plaintiff as a minor could not sue, the case must go back to the lower Court for a finding and decision on the other questions raised. That Court must determine whether, in truth, plaintiff's vendors had the power to sell the property and whether Narayan died when in a state of jointness with the first defendant. I remand the case to the lower Appellate Court for retrial with reference to the above remarks. Costs will abide the result.

G. R. D.

Case remanded.

(3) 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1034.
(4) 35 Ind. Cas. 23; 38 A. 154; 14 A. L. J. 65.
(5) 18 Ind. Cas. 963; 24 M. L. J. 352; 13 M. L. T. 311.
(6) 49 Ind. Cas. 1; 46 C. 566; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 12 Bur. L. T. 122 46 I. A. 1 (P. C.).
(7) 50 Ind. Cas. 304; 42 M. 318; 36 M. L. J. 296; 9 L. W. 362; 25 M. L. T. 351; (1919) M. W. N. 293 (F. B.).
(8) 13 C. P. L. R. 33 at p. 37.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2207 OF 1919.
March 11, 1920.

Present:—Mr. Justice Chevis,
Acting Chief Justice.

WAHGA—DEFENDANT—APPELLANT
versus
MUHAMMAD ALI—PLAINTIFF—
SADAR DIN—DEFENDANT—RESPONDENTS.

Punjab Pre-emption Act (II of 1913), s. 4—Village immoveable property—Building, standing, apart from site.

ARJAN MIRDHA v. KALI KUMAR CHAKERBOTTY.

A standing building in a village is village immoveable property and is liable to pre-emption, even apart from the site.

Banarsi Das v. *Haji Abdul Ghani*, 1 Ind. Cas. 397; 10 P. R. 1909; 13 P. W. R. 1909; 24 P. L. R. 1909, followed.

Second appeal from a decree of the Senior Subordinate Judge, First Class, Gujranwala, dated the 1st May 1919, affirming that of the Munsif, First Class, Sheikhupura, District Gujranwala, dated the 11th March 1919.

Mr. *Muhammad Shah Nawaz*, for the Appellant.

Maulvi *Ghulam Muhy-ud-Din*, for the Respondents.

JUDGMENT.—Defendant No. 1 sold a house to defendant No. 2, plaintiff, son of the vendor, sues to pre empt. The vendee pleaded that the sale did not include the site under the house, and could cut include the site as the vendor was a *kamin* and a non-proprietor and the site was *shamilat abadi deh* owned by the vendee and the other proprietors. The lower Courts have given a decree for possession of the house on payment of the sale price, Rs. 100. The vendee appeals, and it is urged that the sale did not and could not include the site, and that the *malba* is not subject to pre-emption.

For the theory that the *malba* is not liable to pre-emption reliance is placed on an unpublished ruling of a single Judge, Civil Appeal No. 1925 of 1918, which certainly lays down that the sale of the materials of a house gives no right to a suit for pre-emption, but no reasons for this finding are given. On the other hand, there is a Division Bench ruling *Banarsi Das* v. *Haji Abdul Ghani* (1) which holds that a standing building is immoveable property. The house in suit is a standing building in a village, and, following *Banarsi Das* v. *Haji Abdul Ghani* (1), I hold that it is village immoveable property and liable to pre-emption, even apart from the site.

As to the site, I need only remark that the sale deed simply mentions the house (*makan*), and this is what plaintiff sued to pre-empt, and this is what has been decreed. It seems to me quite unnecessary to decide anything about the site. Plaintiff now gets possession and holds on just the same terms as his father did. Whatever the father's rights were now come to the son; he holds those rights and nothing more. So that he cannot say in answer to any claim by the proprietors that he has become the owner of anything more than his father owned by reason of this suit. He simply acquires the rights which his father held. But I see no reason to alter the decree of the lower Courts which is worded simply as a decree for the house, and I dismiss this appeal, but I pass no order as to costs in this Court.

N. H.

Appeal dismissed.

(1) 1 Ind. Cas. 397; 10 P. R. 1909; 13 P. W. R. 1909; 24 P. L. R. 1909.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2291 AND 2292 OF 1919.

March 3, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

IN APPEAL No. 2291 OF 1919

ARJAN MIRDHA AND ON HIS DEATH ONE OF HIS HEIRS AND LEGAL REPRESENTATIVES SERAJUL ISLAM MIRDHA —DEFENDANT—APPELLANT

IN APPEAL No. 2292 OF 1919

APTARUDDI—DEFENDANT—APPELLANT

versus

KALI KUMAR CHAKERBUTTY AND OTHERS—PLAINTIFFS—RESPONDENTS IN BOTH.

Abatement of appeal—Decree for joint possession of land—Appeal by defendant—Death of one respondent—No substitution in time, effect of—Civil Procedure Code (Act V of 1908), O. XXII, rr. 4 (1), 11.

Where during the pendency of an appeal preferred by the defendant against a decree for joint possession of land, one of the plaintiffs-respondents dies and his heirs are not substituted within the time allowed by law, the appeal abates not only against the deceased respondent but also against the other respondents as being no longer competent and should be dismissed against all the respondents. The fact that in the plaint the plaintiffs specified their respective shares would make no difference

as the mere specification by the plaintiffs that each individual plaintiff's share is so much does not alter the nature of the decree.

Kali Dayal v. *Nagendra Nath*, 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 2 7, followed.

Appeals against the decrees of the Subordinate Judge, First Court, Backerganj, dated the 18th of June 191), affirming those of the Munsif, First Court at Ratnakhali, dated the 12th of October 1917.

FACTS appear from the judgment.

Babu *Basanta Kumar Bose*, (with him Babu *Bepin Chandra Bose*), for the Appellants.—The defendant is the appellant. The appeals arise out of a suit for recovery of possession. First Court decreed. Defendants Nos. 4 and 5 preferred separate appeals. During the pendency of the appeals plaintiff No. 1 died and his heirs having been substituted beyond time the lower Appellate Court held that the appeals had abated as against plaintiff No. 1 and dismissed the appeals entirely. I submit the learned Judge ought to have dismissed the appeal as against plaintiff No. 1 only. The case of *Kali Dayal* v. *Nagendra Nath* (1) is distinguishable.

Babu *Suresh Chandra Talukdar*, for the Respondents.—I submit the appeals are incompetent. The death of the deceased plaintiff altered the complexion of the appeal: Refers to *Basir Sheikh* v. *Fazle Karim* (2), *Sriram Chandra Naik* v. *Hridoy Nath Gupta* (3) and *Kali Dayal* v. *Nagendra Nath* (1). The observation in the last case as to the question of shares is an *obiter dictum*. The decree being one for joint possession the appeals became imperfectly constituted directly one of the plaintiffs died. I submit the case is exactly in point.

Babu *Basanta Kumar Bose* replied in brief.

JUDGMENT.

WALMSLEY, J.—The plaintiffs brought a suit to recover possession of some land and in the plaint they specified their respective shares. The first Court decreed the suit. Separate appeals were preferred by the defendant No. 4 and the defendant No. 5 to the lower Appellate Court. After the institution of these appeals, the first plaintiff died. There was delay in substituting his heirs and the learned Judge in the lower Appellate Court held that each of the appeals abated as against the plaintiff No. 1 respondent. When the appeals came up for hearing, the argument was advanced that they were no longer competent and the Judge gave effect to that contentions and dismissed the appeal as against all the respondents. The defendants Nos. 4 and 5 have again preferred these appeals to this Court. On their behalf, it is urged that the learned Judge was wrong. We have been shown the decisions of this Court bearing on the question. Two are referred to in the judgment of the lower Appellate Court, since then another judgment has been delivered in the case of *Kali Dayal* v. *Nagendra Nath* (1). In that judgment, most of the cases on the point are reviewed and the effect of the judgment is to show that the decision of the lower Appellate Court is correct. Our attention is drawn, however, to one particular passage to be found on page 43* of this last mentioned report where there is the remark, after reference to one particular case, "no question of shares was in controversy." It is said here that, inasmuch as the plaintiffs have specified their shares, the principle of that ruling does not apply. I fail to see that. It appears to me that the mere specification by the plaintiffs that each individual plaintiff's share is so much does not alter the nature of the decree. The decree remains a decree for joint possession and, therefore, in my opinion, the decision of the lower Appellate Court is correct, and these two appeals are dismissed with costs. We allow only half the usual hearing fee in each case.

SUHRAWARDY, J.—I agree.

B. N.

Appeals dismissed.

(1) 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217.

(2) 28 Ind. Cas. 703; 19 C. W. N. 290.

(3) 51 Ind. Cas. 409; 29 C. L. J. 461.

*Page of 24 C. W. N.—[*Ed.*]

RAM AUTAR v. BENI SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 270 OF 1921.

January 13, 1922.

Present :—Pandit Kanhaiya Lal, J. C.

RAM AUTAR AND ANOTHER—DEFENDANTS —APPELLANTS

versus

BENI SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 6 —Limitation Act (IX of 1908), s. 19—Acknowledgment of liability not alleged in plaint—Subsequent reference in rebuttal admissible—Acknowledgment, nature of—Acknowledgment by manager of family, effect of—Mortgage otherwise invalid, if validated by pious obligation—Unregistered sub-mortgage, admissibility of.

Where there is a clear acknowledgment of liability effectual enough to extend the period of limitation, but no mention is made of it in the plaint, it is open to the plaintiff to show in reply to the defence set up that his claim is within time from the acknowledgment referred to and such a plea in rebuttal is not inadmissible under O. VII, r. 6 of the Civil Procedure Code. [p. 197, col. 1]

An acknowledgment need not specify every legal consequence of the thing acknowledged. From an acknowledgment of a debt follow the legal incidents which flow from the existence of a liability. In fact, an admission by a mortgagor of his liability carries with it an admission of all the remedies to which the mortgagee might be entitled under it. [p. 197, col. 1.]

An acknowledgment by a person as the head and manager of a family is binding upon other members of the family and is sufficient to save limitation as against them.

The doctrine of the pious obligation of sons to pay the father's debts does not validate a mortgage or alienation made by the latter if the same is otherwise invalid. It may, however, support a mortgage if it is made in lieu of antecedent debts recoverable from a family, and a *bona fide* creditor, in such a case, is not bound to see to the application of the money. [p. 197, col. 2: p. 198, col.]

An unregistered sub-mortgage is not admissible in evidence to prove a lien. [p. 198, col. 1.]

Appeal against a decree of the Subordinate Judge, Partabgarh, dated the 10th May 1921, reversing that of the Munsif, Kunda, Partabgarh District, dated the 15th September 1919.

Mr. *Kisheshwar Nath Srivastava*, for the Appellants.

Messrs. *Radha Krishna* and *Wasi Hasan*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the mortgagee for possession of certain property on the allegation that the defendants, who are the heirs of the original mortgagor, had wrongfully ejected him therefrom in June 1917.

It appears that Madho, the father of the defendants Nos. 1 to 3, made usufructuary mortgage in favour of Beni Singh, the plaintiff-respondent, in lieu of Rs. 200 on the 6th February 1899 (Exhibit 1). The mortgaged property comprised a share in a well and certain *muafi* plots and groves. The mortgagor did not, however, deliver possession over the mortgaged property. On the same date he executed another mortgage-deed of certain other property in favour of Beni Singh in lieu of Rs. 200 and agreed to deliver possession over the property mortgaged (Exhibit 18) but he did not give possession. That deed provided that if the mortgagor failed to deliver possession, the mortgagee would be entitled to recover the money due to him with interest thereon at 2 per cent. per mensem from the date of the mortgage. On the 31st July 1902 Madho executed a deed of further charge in favour of Beni Singh in lieu of Rs. 100 which was due to the latter on account of interest payable under the above deed (Exhibit 2). This deed of further charge provided that the mortgagor would not be entitled to pay the money due on the said deed until the usufructuary mortgage of the 6th February 1899, first mentioned was redeemed.

In 1911 Beni Singh applied for the entry of his name in the revenue papers in pursuance of the mortgage of the 6th February 1899, now sought to be enforced. He was examined in that case and so was Ram Autar, one of the sons of the mortgagor, who had died meanwhile. Ram Autar admitted having made the mortgage and stated that he had no objection to the name of the mortgagee being entered in the revenue papers in the capacity of a mortgagee. The name of the mortgagee was accordingly entered but according to the finding of the Trial Court he did not succeed in getting possession. The lower Appellate Court considered it unnecessary to determine whether he obtained possession or not.

The question had, however, a material bearing on the plea of limitation raised by the defendants. The Court of first instance found that the suit was barred by limitation; but the lower Appellate Court held that it was within time from the acknowledgments contained in the deed of further charge of the 31st July 1902 and mentioned in the statement of Ram Autar, the head and manager of the family, of the 13th September 1911.

RAM AUTAR v. BENI SINGH.

The learned Counsel for the defendants-appellants contends that the acknowledgments relied on by the lower Appellate Court were ineffectual to extend the period of limitation and should be excluded from consideration because there was no reference made to them in the plaint, as required by O VII, r. 6, of the Code of Civil Procedure. The deed of further charge contained a clear acknowledgment of liability to the mortgage money and the statement made by Ram Autar in the mutation proceeding similarly contained an acknowledgment of the right of the mortgagee to obtain possession under the mortgage. As pointed out in *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (1), an acknowledgment need not specify every legal consequence of the thing acknowledged. From an acknowledgment of a debt follow the legal incidents, which flow from the existence of a liability. In fact an admission by a mortgagor of his liability under the mortgage carries with it an admission of all the remedies to which the mortgagee might be entitled under it [*Basant Singh* v. *Thakur Rampal Singh* (2)]; and the present suit which is within time from the dates of the said acknowledgments cannot be treated as barred by limitation.

The omission to refer to these acknowledgments in the plaint is due to the fact that the plaintiff was setting up a different case altogether. His allegation was that he had been in possession till June 1917; and if that was true, his suit was not brought after the expiry of the period prescribed by the Law of Limitation and he could not, therefore, have claimed exemption from such law on the ground of an acknowledgment. There is a mention of the deed of further charge in the plaint, but there is no mention of the mutation proceeding. It is open, however, to the plaintiff to show, in reply to the defence set up, that his claim was within time in any case from the acknowledgments above referred to and such a plea in rebuttal is not inadmissible under O. VII, r. 6 of the Code of Civil Procedure.

It is further contended that Ram Autar did not make his statement on the 13th September 1911 in his capacity as the head and manager of the family, and that that statement was, therefore, insufficient to save limitation as against the other members of the family. The circumstances in which the statement was made in response to an application made by the mortgagee for the entry of his name in the revenue papers, however, indicates that Ram Autar went on behalf of the family to agree to the mutation of names being effected to save the family from being placed under the necessity of having to find money at once to pay what was due on the mortgage and the deed of further charge. He was the eldest male member of the family at the time. Out of his two brothers, one had just attained majority and the other was then, as he is now, admittedly a minor. The defendants-appellants must, therefore, be held to be bound by the act of the manager in acknowledging the liability and agreeing to the mutation of names being made to ward off an immediate demand from them of the money they owed to the plaintiff.

The question of legal necessity for the mortgage and the deed of further charge has been brushed aside by the lower Appellate Court on the ground that the defendants were under a pious obligation to pay the debts due by their father. The existence of the pious obligation does not, however, validate a mortgage or alienation, if it was otherwise invalid. It may support a mortgage, if it was made in lieu of antecedent debts recoverable from the family. The mortgage of the 6th February 1899 was made in lieu of Rs 200, out of which Rs. 348 were to be applied to the payment of a bond-debt, due by the father of the defendants appellants, Rs. 52 were to be applied to the payment of arrears of revenue, due by him for 1305 Fasli, Rs. 50 were taken for the redemption of certain *muafi* land, and another sum of Rs. 50 for the redemption of certain groves, which were mortgaged by him with Sheoraj Dube, and the balance was taken to meet the expenses of execution and registration. The *muafi* land and the groves mortgaged with Sheoraj Dube formed a part of the mortgaged property, conveyed by the mortgage of the 9th February 1899 now in suit. The Court of first instance found that the first two items represented antecedent debts, really due by the mortgagor and the correctness of that finding has not been challenged here. Of the two mortgages

(1) 25 C. 844 at p. 851; 25 I. A. 95; 2 C. W. N. 402; 7 Sar. P. C. J. 294; 13 Ind. Dec. (N. S.) 550.
(2) 51 Ind. Cas. 985; 6 O. L. J. 248; 1 U. P. L. R. (J. C.) 45.

held by Sheoraj Dube, one is admitted to have been redeemed by the mortgagor in paragraph 3 of the written statement, filed by the defendants-appellants, thereby securing to the family a common benefit, namely, the recovery of the property, and the redemption of the other was made by the mortgagor in 1905. The mortgagee took care to take back the original mortgage-deed from Sheoraj Dube (Exhibit 4) and further fortified himself by taking a sub-mortgage from him for Rs. 49-8 (Exhibit 3). The sub mortgage is not admissible in evidence to prove a lien, because it was not registered. The fact of redemption is sufficient, however, to give to the plaintiff the right which Sheoraj Dube possessed under his possessory mortgage of the 4th June 1898 under section 74 of Act IV of 1882 to sue for the money, if he was dispossessed as he evidently was, within the last twelve years. The mortgagee had to pay to Sheoraj Dube what the mortgagor had undertaken to pay out of the consideration of the mortgage received by him. If the money was taken for a valid purpose, *viz.*, to pay an antecedent debt, and get back the family property freed from the earlier mortgage, a *bona fide* creditor like the plaintiff was not bound to see to the application of the money. The identity of the property, comprised in the mortgage redeemed by the plaintiff from Sheoraj Dube, is clear from its description as given in the sub mortgage and the mortgage now sought to be enforced. The sum of Rs. 13 represented the legitimate expenses connected with the execution and registration of the deed of mortgage. The rest of the consideration of the mortgage must be deemed to have been taken to pay antecedent debts. The plaintiff is, therefore, entitled to a decree for Rs. 200 on account of the money due to him on his mortgage of the 6th February 1899 and Rs. 49 8 on account of the mortgage of Sheoraj Dube dated the 4th June 18 8, which he redeemed.

The deed of further charge was executed in lieu of Rs. 100, the whole of which was taken to pay the interest due on the mortgage of the 6th February 1899 (Exhibit 18), which contained a personal covenant for the payment of interest, and the plaintiff is entitled to treat the interest so due as an antecedent debt, which was satisfied, when the deed of further charge was obtained.

It does not appear how the lower Appellate Court has awarded a decree for Rs. 497. The money claimed on the mortgage was Rs. 200 and that on the deed of further charge Rs. 310-4 9. The plaintiff claimed Rs. 49 8 besides on account of the possessory mortgage of Sheoraj Dube redeemed by him, alleging his dispossession from the mortgaged property.

He has filed a cross objection, claiming the last item and damages. He is entitled to the former. The damages have not been proved by him. He has not otherwise challenged the correctness of the amount awarded to him by the lower Appellate Court, though it is difficult to understand how it has been arrived at.

The appeal is, therefore, dismissed with costs and the cross-objection allowed with costs: the result being that the plaintiff will be allowed a decree for Rs. 49-8 with proportionate costs here and hitherto and future interest at 6 per cent. per annum from the date of the suit till payment to be recovered from the sale of the property comprised in the mortgage held by Sheoraj Dube, namely, plot No. 954 with the trees standing thereon. The decree for the said amount will be framed in terms of O. XXXIV, r. 4, of the Code of Civil Procedure and six months will be allowed for payment. In regard to the remainder of the claim the decree of the lower Appellate Court will stand confirmed with the costs incurred by the plaintiff-respondent in this appeal.

N. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 79-B OF 1921.

July 26, 1922.

Present:—Mr. Prideaux, A. J. C.

Musammat GODAWARIBAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SAMPAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Attestation, method of—Acknowledgment of signature insufficient — Attestation, what is—Attesting witness, who is.

GODAWARIBAI v. SAMPAT.

Attestation of a mortgage-deed within the meaning of section 59 of the Transfer of Property Act, IV of 1882, must be made by the witnesses signing their names after seeing the actual execution of the deed. Mere acknowledgment of his signature by the executant is not sufficient. [p. 199, col. 2]

Shamu Patter v. *Abdul Kadir Rowthan*, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I A. 218 (P. C. and *Ajab* v. *Mangal*, 8 Ind. Cas. 1119; 6 N. L. R. 152, referred to.

Attestation being an act done after the execution, the attestation by a witness of a deed before the executant has signed the same is not valid, as until the deed has been executed there can be no attestation. [p. 199, col. 2.]

An attesting witness is a person who, having been personally present at the execution of a document so as to see the executant sign the same, has thereafter subscribed thereon his own name as a memorandum of that fact. [p. 199, col. 2.]

Appeal from a decree of the Additional Sub-Judge, Akola, dated the 28th July 1921, in Civil Suit No. 181 of 1920.

Messrs *M Gupta* and *G. L. Subhedar*, for the Appellants.

Mr. *A. V. Khare*, for the Respondents.

JUDGMENT.—One Tukaram, son of Rodaji, executed, on 21st March 1914, a mortgage deed in favour of the plaintiffs' firm. This suit is brought on that deed and the plaintiffs claim to recover Rs. 6,148 by conditional foreclosure of the property mortgaged. The issues framed show the points of difference between the parties. They run:—

(1) Whether the mortgage-deed, dated 21st March 1914, is genuine and valid and was it duly and validly attested?

(2) Whether the mortgage-debt was incurred for legal necessity and for purposes binding on defendants?

(3) Whether the field 5/2 was the self-acquired property of defendant No. 1 as alleged?

The lower Court finds that the document sued on was not properly attested; that out of the amount of the mortgage Rs 2,598-2 6 were for legal necessity, and that the field 5/2 was not the self-acquired property of the first defendant, Sampat. The case was dismissed on the ground that the mortgage was not validly attested, it being also held that, under the contract of the mortgage, the plaintiffs could not recover the money.

It is here contended that the finding as to the attestation is erroneous. There are three witnesses on this question. The first is one Anoba. There is no doubt that this witness was present at the Registration Office when the document was registered. The plaintiffs' own *Mukhtyar* admits that the witness would only attest after receiving the money due to his masters, money to be paid out of the mortgage amount. It is thus likely that his story that when the deed was brought to him it already contained the attestation of Sampat and the execution mark of Tukaram is true. I see no reason why this witness should not be believed. Sampat, the first defendant, and an attesting witness, said that he was not present when his father executed the deed, nor was Anoba. This witness' statement is possibly open to doubt, but the evidence of Anoba (P. W. No. 1) seems to me to settle the point. It is settled law that attestation of a mortgage-deed within the meaning of section 59 of the Transfer of Property Act (IV of 1882) must be made by the witnesses signing their names after seeing the actual execution of the deed. Mere acknowledgment of his signature by the executant is not sufficient: *Shamu Patter* v. *Abdul Kadir Rowthan* (1) and *Ajab* v. *Mangal* (2). But even if Anoba's statement is not sufficient to show that the document was not validly attested, there is the deposition of P. W. No. 2, the plaintiffs' own *gumastha*, who says that one of the alleged attesting witnesses, Sampat, attested the deed before Tukaram made his mark on it. Now, it is clear that an attesting witness is a person who having been personally present at the execution of a document so as to see the executant sign the same, has thereafter subscribed thereon his own name as a memorandum of that fact. I have no hesitation in holding that Sampat in the present case cannot be held to be an attesting witness to the mortgage. An attestation is an act done after the execution, and until the deed has been executed there can be no attestation.

The third ground of the memorandum of appeal has not been argued. The result is that this appeal fails and is dismissed with costs.

G. R. D. & W. C. A.

Appeal dismissed.

(1) 16 Ind Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(2) 8 Ind. Cas. 1119; 6 N. L. R. 152.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1727, 2122 AND 2123 OF 1919.

March 9, 1922.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Ghose.

PURNA CHANDRA CHATTOPADHYA—DEFENDANT—APPELLANT IN ALL

versus

IN NO. 1727.

Sheikh MABUD BUKSH AND OTHERS—PLAINTIFFS AND *Srimati* AKROBANNESSA BIBI AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS

IN NO. 2122

MAHBOOB ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN NO. 2123

Kazi ABDUL ROUF AND OTHERS—PLAINTIFFS AND *Srimati* EKFATANNESSA BIBI AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Limitation, computation of—Appeal, limitation for—Appellant, if entitled to deduct period during which review application pending

In computing the period of limitation prescribed for preferring an appeal, the appellant is entitled to deduct the period during which an application for review was pending.

Appeals against the decrees of the District Judge, 24 Parganas, dated the 12th of June 1919, affirming those of the Assistant Settlement Officer of Alipur, dated the 24th of March 1919.

FACTS appear from the judgment.

Babu *Girija Prasanna Sanyal*, for the Appellant.—These appeals arise out of proceedings under section 106 of the Bengal Tenancy Act for correction of entry in the Record of Rights. First Court decreed On appeal they were dismissed on the ground of limitation. The question is whether in computing limitation, the period taken up in prosecuting a review is to be deducted or not. The Judge held that time cannot be deducted and seems to think that section 14 of the Indian Limitation Act would apply. He did not refer to section 5 at all According to the recent Privy Council decision in *Brij Indar Singh* v. *Kanshi Ram* (1), I submit I am entitled to deduct the time taken up in review.

(1) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 493; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 966; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 130; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).

No one appeared for the Respondent.

JUDGMENT.—The appeal in this case raises the question whether the appeal to the lower Appellate Court was barred or not. In our opinion it was not time barred as the appellant was entitled to deduct the period during which the application for review was pending.

We accordingly decree these appeals, set aside the decrees of the lower Appellate Court and direct that the appeals be reheard by the lower Appellate Court.

As no one appears for the respondents in these three appeals we make no order as to costs of these appeals.

B. N. *Appeals allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2450 OF 1919.

January 18, 1922.

Present:—Justice Sir N. R. Chatterjea, KT. and Mr. Justice Pearson.

JOGENDRA NATH MUKHERJEE—PLAINTIFF—APPELLANT

versus

RAJENDRA NATH BHATTACHARJEE—DEFENDANT—RESPONDENT.

Co-sharers—Suit for partition—Limitation—Possession of one co-sharer, when adverse to the others—Exclusion and ouster—Knowledge—Adverse possession a mixed question of law and fact—Appeal, second.

There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy: and if no notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights. [p. 203, cols. 1 & 2.]

Jagannath Marwari v. *Chandni Bibi*, 67 Ind. Cas. 81; 26 C. W. N. 65 at p. 70; 34 C. L. J. 432 and *Joynarain Sen* v. *Suchitra Debya*, 65 Ind. Cas. 8; 26 C. W. N. 206; 33 C. L. J. 592, relied on.

The possession of one co-owner is the possession of all for the purpose of limitation, although the sole possession of one co-owner for a very long period may, having regard to other circumstances, show exclusion or ouster The principle does not depend upon whether the parties are members of a joint family but rests upon the ground that they are co-owners, and is applicable to all cases of co-owners. [p. 203, col. 1.]

Corea v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 886, referred to.

Balaram Guria v. *Syama Charan Mondal*, 60 Ind. Cas. 298: 33 C. L J. 344 at p. 348 24 C. W. N. 1057, *Varada Pillai* v. *Jeevarathnammal*, 53 Ind. Cas. 901; 46 I. A. 285; (1919) M W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 8 A. L. J. 274; 2 U. P. L R. (P. C.) 64; 22 Bom. L. R. 445; 43 M. 244 (P. C.), *Culley* v *Doe d. Taylerson*, (1840) 11 A & E. 1008; 3 P. & D. 539; 9 L. J. (N. S.) Q. B. 288; 52 R. R. 6 ; 113 E R. 697, *Doe d. Fisher* v. *Prosser*, 1774 1 Cowp. 217 at pp. 2 9, 220; 98 E. R. 1052, *Bandacharya* v. *Shriniwasacharya*, 5 Bom. L. R. 742, *Gungadhar* v. *Parashram*, 29 B. 300; 7 Bom. L. R 252 and *Ayennessa Bibi* v. *Sheikh Isuf*, 14 Ind. Cas. 722; 16 C. W. N. 849 at p 859, relied on.

In order to prove dispossession of one co-sharer by another it must be shown that there was exclusion or ouster to the knowledge of the former. [p. 202, col. 1.]

Ram Lakhi v *Durya Charan Sen*, 11 C. 680; 5 Ind. Dec. (N S.) 1212, distinguished.

Varada Pillai v. *Jeevarathnammal*, 53 Ind Cas. 901; 46 I. A. 285; (1919) M. W. N. 724; 10 L. W. 679 24 C. W. N. 346; 38 M. L. J. 313; 8 A. L. J. 274: 2 U P. L. R. (P. C.) 64; 22 Bom. L. R. 445; 43 M 244 (P. C.), considered.

The question of adverse possession is a mixed question of fact and law The facts found by the lower Appellate Court must be accepted in second appeal, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by the High Court in second appeal. [p. 202, col. 1.]

Lachmeswar Singh v *Manowar Hossain*, 19 C. 253 at p. 262; 19 I. A. 48; 6 Sar. P. C J 133 10 Ind. Dec. (N. S.) 614 P. C.', *Ramgopal* v. *Shamskhatun*, 20 C. 93 at p. 99; 19 I. A. 228, 6 Sar P. C. J. 247; 17 Ind. Jur. 88; 10 Ind. Dec. (N S.) 63 (P. C.), *Chintamoni Pramanik* v. *Hriday Nath*, 51 Ind. Cas. 123; 29 C. L. J 241 at p. 245, *Balaram Guria* v. *Syama Charan Mondal*, 60 Ind Cas. 298: 33 C. L. J. 344 at p. 348; 24 C. W. N. 1057, relied on.

Appeal against a decree of the Subordinate Judge, Second Court of Howrah in Hooghly, dated the 19th of September 1919, reversing that of the Munsif, First Court at Howrah, dated the 30th of April 1918.

FACTS appear from the judgment.

Babu *Rupendra Kumar Mitter* (with him Babu *Mrityunjoy Chatterjee*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for partition. The property originally belonged to one Ramnath who died in 1900 and after his death his *sadarbari* was sold to the defendants by his heirs. On 19th November 1901 the defendants entered into possession of the *sadarbari* by virtue of a *kobala* executed by three out of four heirs of Ramnath. The *sadarbari* was not fit to be occupied and that it was never occupied has been found by the first Court. That finding has not been reversed on appeal. The other heir transferred to the plaintiff his share of the property on 26th April 1916. The present suit for partition was filed on 27th August 1917. Both Courts found that after purchase the defendant blocked up entrance to the *sadarbari*. There is also a finding that the son of the last transferor was a minor and he never went to that *bari*. The defendant went into possession in 1901 as a co-sharer. The finding of the Appellate Court is not sufficient to dispose of the question of ouster. Refers to *Jagannath Marwari* v. *Chandni Bibi* (1), *Jacobs* v. *Seward* (2), *Jogendra Nath Rai* v. *Baladeo Das* (3). In the last case it has been held that in order to constitute ouster the possession must be of a continuous character and adverse to the co-sharers. Refers to *Coomea* v. *Appuhamy* (4).

Dr. *Dwarkanath Mitter*, (with him Babu *Haradhan Chatterjee*), for the Respondent.—The question of adverse possession is a question of fact and the Subordinate Judge has come to a conclusive finding on the point.

[CHATTERJEA, J.—If he had no knowledge would the mere fact of the door having been blocked up constitute adverse possession.]

Of course, on the question of knowledge it would be presumed that he had no knowledge in view of the fact that the place was very near to Calcutta. Refers to *Hardit Singh* v. *Gurmukh Singh* (5). In the present case the co-sharer was a mere stranger. Refer to *Ram Lakhi* v. *Durga Charan Sen* (6). There is a difference of opinion as to which Article of the Indian Limitation Act would apply —Art. 13 or 144. I submit the learned Judge was justified in coming to the conclusion that possession was adverse having regard to the length of time which elapsed since the blocking up of the entrance to the *sadarbari* and the notoriety of the fact. The appeal is wholly concluded by findings of fact.

Babu *Rupendra Kumar Mitter* replied in brief.

(1) 67 Ind. Cas 31; 23 C. W. N. 65 at p. 70; 34 C. L. J. 432.

(2) (1872) 5 H. L. 464 at p. 474; 41 L. J. C. P. 221; 27 L. T. 185.

(3) 35 C. 961 at p. 969; 12 C. W. N. 127; 6 C. L. J. 735.

(4) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 835.

(5) 47 Ind. Cas 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R 1918; 24 M L. T. 389; 20 Bom. L. R. 704. (1919) M. W. N. 1; 8 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(6) 11 C. 680; 5 Ind. Dec. (N. S.) 1212.

JOGENDRA NATH MUKHERJEE v. RAJENDRA NATH BHATTACHARJEE.

JUDGMENT.—This appeal arises out of a suit for partition of a house described as the *sadarbari* which originally belonged to one Haridhan and his co-sharer.

The plaintiff purchased the 4 annas share, which belonged to Haridhan, on the 26th April 1916, the defendant having purchased the remaining shares so far back as 19th November 1901 from the other co-sharers. After his purchase, the defendant blocked up the *sadar* door of the *sadarbari*.

The plaintiff brought the suit for partition in 1917, and the defendant pleaded that the claim was barred by limitation by reason of adverse possession on his part for 12 years.

The Court of first instance was of opinion that the possession of the defendant was not adverse to Haridhan and that the claim of the plaintiff, therefore, was not barred by limitation.

On appeal, the learned Subordinate Judge held that the possession was adverse and that his claim was barred by limitation.

The plaintiff has appealed to this Court.

It is contended that the facts found do not amount to an ouster by a co-sharer.

On behalf of the respondent, it is contended that the question of adverse possession is a question of fact and that the finding of the lower Appellate Court on the point cannot be considered by this Court in second appeal.

The question of adverse possession, however, is a mixed question of fact and law. The facts found by the Judge must, of course, be accepted, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by this Court [see the cases of *Lachmeswar Singh* v. *Manowar Hossain* (7), *Ramgopal* v. *Shamskhatun* (8), *Chintamoni Pramanik* v. *Hriday Nath* (9) and *Balaram Guria* v. *Syama Charan Mondal* (10).]

With regard to the question of limitation, the learned Subordinate Judge, as stated above, found that the defendant was in adverse possession since he blocked the entrance to the *sadarbari*. There is no doubt that Haridhan was a co-sharer and in order to prove dispossession of one co-sharer by another, it must be shown that there was exclusion or ouster to the knowledge of the former.

It is contended by the learned Pleader for the respondent that the principle cannot apply to a stranger who is not a member of the family and we are referred to the case of *Ram Lakhi* v. *Durga Charan Sen* (6).

The question there was whether a person who had purchased a property from a member of a joint Hindu family was entitled to the benefit of Art. 127 of the Limitation Act, and it was answered in the negative. One of the Judges, Garth, C. J., held that Art. 136 would apply to the case, while the other Judge, Ghose, J., held that Art 144 was the Article applicable.

The question of adverse possession as between co sharers, however, does not appear to have been considered in that case.

We have also been referred to the case of *Varada Pillai* v. *Jeevarathnammal* (11), where the Judicial Committee, referring to the rule that the possession of one of several joint tenants or tenants-in-common is not adverse to the others so as to prevent the Statutes of Limitation from affecting them, observed: "Whether the rule is applicable to sharers in an unpartitioned agricultural village in India not holding their shares as members of a joint family, it is unnecessary for the purpose of the present case to decide." There is no expression of opinion by their Lordships that the principle was not applicable and when their Lordships expressly stated that it was unnecessary for the purpose of that case to decide the question, it cannot be contended that the principle is inapplicable.

It is true that in the case of *Corea* v. *Appuhamy* (4) and in some other cases, the question arose as between persons who had at one time formed members of a family. But the principle is not confined to such cases only. The principle does not depend upon whether the parties are members of a joint family but rests upon the ground that they are co-owners, and is applicable to all cases of co-owners. In the case of *Balaram Guria* v. *Syama Charan Mondal* (10),

(7) 19 C. 253 at p. 262; 19 I. A. 48; 6 Sar. P. C. J. 133; 10 Ind. Dec. (N. S.) 614 (P. C.).

(8) 20 C. 93 at p. 99; 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63 (P. C.).

(9) 51 Ind. Cas. 123; 29 C. L. J. 241 at p. 245.

(10) 60 Ind. Cas. 298; 33 C. L. J. 314 at p. 348; 24 C. W. N. 957.

(11) 53 Ind. Cas. 901; 46 I. A. 285; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 16 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 445; 43 M. 244 (P. C.).

both the plaintiff and the defendants were strangers who purchased from the members of a joint family and the plaintiff's vendor was not in possession for 30 years. The principle is, that the possession of one co-owner is the possession of all for the purpose of limitation. No doubt, the sole possession of one co-owner for a very long period may, having regard to other circumstances, show exclusion or ouster. The Judicial Committee in the case of *Varada Pillai* v. *Jeev ruthnammal* (11) observed: "The limits of the rule were defined in *Culley* v. *Doe d. Taylerson* (12) as follows: 'Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant in common because the possession of one tenant-in-common is the possession of the other, and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining; but where the claimant, tenant-in-common, has not been in the participation of rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the Jury to take into consideration whether they will presume that there has been an ouster...'."

The question was also considered in *Doe d. Fisher* v. *Prosser* (13), *Banlachhya* v. *Shriniwasacharya* (14), *Gungadhar* v. *Parashram* (15) and in our Court. The circumstances which should be taken into consideration were pointed out in the case of *Aysnessa Bibi* v. *Sheikh Iuf* (16). See also *Jagannath Marwari* v. *Chandni Bibi* (1).

It is contended on behalf of the respondent that, having regard to the length of time which has elapsed since the defendant blocked up the entrance to the *sadarbari* and to the notoriety attending on the closing of the door to the entrance, the Court below was justified in coming to the conclusion that the possession of the defendant was adverse. But the learned Subordinate Judge has not considered the question whether Haridhan had direct knowledge of the blocking of the *sadar* door or that there were circumstances, from which one could impute knowledge to him.

(12) (1840) 11 A. & E. 1008; 3 P. & D. 539; 9 L. J. (N. S.) Q. B. 288; 52 R. R. 566; 113 E. R. 697.

(13) (1774) 1 Cowp. 217 at pp. 219, 220; 98 E. R. 1052.

(14) 5 Bom. L. R. 742.

(15) 29 B. 300; 7 Bom. L. R 252.

(16) 14 Ind. Cas. 722; 16 C. W. N. 849 at p. 859.

There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy: and if no notice is given to the co sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co owner sought to be ousted and of laches if he fails to discover and assert his rights: see *Jagannath Marwari* v. *Chandni Bibi* (1) and *Joynarain Sen* v. *Suchitra Debya* (17) where the question is fully discussed.

The learned Pleader for the respondent lays much stress upon the fact that the defendant blocked the entrance in 1901 and that the suit was not brought until 1917. But Haridhan was a minor for a greater part of this period and did not attain majority until 1911. It is also found that he did not go to Andul where the property is situated ever since the defendant purchased the property.

We think that the Court must consider whether, having regard to all the circumstances, knowledge of Haridhan of the exclusion can be inferred.

The case must accordingly go back to the lower Appellate Court in order that the question may be considered and the case disposed of according to law. It will be in the discretion of that Court to take further evidence on the question of knowledge.

Costs to abide the result.

B. N. *Case sent back.*

(17) 65 Ind. Cas. 8; 26 C. W. N. 206; 33 C. L. J. 592.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1547 OF 1919.

March 27, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

Srimati SUKHADAMOYI DASI, WIDOW OF JOHURILAL ROY—PLAINTIFF—APPELLANT

versus

ATUL CHANDRA ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 43, applic.

SUKHADAMOYI DASI v. ATUL CHANDRA ROY.

cability of—Erroneous representation—Question of fact —Appeal, second.

Before advantage can be taken of the provisions of section 43 of the Transfer of Property Act it must be shown that there was an erroneous representation. Whether there was such representation or not is a question of fact and an inference drawn by the lower Appellate Court with regard to it, being an inference of fact must be accepted by the High Court in second appeal. [p. 205, col. 1.]

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 22nd April 1919, modifying that of the Munsif First Court at that place dated the 26th March 1918.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Choudhury* (with him Babu *Pramathanath Bandopadhya*), for Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration of her title to, and recovery of, possession in a certain tank. The First Court granted a decree in respect of 8 annas share of the tank. On appeal that has been affirmed. My first point is with regard to plaintiff's title. There was a mortgage in respect of 16 annas in plaintiff's favour on 13th September, 1892. On 10th December 1897 one Krishna purchased. So far as Drabomoyi's share is concerned, the question is whether Krishna is entitled to 8 annas on Drabomoyi's death. The Judge thinks that section 43 of the Transfer of Property Act does not apply because there was no misrepresentation and also no subsisting mortgage at the time of sale. I submit that is wrong. As soon as the purchaser comes to know of the contractee's title, he is entitled to claim it. I have become entitled to 8 annas on Drabomoyi's death. I submit section 43 applies. The cases in *Jadu Bans Upadhiya* v. *Sheo it Singh* (1) and *Chakrapani Nandi* v. *Gyamoni Dasi* (2) are distinguishable. There is nothing to show that I had knowledge at the time of the mortgage. If section 43 applies to a sale, it applies to a mortgage also. The decision in *Jadu Bans Upadhiya* v. *Sheo it Singh* (1) was given by a Judge sitting singly and is not binding on you. The mortgage decree was for Rs. 76 and the sale certificate was for Rs. 60. I submit the proceeds did not satisfy the mortgage. Hence the mortgage must be taken to have been subsisting. The next question is whether the estoppel continues after the sale of mortgaged properties. Sukhoda did not acquire any interest by virtue of the *kobala*. The case in *Kishori Pal* v. *Shi h Bhuchai Bhuiya* (3) does not apply. There was no consideration for the *kobala*. The learned Judge has entirely misconceived the facts of the case. Defendants Nos. 1-3 claim through their mother. The other defendants claim through Sukhoda. I submit they are estopped from questioning my title.

Babu *Dwarkanath Chakrabartty* (with him Babus *Gopal Chandra Das*, *Atul Chandra Gupta* and *Sukhamoy Chatterjee*), for the Respondents.—This appeal fails on the ground that the plaintiff has no title to 8 annas. The findings conclude the point. Plaintiff claims on the ground of auction purchase, when the property really belonged to Drabomoyi who had already transferred her interest in 1893 i.e. is property to Sukhoda. Therefore, how could the mortgage sale affect any right of Drabomoyi in the property. A reversionary interest is not transferable. In the plaint no question of section 43 was raised. The finding is that there was no misrepresentation. Then as regards the subsistence of the mortgage, a sale extinguishes the mortgage. Refers to *Het Ram* v. *Shadi Ram* (4), *Matru Mal* v. *Durga Kunwar* (5) and *Bajrangi* v. *Manokarn ka Bakhsh Singh* (6). I submit the suit should fail as plaintiff could not make out both.

Babu *Sarat Chandra Roy Choudhury* replied in brief.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.—The plaintiff in this suit sought for declaration of her title

(1) 10 Ind. Cas. 443.

(2) 18 Ind. Cas. 228; (1918) Pat. 278; 5 P. L. W. 219.

(3) 3 Ind. Cas. 78; 14 C. W. N. 106.

(4) 45 Ind. Cas 798; 40 A. 407; 45 I. A. 130; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 21 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72 (P. C.).

(5) 55 Ind. Cas. 969; 42 A. 334; (1920) M. W. N. 338; 18 A. L. J. 396; 34 M. L. J. 419; 11 L. W. 523; 2 U. P. L. R. (P. C. 75; 22 Bom. L. R 553; 32 C. L. J. 121; 47 I. A. 71; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.).

(6) 35 I. A. 1 at p. 5; 9 Bom. L. R. 1348; 12 C. W. N. 74; 17 M. L. J. 605; 6 C. L. J. 766; 30 A. 1; 5 A. L. J. 1; 11 O. C. 78; 3 M. L. T. 1 (P. C.).

to and recovery of possession or confirmation of her possession in a certain tank. She has been successful in the First Court in respect of 8-annas share of the tank and has appealed in respect of the 8 annas share to which her claim has been dismissed by the lower Appellate Court.

A genealogical table showing the principal parties in this litigation will be found in Schedule *kha* of the plaint which is translated and printed at page 11 of the paper-book. The tank in suit originally belonged to Swarup Chandra Roy. A half share descended to Anup Chandra Roy and the other half share to Jahuri and Biswanath. It is now undisputed that the plaintiff has obtained Jahuri and Biswanath's share. We are only concerned with the share which descended to Anup. The plaintiff's case as now made out is that Jahuri and Biswanath executed a mortgage by which they purported to transfer 16-annas share in the tank to one Kristo Chandra Dutt. Kristo Chandra Dutt brought suit on his mortgage and in execution of that decree purchased the mortgaged property and then the plaintiff purchased half of the tank from Kristo Chandra Dutt

It is conceded that in order to establish a title to this half share of the tank the plaintiff must rely on section 43 of the Transfer of Property Act, that is to say, that though Jahuri and Biswanath had no interest in the tank where (*sic*) they executed the mortgage in favour of Kristo Chandra Dutt they subsequently as reversioners succeeded to Anup's share on the death of his widow Drabomoyi. This contention that the plaintiff claiming through the mortgagee is entitled to the benefit of this accession of interest to the mortgagors on behalf of the plaintiff must fail on account of the finding of fact arrived at by the lower Appellate Court. Before advantage can be taken of the provisions of section 43 of the Transfer of Property Act it must be shown that there was an erroneous representation. Whether there was such representation or not is a question of fact and on this question the finding of the lower Appellate Court is perfectly clear. He finds that "there is no case of misrepresentation by Jahuri and Biswanath in the matter". It is contended that in coming to this conclusion the learned Subordinate Judge has misunderstood paragraph 5 of the plaint. There is no error in what he says with reference to that paragraph and the inference he has drawn from that statement is one which he might legitimately draw. It is an inference of fact which we must accept in second appeal.

There is also another finding which is fatal to the plaintiff's case and that is that before her death Darbomoyi, the widow of Anup, sold her interest with the consent of the reversioners. That being so there was nothing to go to Jahuri and Biswanath as reversioners to feed the estoppel if we had held that section 43 was applicable to the facts of the case.

Taking this view of the case the appeal fails and is dismissed with costs to defendants Nos. 1 to 8 and 9 and 10 We allow one set of costs to these defendants.

B. N.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 36 OF 9 1.

January 10, 1922.

Present :—Pandit Kanhaiya Lal, J. C.

BADAL AND OTHERS --JUDGMENT-DEBTORS OBJECTORS—APPELLANTS

versus

CHHATTAR SINGH AND OTHERS—DECREE-HOLDER OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148—Decree for possession subject to payment of certain amount —Time for making payment fixed—Decree-holder joining Army before expiry of time—Extension of time for payment Indian Soldiers (Litigation) Act (IX of 1918), ss. 5, 6, 7, 11, application of.

A Court has no power to extend the time allowed by a decree for the payment of money under section 148 of the Code of Civil Procedure If the decree provides for the payment of a certain sum of money on or before a certain date and specifies the penalty which will attach to non-payment, the enforcement of that penalty cannot be delayed or dispensed with by any order or direction issued in derogation of the decree. [p. 21, col 2 p. 20, col. 1.]

A decree was passed in favour of *C* and *M* entitling them to get possession of certain property in

terms of a compromise subject to their paying a certain sum in Court to the credit of the defendants on or before a certain date. On their failure to do so the suit was to stand dismissed. Before the time for payment had expired, *C.* joined the Army and in order to protect himself against the expiry of the period allowed him by the decree, a certificate under section 5 of Act IX of 1918 was sent at his instance to the Court which passed the decree, stating that the time allowed to him for payment should be extended till his return from the War:

Held, (i) that there was no proceeding pending before the Court at the time *C* joined the Army and that section 5 did not apply; [p. 2 6, col 1.]

(ii) that the period of payment having been fixed not by any law for the time being in force but by the decree itself which was passed in accordance with the compromise, section 11 of the Act was also not applicable and the Court could not interfere with the operation of the decree or alter the condition prescribed. [p. 207, col. 2]

Bachchu Lal v. *Raja Ram*, 19 Ind. Cas. 347; 16 O. C. 5 and *Niranjan Singh* v. *Jagan Nath*, 28 Ind. Cas. 862; 18 O. C. 58, followed.

Appeal against a decree of the District Judge, Gonda, dated the 22nd August 1921, confirming that of the Subordinate Judge, Gonda, dated the 30th October 1920.

Mr. *Bisheshwar Nath Srivastava*, for the Appellants.

Mr. *Mohammad Wasim*, for Respondents, Nos. 1 and 2.

JUDGMENT.—This is an appeal from an order, disallowing certain objections filed by the judgment-debtors to the execution of a decree. The decree in question was passed on the 27th March 1917, in favour of Chhattar Singh and Mahadeo Singh, of whom the latter was a minor under the guardianship of his mother, *Musammat* Mulha. By virtue of it the decree-holders were entitled to get possession of certain property in terms of a compromise subject to their paying Rs. 2,500 in Court to the credit of the defendants on or before the last day of *Jeth* 1325 Fasli. It directed that if the money aforesaid was not so paid the suit shall stand dismissed.

The time allowed for payment of the above amount was to have expired on the 24th June 1918, but before that date Chhattar Singh, one of the decree-holders, was enrolled in the Army and eventually placed under War conditions. It is stated by Mr. Wasim on behalf of the respondents that Chhattar Singh joined the Army on the 8th November 1917, that he left Bombay for Aden with his Unit on the 22nd March 1918 and that he returned, except for a short period of leave for a month, after he got his discharge on the 30th September 1920.

After he joined the Army, he took steps to protect himself against the expiry of the period allowed to him by the decree for the payment of the money due to the defendants, and a certificate under section 5 of the Indian Soldiers (Litigation) Act (IX of 1918) was sent at his instance to the Court which passed the decree on the 25th January 1919, stating that he was enrolled for the 7th Rajputs and despatched to Benares on the 8th November 1917, and that the time allowed to him by the Subordinate Judge of Gonda for the payment of Rs. 2,500 in Suit No. 144 of 1916, *ie Chhattar Singh and Mahadeo Sinah* plaintiffs v. *Badal and others* defendants, should under that section be extended till his return from War. The order of the Subordinate Judge thereon was that the parties should be informed.

After his return to British India on leave, Chhattar Singh and *Musammat* Mulha, acting as the next friend of Mahadeo Singh, sold the property comprised in the decree to the respondents and left Rs. 2,500 out of the consideration with them for payment to the defendants in pursuance of the decree. The respondents deposited the said money and applied for possession, but were opposed by the judgment-debtors, whose contention was that the deposit was made too late and that the sale deed did not entitle the transferees to apply for execution or to obtain possession of the property comprised in the decree. That objection was disallowed by the learned Subordinate Judge and his order has been upheld by the lower Appellate Court,

The question for determination in this appeal is, whether the certificate granted by the Deputy Commissioner of Gonda, under section 5 of Act IX of 1918, had the effect of extending the period allowed by the decree for the payment of the money directed to be paid to the defendants. As pointed out in *Bachchu Lal* v. *Raja Ram* (1) and *Niranjan Singh* v. *Jagan Nath* (2) the Court has no power to extend the time allowed by a decree for the payment of money under section 148 of the Code of Civil Procedure. If the decree provides for

(1) 19 Ind. Cas. 347; 16 O. C. 5.
(2) 28 Ind. Cas. 862; 18 O. C. 58.

the payment of a certain sum of money on or before a certain date and specifies the penalty which will attach to the non payment, the enforcement of that penalty cannot be delayed or dispensed with by any order or direction issued in derogation of the decree. In other words, if it provides that the right of the decree-holder to obtain possession shall be extinguished, in case a certain condition is not carried out within a certain period, that right becomes extinct on the failure to comply with that condition and cannot be revived by any consequent act of the Court or of the party at fault. Sections 6 and 7 of Act IX of 1918 lay down that if any Civil or Revenue Court has reason to believe that any party to any proceeding *pending before such Court* is an Indian Soldier, serving under War conditions, the Court shall, on the receipt of a certificate from the prescribed authority, postpone the proceeding as against such soldier for the prescribed period, or, if no period has been prescribed, for such period as it thinks fit. Section 2 defines a proceeding to include a suit and an appeal. Section 11 prescribes that in computing the period of limitation prescribed by the Indian Limitation Act, 1903, or by any other law for the time being in force for any suit, appeal or application to any Civil or Revenue Court, in which the plaintiff, appellant or applicant is an Indian Soldier, the time during which such soldier has been serving under War conditions since the 4th August 1914 shall be excluded.

There was no proceeding, however, pending at the time when Chhattar Singh joined the Army or while he was serving under War conditions. The suit had already been decided and a decree passed, which required him to pay a certain amount within a certain date. The decree could have been executed only after such payment. The time fixed for payment was definite and not capable of being altered by any order of the Court or by a direction under Act IX of 1918. If the money had been paid, the decree for possession could have been executed at any time within three years from the date of Chhattar Singh's return, so far as his interests were concerned. Not having been so paid, the decree for possession became inoperative, or, in other words, was transformed into a decree for dismissal in consequence of the failure to comply with the condition prescribed It was open to the Court under section 5 to have postponed any proceeding which was pending, but it could not have interfered with the operation of the decree or altered the condition prescribed by it so as to permit a suspension of its operation or a postponement of the condition till the expiry of six months after the close of the War.

Section 11 of the Act is not applicable, because the period of payment was here fixed not by any law for the time being in force but by the decree itself which was passed in accordance with a compromise. The penalty became due as soon as the payment was not made. Section 13 of the Indian Limitation Act (IX of 1903) also does not help the decree-holders, because it is confined in its application to the period of limitation prescribed for a suit. The transferees have, therefore, acquired no right by virtue of their purchase.

The appeal is allowed and the application for execution filed by the transferees will stand dismissed with costs throughout.

N. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 236 OF 1920.

July 25, 1921.

Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

Chowdhury AJODHYA NATH PAHARY—DECREE-HOLDER—APPELLANT

versus

Chowdhury SRINATH CHANDRA PAHARY—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Limitation—Application for execution, when may be treated as one in continuance or revival of a previous application.

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the

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intervention of objections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction. [p. 209, col. 1.]

Madhab Moni Dasi v. *Pamela Lambert*, 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 328; 15 C W. N. 337, followed.

Shaikh Qamaruddin Ahmad v. *Jawahir Lal*, 32 I. A. 102; 27 A. 334; 1 C. L. J 381; 2 A. L. J. 397; 9 C. W. N. 601; 15 M. L. J. 258; 7 Bom. L. R. 473; 8 Sar. P. C. J. 810 (P C.), *Rameshwar Singh Bahadur* [*Maharajah of Dharbhanga*] v. *Homeshwar Singh*, 59 Ind. Cas 636; 48 I. A. 1?; 35 C. L. J. 109; 1 P. L. T. 731; 19 A. L. J. 26 40 M. L. J. 1; 1921 M. W. N. 21; 25 C. W. N. 337; 6 P. L. J. 132; 13 L. W 546; 23 Bom. L. R. 721; 30 M. L T. 189 P. C.), referred to.

On the 24th June 1916 an application was made for the execution of a decree passed on the 24th June 1915, and the process and process-fees filed. The judgment-debtor filed a petition under O. XXI, r. 2 of the Code of Civil Procedure to the effect that the decree had been satisfied out of Court. This objection was numbered as a separate case. On the 9th December 1916 the objection case as well as the execution case came up for consideration The objection case was dismissed for default with regard to the execution case the following entry was made in the order sheet: "The Pleader for the decree-holder has no objection to his case being dismissed provided he gets his costs. The execution case is dismissed for default The decree-holder will get his costs" In a subsequent application for execution of the decree presented on the - th November 1919 objection having been taken by the judgment-debtor that the application was barred by limitation inasmuch as it was presented more than - years after the 24th June 1916, when the previous application for execution had been made:

Held, that as soon as the objection was abandoned, it became the duty of the Court to proceed with the application for execution so that the order for dismissal passed on the 9th December 1916 must be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court. Consequently, the subsequent application for execution was not barred by limitation. [p 208, col p 09, col 1.]

Kishen Lal v *Charat Singh*, 23 A. 114: A. W. N. (1900) 214, *Puddomonee Dassee* v *Roy Muthooranath Chowdhry*, 12 B L R 41?: 20 W R. 13?, *Peary Lal Sinha* v *Chandi Charan Sinha*, 1 C W. N. 163; 5 C. L J. 80, *Dand Ali Shah* v. *Ram Prasad*, 30 Ind. Cas. 787; 37 A. 542; 13 A. L. J. 7 0, and *Yakub Ali* v. *Durga Prasad*, 30 Ind. Cas. 877; 37 A. 518; 13 A. L. J. 7c0, referred to.

Appeal against an order of the District Judge of Midnapur, dated the 31st March 1920, affirming that of the Munsif, Contai, dated the 16th January 1920

Babus *Karunamoy Bose* and *Bimala Charan Deb*, for the Appellant.

Babu *Chanindra Nath Das*, for the Respondent.

JUDGMENT.—This is an appeal by the decree-holder against an order of dismissal made on an application for execution of a decree. The decree was made by consent of parties on the 25th June 1915. The first application for execution was made on the 24th June 1916. Thereupon a writ of attachment was issued. The writ was returned unserved and on the 4th August 1916 the Court directed a fresh attachment to issue in the following terms: "The decree-holder is to file process and process-fees within five days." This order was carried out. But on the very next day, the judgment-debtor filed a petition under O. XXI, r. 2 of the Code of Civil Procedure, to the effect that the decree had been satisfied out of Court and, consequently, no execution could issue on the basis thereof. This objection was numbered as a separate case. The two cases were adjourned from time to time and on the 9th December 1916 the objection case as well as the execution case came up for consideration. The objector applied for further time but the Court refused adjournment on the ground that the case was already very old. The Pleader for the objector thereupon stated that he had no further instructions. The objection case was consequently dismissed for default. We find thereafter the following entry in the order-sheet: "The Pleader for the decree-holder has no objection to his case being dismissed provided he gets his costs. The execution case is dismissed for default. The decree-holder will get his costs." Subsequently, on the 27th November 1919 the present application was made. The judgment debtor objected that the application was barred by limitation inasmuch as it had been presented more than three years after the 24th June 1916 when the previous application for execution had been made. We are of opinion that this contention should have been treated as unsustainable. It is plain that the execution proceedings which had been initiated on the 24th June 1916 had been suspended by reason of the objection taken by the judgment debtor. During the period the objection remained under consideration of the Court, execution could not obviously proceed. As soon as the objection was abandoned on the 9th December 1916, it became the duty of the Court to proceed with the application for execution. The decree-holder had done every thing that he was required to

do to enable the Court to proceed with the case. He had filed processes and had paid process-fees as directed on the 4th August 1919. The order for dismissal made on the 9th December 1916 must accordingly be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court: *Kishen Lal* v. *Charat Singh* (1), *Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* (2), *Peary Lal Sinha* v. *Chandi Charan Sinha* (3), *Dand Ali Shah* v. *Ram Prasad* (4), *Yakub Ali* v. *Durga Prasad* (5). In these circumstances, the principle applicable is that stated in the case of *Madhab Moni Dasi* v. *Pamela Lambert* (6). "An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction." In support of this view reliance may be placed on the decision of the Judicial Committee in *Shaikh Qamaruddin Ahmad* v. *Jawahir Lal* (7) which has been recently applied in *Rameshwar Singh Bahadur (Maharajah of Darbhanga)* v. *Homeshwar Singh* (8).

We are of opinion, therefore, that this appeal must be allowed. The order of the lower Appellate Court is set aside and the case is sent back to the Court of first instance in order that the execution may proceed.

The decree-holder will get his costs throughout. We assess the hearing fee in this Court at one gold *mohur*.

B. N. & N. H. *Appeal allowed.*

(1) 23 A. 114; A. W. N. (1900) 214.
(2) 12 B. L. R. 411; 20 W. R. 133.
(3) 11 C. W. N. 163; 5 C. L. J. 80.
(4) 30 Ind. Cas. 787; 37 A. 512; 13 A. L. J. 750.
(5) 30 Ind. Cas. 877; 37 A. 518; 13 A. L. J. 760.
(6) 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 328; 15 C. W. N. 337.
(7) 32 I. A. 102; 27 A. 334; 1 C. L. J. 331; 2 A. L. J. 397; 9 C. W. N. 601; 15 M. L. J. 258; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).
(8) 59 Ind. Cas. 636; 48 I. A. 17; 33 C. L. J. 109; 1 P. L. T. 731; 19 A. L. J. 26; 40 M. L. J. 1; (1921) M. W. N. 21; 25 C. W. N. 337; 6 P. L. J. 132; 13 L. W. 546; 23 Bom. L. R. 721; 30 M. L. T. 189 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 52 OF 1921.

March 29, 1922.

Present :—Pandit Kanhaiya Lal, J. C., and Mr. Lyle, A. J. C.

Hakim FAZAL AHMAD—DEFENDANT No. 1—APPELLANT

versus

ENAYAT AHMAD AND OTHERS—PLAINTIFFS, SHAHABUDDIN AND ANOTHER—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1898), O. XXIII, r. 3, Sch. II, paras. 20, 21—Arbitration without intervention of Court—Award, application to file—Compromise modifying award—Court, power of, to pass decree in terms of compromise—Appeal.

Where after an application under paragraph 20 of Schedule II to the Civil Procedure Code, for filing an award made without the intervention of the Court has been made, the parties enter into a compromise, the effect of which is to modify the award, it is not illegal or *ultra vires* for the Court to pass a decree in terms of the award as modified by the compromise [p. 211, col. 1]

(Case-law considered.)

Except in so far as such a decree is in excess of, or not in accordance with, the modified award, an appeal against the decree is not competent. [p. 216, col. 2.]

Appeal from a decree of the Subordinate Judge, Tahsil Mohanlalganj, Lucknow, dated the 9th August 1921.

Mr. *Zahur Ahmad*, for the Appellant.

Messrs. *Haidar Husain* and *Mukand Behari Lal*, for the Respondents.

JUDGMENT.

DANIELS, A. J. C.—(*December* 14, 1921).—Except in one small particular to be mentioned presently, there are no merits in this appeal. Certainly there are no grounds of equity or justice in the appellant's favour. He is seeking on a highly technical plea to evade the effect of a compromise freely entered into by himself. The facts are these.

The parties had a dispute about certain property. They referred the matter privately to the decision of four arbitrators. The arbitrators made an award. Certain of the parties who are described as the plaintiffs in these proceedings applied under paragraph 20 of the Second Schedule, Civil Procedure Code, to have the award filed. Objections were lodged by the defendants. It appears that after the making of the award one Sahibdin had obtained a

decree against the estate. Before the learned Subordinate Judge the parties filed a compromise providing for the payment of this decree out of certain sums awarded by the arbitrators and also saying that the award should be sent back to the arbitrators to make up the final account between the parties. The original award had settled the rights of the parties but had not worked out the details of the account. The learned Subordinate Judge might have passed a decree at once in terms of this compromise. If he had done so it is conceded that the decree would not have been open to attack. Instead of doing so he sent the compromise to the umpire to ask him to make the final distribution. The umpire declined to do this. By that time disputes had arisen and the defendants wanted to resile from the compromise. The learned Subordinate Judge then proceeded to do what he should have done in the first instance, namely, to make a decree in terms of the award. He calls it, however, a preliminary decree and this is the only point in which his judgment is open to question.

A preliminary objection is taken that no appeal lies, the decree having been a decree passed by the Court with the consent of parties within the meaning of section 96, Civil Procedure Code. In the compromise the parties prayed the Court to pass a decree in terms of the compromise. It is admitted that if the Court had passed a decree then it would have been a consent decree. It seems mere hair-splitting to argue that because the defendants afterwards withdrew their consent section 96 does not apply. The parties had given their consent to the decree being passed and one party alone was not at liberty arbitrarily to withdraw. If O. XXIII, r. 3, applies to the case the matter is perfectly clear. The case having been adjusted by a lawful agreement or compromise, the Court was bound to pass a decree in accordance therewith and a decree so passed is not open to attack. The appellant has argued that the compromise cannot be treated as lawful, because, according to him, the Court had no power under paragraph 20 of the Second Schedule to modify the award. This is mixing up two entirely distinct matters. Whether or not the Court had power to pass a decree of a particular kind is one question. The right of the parties to enter into a compromise on the matters in dispute between them is quite another. It has not been suggested that there was anything unlawful or improper in the actual terms of the compromise and the compromise was, therefore, clearly a lawful compromise within the meaning of O. XXIII, r. 3. The difficulty as to the application of O. XXIII arises from the language of paragraph 20 of the Second Schedule which says that an application to file an award "shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants." This language leaves it uncertain how far it is to be deemed to be a suit for the purpose of applying O. XXIII. O. XXIII, r. 2, has been applied by the Calcutta High Court in *Gauri Shankar* v. *Maida Koer* (1). Other cases on the same side are collected in the judgment of Mr. Justice Fawcett in *Manilal Motilal* v. *Gokaldas Rowji* (2). There is also authority of the the Bombay High Court in *Harakhbai* v. *Jamnabai* (3) for the view that the words in section 89 of the Code, which says that, save as is otherwise provided by "any other law for the time being in force," references to arbitration should be governed by the Second Schedule, are wide enough to save the provisions of O. XXIII, which, though contained in the same Code as the Schedule, are not a part of it. This view was, however, dissented from by Macleod, C. J., in *Manilal Motilal* v. *Gokaldas Rowji* (2). I am disposed to agree with the view of Macleod, C. J. as to the interpretation of section 89, but it is not necessary to call this section in aid. There is nothing in the Second Schedule forbidding a compromise or adjustment. It is merely that the Schedule says nothing about it It is quite possible to hold without calling in section 89 that the policy of the Legislature in directing that applications of this kind shall be registered and filed as suits carries with it as a necessary consequence the right of the parties to enter into a compromise. Even if O. XXIII, rule 3, were not strictly applicable I should still hold with the

(1) 31 C. 516.
(2) 39 Ind Cas. 53; 45 B. 245; 22 Bom. L. R. 1048.
(3) 19 Ind. Cas. 786; 37 B. 639; 15 Bom. L. R. 340.

Punjab High Court in *Dwarka Das* v. *Krishan Kishore* (4) that where all the parties are agreed as to some modification of the original award it is quite open to them to embody that modification in a compromise and ask the Court to pass a decree in terms of the compromise. I agree with those authorities which lay down that the Court has no power under paragraph 20 of the Schedule to remit an award for re-consideration, but this is quite a different thing from giving effect to a modification embodied in a compromise to which all the parties have consented. I cannot see that there is anything illegal or *ultra vires* in giving effect to an agreement of this nature.

It has been suggested that section 96 (3) only applies when the decree was one which the Court could legally pass. This may depend upon the nature and extent of the illegality. If a Court had no jurisdiction over the subject-matter of the suit at all, as for instance if a Revenue Court attempted to pass a decree in a purely Civil Court matter, it may well be that the decree even though passed by consent would be a nullity, but where the Court is seized of the subject-matter of the suit and the allegation merely is that the decree contravenes some provision of law other considerations would apply. It has been held, for instance, by the Privy Council in *Raja of Killikota* v. *Chaitana Sahu* (5) that no appeal lies from a consent decree even though the suit was really barred by limitation. It will also be noticed that the restriction suggested is not to be found in the language of the section. The object of the section is to prevent the parties doing exactly what the appellant is doing in this case, namely, attacking what they have themselves agreed to. The only illegality alleged in this case is that the Court had no power to modify the award but could only either file it or reject it. The modification was in fact made not by the Court but by the parties, but even if I accept the appellant's argument on this point I should still be disposed to hold that the decree was a consent decree from which no appeal lies.

The only point in which I think the Court below has erred is in calling its decree a preliminary decree. This means that if the arbitrator refused to make up the account the Court will proceed to enter into the question of account itself. It has been pointed out in the course of the argument that the application to file the award was made on a Court fee of eight annas only and that the only adjudication to which this fee entitles the parties is an adjudication whether the award has been validly made. If the parties require an adjudication on questions of fact which the award left undetermined they must file a suit for that purpose.

I would, therefore, modify the decree of the Court below by striking out the words "preliminary decree for partition" and substituting the words "decree under paragraph 21 of the Second Schedule of the Code of Civil Procedure read with O. XXIII, r. 3 of the same Code." This modification will not be affected by the preliminary objection as it was no part of the compromise that the decree should be a preliminary decree. As my finding is in favour of the respondents on the main question at issue I would allow them their costs in both Courts.

DANIELS, A. J. C.—(*January* 17, 1922). —I was under the impression that I had made it clear in my order of 14th December in this case that as the decree of the Court below was declared not to be a preliminary decree, no further proceedings could be taken in the case except by way of execution. It has been suggested to me, however, that my order is capable of a different interpretation, and, therefore, to prevent misapprehension and by way of correction of an accidental omission under section 152 of the Code of Civil Procedure, I would add to the decree to be passed in the case the words: "That portion of the partition of 30th May 1921 which runs 'the award be sent to the arbitrators with the request that they, having made the amendment as above, should state the amount found due to each person on calculation and a decree absolute be passed in accordance therewith' will not be treated as forming part of the decree."

In my view the application of 30th May contains two prayers:—

(1) That the award be modified and para-

(4) 61 Ind. Cas. 628; 2 L. 114; 3 L. L. J. 349.
(5) 56 Ind. Cas. 539; 47 I. A. 200; 18 A. L. J. 625; (1920) M. W. N. 566; 39 M. L. J. 68; 28 M. L. T. 97; 12 L. W. 260; 24 C. W. N. 1055; 2 U. P. L. R. (P. C.) 122; 22 Bom. L. R. 1313 (P. C.).

graphs 1 and 2 of the petition of compromise be embodied in the decree.

(2) That the award be sent to the arbitrators to calculate the amount due to each person and that a decree absolute be passed in accordance therewith.

In my view the Court was perfectly entitled to give effect to the first of these requests by passing a decree in terms of the award as modified by consent. The second prayer was an additional prayer altogether outside the terms of the award and was an application to the Court to do something which the Court had no power to do.

KANHAIYA LAL, J. C.—(*January* 17, 1922). —This is an appeal from a preliminary decree prepared in accordance with an award as modified by a compromise filed by the parties. The parties claim to be the heirs of Hakim Anwar Ahmad, and the dispute between them in regard to the distribution of the estate was referred to the arbitration of certain persons by an agreement executed by them on the 14th June 1920. That agreement provided that the distribution of the estate was to be effected in accordance with the Muhammadan Law and that the award was to be made within three months.

On the 13th September 1920 the arbitrators made an award, determining the shares to which each of the contending parties was entitled and prescribing the manner in which the debts and liabilities due by the estate were to be discharged. The award also stated that the jewellery, held by the mother of Hakim Fazal Ahmad, was to be treated as her property and excluded from partition and that the room in which Hakim Anwar Ahmad used to sit and work as a physician was to remain with Hakim Fazal Ahmad without any right of transfer but it made no division or allotment of the remaining property.

An application was filed by three sons and one of the widows of Hakim Anwar Ahmad to file the award, to which certain objections were taken by the present appellant, who is one of the sons of Hakim Anwar Ahmad. On the 30th May 1921 an application was made by the parties, agreeing that a decree might be passed in accordance with the award subject to the conditions or modifications entered in that application with costs and further asking that the petition of compromise might be sent to the arbitrators with a direction to modify the award in accordance therewith and to state in express terms after an adjustment of accounts as to what each party was entitled to get and to prepare a final decree in conformity with it.

The Court below recorded the compromise and remitted the award to the arbitrators for amendment in accordance therewith but the arbitrators refused to have anything again to do with the arbitration.

The object of the parties clearly was that the award should be sent back to the arbitrators in order that they might adopt the modification suggested by the parties and make an actual partition. When the arbitrators refused, the present appellant asked the Court below under paragraph 15 of the Second Schedule of the Code of Civil Procedure to set aside the award and restore the parties to their original position. The plaintiffs, however, insisted that a decree should be passed in accordance with the award, as modified by the compromise, and that the further proceedings in pursuance of the modified award should be taken by the Court itself. The Court below adopted the latter course and that forms the subject of this appeal.

Paragraphs 20 and 21 of the Second Schedule of the Code of Civil Procedure are intended to provide an alternative remedy for enforcing awards made without the intervention of a Court. The petition to file such an award is made on a Court fee of 8 annas and the Court is given the authority in a proceeding of that kind to enquire whether the matter had in fact been referred to arbitration and an award had been made thereon and whether any ground such as is referred to in paragraphs 14 or 15 is established. The Court has power after such an enquiry to order the award to be filed and to pronounce judgment in accordance with it, and upon the judgment so pronounced a decree is to follow: but no appeal lies from such a decree except in so far as it might be in excess of or not in accordance with the award. Paragraph 21 does not give any authority to the Court to remit the award; but it is argued that if the Court can enquire into the grounds mentioned in paragraph 14, it is presumable that it has the power to remit the award and have the defects found remedied or rectified. It has obviously

no power to modify the award itself or try the suit, because paragraph 19 extends the provisions of paragraphs 12, 14 or 15 to proceedings under paragraph 17 only, that is, to references through Court. If it has no power to modify the award, it can equally have no power to remit the award, because the effect of the remission and a subsequent refusal by the arbitrators to re-consider would be to drive the Court to try the suit itself, but no such trial is contemplated by paragraph 21.

The Court can only order the award to be filed or refuse to pass such an order. In *Mustafa Khan* v. *Phulja Bibi* (6) it was held under section 525 of the old Code of Civil Procedure that the Court had no power to amend the award or to remit it for re-consideration but had the power to file and enforce it or to reject the application. In *Hodgkinson* v. *McMillan* (7) it was held that an award which was provisional or indefinite could not be enforced under section 525 of the old Code of Civil Procedure. It was not even remitted. In *Dandekar* v. *Dandekars* (8), *Thiruvengadathiengar* v. *Vaidinatha Ayyar* (9) and *Narsing Narain Singh* v. *Ajodhya Prosad Singh* (10) a similar view was taken. In *Kunj Lal* v. *Banwari Lall* (11), *Dinabandhu Jana* v. *Chintamoni Jana* (12) and *Dhanpat Rai* v. *Kahn Devi* (13) it appears to have been recognised that the Court had no power to remit the award to the arbitrators, if any matter was left undetermined, or, as the last two decisions show, to file an award in part, even if that part was separable from the rest. In *Sabitree Dabi* v. *Promoda Prosad Chatterjee* (14) it was held that the pre-existing law was not altered in this respect by the new Code. The language of paragraph 21 is in this respect substantially the same as that of section 526 of the old Code of Civil Procedure. The old Code provided that if no ground such as was mentioned or referred to in section 520 or section 521 was shown against the award, the Court should order it to be filed and such award would then take effect in the same way as an award made through the Court. Paragraph 21 empowers the Court to order the award to be filed and to pronounce judgment in accordance with it and adds that upon the judgment so pronounced a decree shall follow, but no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. The last clause only contemplates cases where a decree might be erroneously made in excess of or not in accordance with the award.

A fresh trial by the same arbitrators or another set of arbitrators or by the Court would hardly fall within the scope of such a proceeding. If the award is a good award the law gives the party in whose favour it is made a summary method of enforcing it. If it is not a good award the law refuses to enforce it as such and leaves the parties to seek such other remedies as may be open to them.

The learned Counsel for the plaintiffs respondents contends that the Court is competent to modify the award by consent or to remit it to the arbitrators, if both the parties so desire it. The compromise stated that the entire sum of Rs. 500 left for the construction of a mosque and Rs. 150 out of the amount left for payment to *Musammat* Masuma should be applied to the satisfaction of a certain decree, and it asked that a decree might be passed in accordance with the award subject to the terms of the compromise and the award remitted to the arbitrators for modification of what each party was entitled to. The effect of the compromise to my mind was to substitute for a portion of the award a new contract but that contract cannot be enforced in a proceeding meant only to enforce the award as it stood, if it was good and valid. In such a proceeding, the filing of the compromise has the effect of stopping the necessity of making an enquiry into the grounds urged against the validity of the award, but the Court cannot give effect to the substituted contract in whole or in part, specially where that part is not separable, or remit the award to the arbitrators for making the modification desired, much less make the modification itself, when the arbitrators

(6) 27 A. 526; 2 A. L. J. 416; A. W. N. (1905) 86.
(7) 2 Ind. Cas. 304; 6 A. L. J. 467.
(8) 6 B. 663; 3 Ind. Dec. (N. S.) 896.
(9) 29 M. 303.
(10) 13 Ind. Cas. 118; 15 C. L. J. 110; 16 C. W. N. 256.
(11) 48 Ind. Cas. 711. 4 P. L. J. 394.
(12) 26 Ind. Cas. 697; 19 C. W. N. 476.
(13) 23 Ind. Cas. 422; 30 P. R. 1914; 31 P. L. R. 1914; 11 P. W. R. 1914.
(14) 19 Ind Cas. 941; 21 C. L. J. 248.

refuse to do so. Under paragraph 15, an award remitted under paragraph 14 becomes void on the failure of the arbitrators to re-consider it, and the Court has to try the suit itself. If paragraphs 14 and 15 apply, the award became *ipso facto* void when the arbitrators refused to modify or re consider it, and the Court could not pass a decree in accordance with it as modified by the compromise after such refusal.

Under section 96, clause (3), of the Code of Civil Procedure, an appeal does not lie from a consent decree but section 89 lays down that, save as provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule. That Schedule gives a right of appeal where a decree is in excess of the award or not in conformity with it. Section 104 gives similarly a right of appeal from an order filing or refusing to file an award. The Second Schedule is complete in itself, except in regard to matters about which it is silent or which are not inconsistent with it. The restricted power given to the Court by paragraph 21 cannot be enlarged by a reference to anything outside the Schedule.

The decisions in *Dwarka Das* v. *Krishan Kishore* (4) and *Manilal Motilal* v. *Gokaldas Bowji* (2) do not help a right solution. The former merely follows an earlier decision of the Punjab Chief Court and does not take into account section 89 of the present Code of Civil Procedure. The latter deals with a reference made out of Court about a matter then being litigated in a pending suit. The compromise filed in Court might still be a good contract binding on the parties so far as it modifies the award, but it cannot be enforced in this proceeding in substitution or modification of the award. It asks the Court to do more than it has the power to do.

The appeal should, in my opinion, be allowed, but in view of the circumstances, the parties ought not to be allowed their costs in any of the Courts.

KANHAIYA LAL, J. C. AND DANIELS, A. J. C.—(*January* 17, 1922).—In this case we differ on the question whether a Court is competent on an application under paragraph 20 of the Second Schedule of the Code of Civil Procedure, 1908, to pass a decree on an award as modified by the compromise filed by the parties and whether an appeal lies from the decree so passed. We accordingly refer these questions for decision of the Second Additional Judicial Commissioner in accordance with section 98 of the Code.

LYLE, A. J. C.—(*March* 16, 1922).—The following question of law which has arisen in Miscellaneous Appeal No. 52 of 1921 and with regard to which the Judges composing the Bench trying that appeal differed in opinion has been referred to me under section 98 of the Code of Civil Procedure:—

Is a Court competent on an application under paragraph 20 of the Second Schedule of the Code of Civil Procedure, 1908, to pass a decree on an award as modified by the compromise filed by the parties and does an appeal lie from the decree so passed?

The learned Counsel for the appellant wished to discuss all the facts in the case and to argue the whole appeal before me, but in view of the terms of the reference and of the provisions of section 98 (2) of the Code of Civil Procedure I do not think that he is at liberty to do so. Under section 575 of the old Code of Civil Procedure when the Judges composing the Bench differed in opinion on a point of law the whole appeal was referred to one or more of the other Judges of the same Court and was decided in accordance with the opinion of the majority of all the Judges who had heard the appeal, including those who first heard it. The law has been very definitely altered by section 98 of the present Code which provides that when the Judges composing a Bench differ in opinion on a point of law they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges and such a point shall be decided according to the opinion of the majority of the Judges who have heard the appeal including those who first heard it. As the law at present stands the whole appeal is not referred but only a point of law as stated by the Bench and the Judge to whom the reference is made is at liberty to express an opinion on that point of law only. Of course reference may be made to the facts if it be necessary for the purpose

of elucidating the point of law stated in the reference, but the Referring Judge is not, as the law at present stands, at liberty to express an opinion on the facts, or on any point of law outside that stated in the reference. In the present case the point upon which the learned Judges composing the Bench have differed has been stated in general terms in the referring order and that being so no reference to the facts of the case is necessary or permissible.

Section 89 of the Code provides that "Save in so far as is otherwise provided..... .....by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule." Paragraph 20 of the Second Schedule refers to an application for filing an award made without the intervention of a Court and paragraph 21 provides that: "Where the Court is satisfied that the matter has been referred to arbiration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award." The question under reference is whether in the case of such an award the power of the Court is limited to accepting or rejecting the award as it stands or whether the Court can accept the award as modified by a compromise. The learned Counsel for the appellant admits that when an objection is taken on any of the grounds referred to in paragraph 14 or paragraph 15 of the Schedule the parties can come to a compromise in respect of such objection and the Court is bound to reject or accept the award in accordance with such compromise. He admits that the parties may enter into a compromise as to any question which properly arises in an application made under paragraph 20 to file an award but he urges that the Court has no jurisdiction to consider any compromise by which an award is altered or amended. He urges that the Court has power only to accept or reject the award and its jurisdiction cannot be extended by any agreement entered into between the parties. He has referred to two rulings: *Mustafa Khan* v. *Phulja Bibi* (6) and *Sabitree Dabi* v. *Promoda Prosad Chhuttaries* (14), but neither of these rulings lends any support to his contention. They are merely authority for the proposition that when an application has been made under paragraph 20 of the Schedule the Court has no power to refer the award back to the arbitrators, a proposition which is not denied by the learned Counsel for the respondents. The position taken up by the learned Counsel for the appellant is that under paragraph 21 of the Schedule the power of the Court is limited to filing or rejecting the award as it stands and it has no power to file an award as modified by a compromise and reliance is placed on paragraph 21 (2) of the Schedule which provides for an appeal from any decree passed in excess of or not in accordance with the award. It is urged that if the Court has no power under the provisions of paragraph 21 to modify the award an agreement between the parties cannot give it the power to do so. He refers to Mr. Daniel's order of the 17th of January 1922 and argues that if by consent of parties the Court had power to give effect to the first prayer mentioned in that order it would follow that it had power also to give effect to the second prayer mentioned in the order. This argument is clearly fallacious. The first prayer is merely that the award as modified not by the Court but by the parties themselves should be filed. The Court is not asked to adjudicate in any way but merely to file the award as modified. The second prayer is that the award should be sent back to the arbitrators with directions to calculate the amount due to each person and that a decree should be passed in accordance with their finding. No agreement between the parties could operate to give the Court power to call upon the arbitrators to make a fresh award. The two prayers are altogether different in nature and it is absurd to argue that if the Court has power to grant one of the prayers it has power also to grant the other.

The question really is whether the provisions of r. 3 of O. XXIII are applicable in the case of an application under paragraph 20 of the Schedule to have an award filed. The learned Counsel for the appel-

lant argues that this rule being one of the general provisions of the Code is not applicable, because it conflicts with the special provisions of paragraph 21 of the Schedule in so much as, if applied, it would operate to enlarge the powers of the Court expressly stated in that paragraph. With this view I am unable to agree. The Second Schedule of the Code contains special provisions governing arbitration proceedings but it is as much a part of the Code as O. XXIII, r. 3. It is not exhaustive and must be read with the other provisions of the Code, for example in order to enable the Court to decide whether any ground such as is referred to in paragraph 14 or paragraph 15 is proved the procedure prescribed by the Code must be followed. And the provisions with regard to appeals from orders passed in arbitration proceedings are contained not in the Second Schedule but in section 104 of the Code. Paragraph 20 of the Schedule provides that an application to have an award filed "shall be numbered and registered as a suit," and that being so it seems to me that all proceedings in suits allowed by the Code which do not require adjudication by the Court can be taken on such an application. A Court cannot of its own motion or by adjudication modify the award but where there is a lawful agreement between the parties modifying the award the Court is bound to recognise such an agreement and to pass a decree in accordance therewith. Had it been intended that r. 3 of O. XXIII should not be applicable to cases registered as suits under paragraph 20 of the Second Schedule we should have expected an express provision to this effect in the Code just in the same way as by r. 4 of O. XXIII it has been declared not to be applicable to any proceedings in execution of a decree or order. There is authority for the proposition that the provisions of O. XXIII, r. 1 are applicable to such proceedings in *Gauri Shankar* v. *Maida Koer* (1), and there is direct authority for the proposition that the provisions of O. XXIII, r. 3, are also applicable in *Dwarka Das* v. *Krishan Kishore* (4). Where an application for filing an award made without the intervention of the Court has been made and a compromise subsequently entered into between the parties it seems absurd to hold that the Court to which the application is made is bound to ignore the compromise and to pass a decree in terms of the original award if that award is not defective on any of the grounds mentioned in paragraph 14 or paragraph 15 of the Schedule. This would be the result of holding that the Schedule was complete in itself and that the provisions of O. XXIII, r. 3, were not applicable to such proceedings.

It is admitted by the parties that if the Court can pass a decree on an award as modified by a compromise filed by the parties no appeal would lie from a decree so passed except in so far as the decree was in excess of or not in accordance with the award as modified by the compromise. My answer, therefore, to the reference is that a Court is competent on an application under paragraph 20 of the Second Schedule of the Code of Civil Procedure to pass a decree on an award as modified by a lawful compromise filed by the parties and that from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified.

Let this opinion be laid before the Bench.

KANHAIYA LAL, J. C. AND LYLE, A. J. C. (*March* 29, 1922.)—In view of the opinion obtained under section 98 of the Code of Civil Procedure we modify the decree of the lower Court to the extent that for the words "preliminary decree for partition" the words "decree under paragraph 21 of the Second Schedule of the Code of Civil Procedure read with rule 3 of O. XXIII of the same Code" shall be substituted and that that portion of the petition of the 30th of May 1921 which runs "and that the award be sent to the arbitrators with the request that they, having made the amendment as above, should state the amount found due to each person on calculation and a decree absolute be passed in accordance therewith" shall not be treated as forming part of the decree. The respondents will get their costs in both Courts.

W. C. A.

Lower Court's decree modified.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 35 OF 1921.

July 1, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

UTTAMRAM VITHALDAS—PLAINTIFF—APPLICANT

versus

THAKORDAS PARSHOTTAMDAS—DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 14—Plaint signed and presented by servant of plaintiff—Authority of servant not proved—Suit dismissed—Application to High Court—Extraordinary jurisdiction.

Plaintiff sued to recover a certain sum of money from the defendant. The plaint was signed by an unauthorised servant of the plaintiff instead of by the plaintiff himself. When this fact came to the notice of the Court, it dismissed the suit. The plaintiff moved the High Court in the exercise of its extraordinary jurisdiction:

Held, setting aside the decree of the lower Court, (1) that if the plaintiff had applied to sign the plaint and present it on the day of the dismissal of the suit, he should have been allowed to do so;

(2) that he should be given the opportunity now of having his suit considered as if it was filed on the day of its dismissal subject to the question of limitation.

Application under Extraordinary Jurisdiction against the decision of the First Class Subordinate Judge, at Surat.

Mr. *G. N. Thakor*, for the Applicant.

Mr. *M. B. Dave*, for the Opponent.

JUDGMENT.—The plaintiff sued to recover the balance due in Sambat 1973 from the defendant and the price of goods supplied in Sambats 1973 and 1974, and for a further amount of Rs. 35 odd. The plaint was first presented on the 23rd October 1920 signed by Vithaldas, a servant of the plaintiff, while the Vakilpatra of the Vakil was also signed by Vithaldas. When these facts came to the notice of the Judge on the 3rd December 1920, he found that the plaint was not properly signed and not properly presented by the plaintiff, and that the Pleader presenting the plaint was not duly authorised, and, therefore, dismissed the suit with costs. We think he was right in holding that the plaint was not duly presented and not duly signed, as the plaintiff made no effort to prove that Vithaldas was his recognised agent trading on his behalf while he was away from the jurisdiction. But we think that if the plaintiff had applied to be allowed to sign the plaint and present it on that day, he should have been allowed to do so. Then, of course, the question of limitation would arise. We have nothing to do at present with that. So that to that extent the Rule will be made absolute, the decree dismissing the suit will be set aside and the plaintiff will have an opportunity of having his suit considered as if it was filed on the 3rd December 1920. The plaintiff must pay the costs up to date.

W. C. A.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 229 OF 1921.

December 23, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

KANHAI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM RATAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Gift from father—Property, whether self-acquired in hands of donee.

In the absence of any express limitation or condition to the contrary, all property obtained by gift or devise becomes self-acquired in the hands of the donee or devisee. Consequently, any property obtained by virtue of a gift from the father, grandfather or great-grandfather would be self-acquired in the hands of the donee if it was not ancestral property in the hands of the donor or was acquired by him without detriment to the joint estate. [p. 218, col. 2.]

Appeal against the decree of the District Judge, Gonda, dated the 11th June 192', upholding that of the Subordinate Judge, Gonda, dated the 28th February 1921.

Mr. *Aditya Prasad*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—The dispute in this appeal relates to a 6-pies share of certain property and the question for consideration is whether the plaintiffs are bound by the transfer of the said share made by their father, Ajudhia, in favour of Ram Rattan. The allegation of the plaintiffs was that the said share formed part of the joint family property belonging to them and their father; that the latter had no right to sell the same and that they were not in any way benefited by the sales effected by him. The defence was that the property in question was the exclusive property of Ajudhia and that the

sales in question had been made for legal necessity and for the benefit of the family.

The Court of first instance found that the property in question was the self-acquired property of Ajudhia, having been obtained by him by virtue of a gift made in his favour by his brother, Sarju; that the sale deed of the 26th August 1911, was binding on the family and that Rs. 166 out of the sale-deed of the 2nd September 1912, were taken for legal necessity. The lower Appellate Court upheld the view that the property comprised in the two sale-deeds was not ancestral.

It appears that Fakir, the father of Ajudhia, was the owner of an 8-annas share in the village Dhondhupur. He had four sons, Bhagan, Sarju, Ajudhia and Mathura. Mathura died in his lifetime, leaving a son, Jhingur. Fakir got mutation of names effected in his lifetime in respect of his 8-annas share in favour of his three sons, Bhagan, Sarju and Ajudhia, and his grandson, Jhingur, in equal portions. In the *khewat* prepared for 1315 Fasli it was recited that mutation of names was effected in pursuance of an oral gift (Exhibit A 22). Ajudhia thus became the owner of a 2-annas share. On the 22nd July 1910, Sarju made a gift of 8-pies out of his 2-annas share to Ajudhia (Exhibit A-4). The total share of Ajudhia thus amounted to 2-annas 8-pies.

On the 27th September 1910 Ajudhia sold a 4-pies share to Lachman, describing the same as his ancestral and self-acquired property (*milkiat maurusi wa paida kar a khud*) (Exhibit 12). The sale was stated to have been made to pay certain prior debts and for other necessary expenses. On the 26th August 1911 he sold another 4 pies share to a person named Ram Rattan, describing himself as the owner and possessor of the same without any specification as to the manner in which he had acquired his title (Exhibit A 1). The sale was stated to have been made for his personal necessity (*zarurat khud*). On the 18th October 1911 he sold another 6-pies share to certain persons, describing himself as the owner and possessor of the same without specifying how he had obtained the same (Exhibit 10). That sale was stated to have been made for the purchase of certain property and for other necessary expenses. On the 22nd May 1912 he again sold a 6-pies share to the same persons, describing it in the same manner (Exhibit 11). No necessity was mentioned for the sale. On the 2nd September 1912 he sold a 2 pies share to Ram Rattan without specifying how he had acquired it or mentioning the necessity for the sale (Exhibit A-2). He had thus sold 1-anna 10-pies out of his 2 annas 8-pies share. The validity of the sales of the 26th August 1911 (Exhibit A 1) and the 22nd September 1912 (Exhibit A-2) is now in question.

It is well settled that, in the absence of any express limitation or condition to the contrary, all property obtained by gift or devise becomes self-acquired property in the hands of the donee or devisee. Consequently, any property obtained by virtue of a gift from the father, grandfather or great-grandfather would be self-acquired property in the hands of the donee, if it was not ancestral property in the hands of the donor or was acquired by him without any detriment to the joint estate. In *Bai Diwali* v. *Patel Bechardas* (1) it was held that where a property was given jointly to two persons living as members of a joint Hindu family, each donee took an interest in the property which passed to his heirs at his death, and not to the other donee by survivorship. In *Kishori Dubain* v. *Mundra Dubain* (2) it was similarly held that where a gift was made in favour of several persons living jointly it did not follow that they took such property as joint property.

The gift in this instance is described as oral but as it is said to have been made before 1315 Fasli in favour of several donees who accepted the same and succeeded in obtaining mutation of names in their favour and retaining possession so long, such defect as might originally have existed owing to the absence of a validly executed and registered deed was perfected by the length of possession retained by them.

By the same oral gift the other members of the family were given a 2-annas share each. It is admitted that the entire 8 annas share was acquired by Fakir by purchase from certain persons in 1873 and was his self-acquired property. The 8-pies share obtained by Ajudhia under a gift made by Sarju was similarly self-acquired property in the

(1) 26 B. 445; 4 Bom. L. R. 102.
(2) 10 Ind. Cas. 660; 33 A. 635; 8 A. L. J. 757.

hands of Adjudhia. The plaintiffs have, therefore, no right to question the sales effected by their father of property which he had obtained in the manner aforesaid from his father and brother.

It is unnecessary to determine whether the 8-pies share sold formed part of the property obtained by Ajudhia from his father or represented the share which he had obtained by gift from his brother.

The appeal fails and is dismissed with costs.

N. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 49 OF 1920.

August 18, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

ISHAN CHANDRA BAKSHI—

PLAINTIFF—APPELLANT

versus

SEFATULLA SIKDAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 159, 161, 167—Adverse possession—"Encumbrance", meaning of—Construction of Statutes—Courts to follow long established decisions.

The word "encumbrance" in sections 159 and 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding, and such an encumbrance cannot be annulled in any manner other than what is provided in section 167. [p. 222, col. 2.]

(Case-law considered.)

Where an Act of Parliament has received a judicial construction, putting a certain meaning on its words, and the Legislature in a subsequent Act in *pari materia* uses the same words, there is a presumption that the Legislature used these words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be so construed even if they were such that they might originally have been construed otherwise [p. 222, cols. 1 & 2]

Mersey Docks and Harbour Board v. *Cameron*, (1864) 11 H. L. Cas. 443 at p. 484; 20 C. B. (N. S.) 56; 35 L. J. M. C. 1; 11 Jur. (N. S.) 748; 13 W. R. 1059; 11 E. R. 1405; 12 L. J. (N. S.) 463; 145 R. A. 255; 14 E. R. 1024, applied.

Ruckmaboye v. *Lulloobhoy*, 5 M. I. A. 234; 8 Moo. P. C. 4; 1 Sar. P. C. J. 42; 18 E. R. 884; 14 E. R. 2; 97 R. R. 1, *Campbell, Ex parte, Cathcart, In re*, 1870, 5 Ch App. 703; 23 L. T. 289; 18 W. R. 1165, referred to.

Courts should be reluctant to dissent from the view expressed in long established decided cases. [p. 222, col. 2.]

Young v. *Robertson*, (1862) 4 Macq. 314 at p. 345; 8 Jur. (N. S.) 825; 131 R. R. 788, *Owners of Steamship Mediana* v. *Owners, Master and Crew of Lightship "Comet"*, (1900) App Cas. 113; 69 L. J. P. C. 35; 82 L. T. 95; 48 W. R. 398; 9 Asp. M. C. 41; 16 T. L. R. 194, *Kreglinger* v. *New Patagonia Meat & Cold Storage Co Ltd*, (1914) A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 31 T. L. R. 114, relied on.

Letters Patent Appeal against the decree of Mr. Justice Newbould dated the 11th of May 1920, in Appeal from Appellate Decree No. 1580 of 1918.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen*, for the Appellant.—The question for your Lordships' consideration in this appeal is whether the title by adverse possession acquired by the defendants against the tenants is an incumbrance within the meaning of section 159 of the Bengal Tenancy Act. My submission is that as soon as the statutory title by adverse possession against the tenants was complete, the adverse possessor became, in reality, a co-owner of the tenants and in such circumstances the question of encumbrance or no encumbrance hardly arises. The interest of a co-owner cannot be characterised as an encumbrance upon the interest of another co-owner. The term 'encumbrance' implies that the interest of the holder of the encumbrance is inferior in degree to that of the owner. But the interest of the adverse possessor, when it has ripened by prescription, is of the same nature as that of the true owner and is, therefore, not an encumbrance upon the interest of the true owner. Refers to *Kumar Kalanand Singh* v. *Syed Sarfat Hossein* (1), *Rahim ud Din* v. *Bhabangana Debya* (2), *Baikuntha Nath Kai* v. *Basanti Kumari Dasi* (3), *Aftar Ali* v. *Brojendra Kishore* (4), *Jitendra Kumar Pal* v. *Mohendra Chandra Sarma* (5) and *Mohim Chandra Deb* v. *Pyare Lal Das* (6).

(1) 12 C. W. N. 528.
(2) 1 Ind Cas 81; 13 C. W. N. 407.
(3) 34 Ind. Cas 946; 23 C. L. J. 154.
(4) 37 Ind Cas. 252; 24 C. L. J. 60.
(5) 37 Ind. Cas. 239, 24 C. L. J. 62.
(6) 39 Ind. Cas. 213; 25 C. L. J. 99; 21 C. W. N. 537; 44 C. 412.

ISHAN CHANDRA BAKSHI v. SEFATULLA SIKDAR.

Babu *Basanta Kumar Bose* (with him Babu *Situram Banerjee*), for the Respondents.—Having regard to the long line of decisions as to the meaning of the term "encumbrance," it is now too late for my learned friend to contend that the statutory title of the adverse possessor is not an incumbrance within the meaning of section 159 of the Bengal Tenancy Act. This term does not find a place for the first time in the Bengal Tenancy Act and has been used by the Indian Legislature more than once in the statutory provisions in a well recognised sense. See *Gokul Bagdi* v. *Debendra Nath Sen* (7). See also *Moizuddi Biswas* v. *Ishan Chandra Das* (8) and *Kalikananda Mukherjee* v. *Bipro Das Pal* (9). The word "incumbrance" as used in sections 159 and 161 of the Bengal Tenancy Act has been interpreted, by a long series of decisions, to include the statutory title acquired by a trespasser by adverse possession. See *Moizuddi Biswas* v. *Ishan Chandra Das* (8), *Gokul Bagdi* v. *Debendra Nath Sen* (7), *Arsadulla* v. *Munsab Ali* (10), *Bhuson Chandra Ghosh* v. *Srakanta Banerjee* (11), *Satish Chandra* v. *Munjamali Debi* (12), *Monmotha Nath Mitter* v. *Anath Bundhu Pal* (13).

Babu *Surendra Chandra Sen* replied.

JUDGMENT,—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould in an Appeal from Appellate Decree in a suit for recovery of possession of land on declaration of title. The plaintiff claimed the disputed land as included in an occupancy holding held by one Biswambhur Bakshi at an annual rent of Rs. 6-4-0 under the Sinha Rays who were tenure holders under the Raja of Dighapatya. The occupancy holding was sold in 1900 in execution of a decree for arrears of rent, when it was purchased by one Prosanna Chandra Bhattacharjya. His representatives made default in the payment of rent, and the occupancy holding was again sold in execution of a decree for arrears of rent on the 23rd April 1913 when it was purchased by the landlords themselves. The plaintiff took settlement from the landlords on the 24th February 1915, but was unable to obtain possession of the disputed area. The result was the institution of this suit on the 10th January 1916. The defendants resisted the claim on the ground that the tract in suit never formed part of the occupancy holding held by Biswambhur Bakshi under the Sinha Rays and was in reality included in a tenancy held by Biswambhur Bakshi and Gobinda Bakshi at an annual rent of Rs. 9-4-0 payable directly to the Raja of Dighapatya. The question consequently arose, whether the disputed land was included in the tenancy of Rs. 6-4-0 held by Biswambhur Bakshi under the Sinha Rays or in the tenancy of Rs. 9-4-0 held by Biswambhur Bakshi and Gobinda Bakshi under the Raja of Dighapatya. The Trial Court answered this question in favour of the plaintiff and decreed the suit. On appeal the Subordinate Judge did not determine this question, but held that, on the assumption that the land was included in the tenancy of Rs. 6-4-0 held by Biswambhur Bakshi under the Sinha Rays, the defendants and their predecessors had acquired a title by adverse possession which constituted an incumbarance and could have been, but had not been, annulled by the grantor of the plaintiff under section 167 of the Bengal Tenancy Act, read with section 159. The Subordinate Judge found upon the evidence that, on the 21st May 18 6 one Abinash Chandra Bhattacharjya, in execution of a mortgage decree held by him against Biswambhur Bakshi and Gobinda Bakshi, purchased their tenancy of Rs. 9-4-0 under the Raja of Dighapatya, that on the 29th November 1898 the purchaser transferred the tenancy to Harinath Mookerjee (one of the defendants in this suit), and that, since the mortgage sale of 1896, Abinash and thereafter Harinath had been in possession of the disputed land as included in the tenancy of Rs. 9-4-0. The Subordinate Judge further found that neither Prosanna Chandra Bhattacharjya nor his successors-in-interest ever possessed the land as included in the tenancy of Rs. 6-4-0 held by Biswambhur Bakshi under the Sinha Rays. On these findings, the Subordinate

(7) 11 Ind. Cas. 453; 14 C. L. J. 136.
(8) 7 Ind. Cas. 849; 15 C. W. N. 706; 13 C. L. J. 293.
(9) 26 Ind. Cas. 436; 21 C. L. J. 235; 19 C. W. N. 18 at p. 20.
(10) 14 Ind. Cas. 349; 16 C. L. J. 539; 16 C. W. N. 831.
(11) 33 Ind. Cas. 957; 23 C. L. J. 485; 21 C. W. N. 155; 45 C. 756.
(12) 15 Ind. Cas. 869; 17 C. W. N. 340.
(13) 61 Ind. Cas. 469; 25 C. W. N. 106.

Judge held that the defendants had acquired a good title by adverse possession from 1900 when Prosanna Chandra Bhattacharjya became the purchaser at a rent-sale-till the 23rd April, 19.3, when the grantors of the plaintiff purchased at another rent-sale. The question thus emerged for consideration, whether the statutory title by adverse possession acquired by the defendants against the tenant for whose fault the holding of Rs. 6-4-0 was brought to sale, was an incumbrance within the meaning of section 159 of the Bengal Tenancy Act which the purchaser at the rent-sale was competent and bound to annul in the prescribed method, namely, in the manner directed in section 167. The Subordinate Judge answered this question in the affirmative, and his view has been approved by Mr. Justice Newbould, as supported by a long line of decisions in this Court.

The term "encumbrance" was not introduced for the first time in the Bengal Tenancy Act, but, as was pointed out in *Gakul Bagdi* v. *Debendra Nath Sen* (7), had been repeatedly used by the Indian Legislature in a well-recognised sense in the statutory provisions of our land-law and revenue-law. In *Lukhmeer Khan* v. *Collector of Rajshahye* (14) section 27 of the Revenue Sale Law, 1841, which provided that a purchaser of an estate sold for the recovery of arrears of revenue due thereon would acquire the estate free from all incumbrances imposed thereupon after the time of settlement, was interpreted to signify that the interest acquired by an adverse possessor was an encumbrance. The same phraseology was reproduced in section 26 of the Revenue Sale Law, 1845, and was similarly interpreted in *Ramsunkur* v. *Bejoy Govind Boral* (15). Section 37 of the Revenue Sale Law, 1859, reproduces the same phraseology and has been repeatedly construed in the same sense: *Goluck Monee* v. *Huro Chunder* (16), *Thakore Dass* v. *Nubeen Kishen* (17), *Narain Chunder* v. *Tayler* (18), *Karmi Khan* v. *Brojo Nath Das* (19), *Moizudi Eiswas* v. *Ishan Chandra Das* (8). A similar question has arisen upon the construction of section 11 of the Patni Regulation, 1819, and it has been frequently held that the interest acquired by a trespasser, who has been in adverse possession of part of the lands of the *taluk* for the statutory period is an incumbrance that has accrued upon it by the act of the defaulting *patnidar*: *Khantomoni Dasi* v. *Bijoy Chand* (20), *Gopendro Chunder* v. *Mokaddam Hossein* (21), *Nuffer Chandra Pal* v. *Rajendra Lal Goswami* (22), *Prodyote Kumar Tagore* v. *Rakhal Chandra Sarkar* (23), *Kalikonanda Mukherjee* v. *Bipro Das Pal* (9). When we turn to section 16 of the Sales of Under-Tenures Act, 1865, we meet with a similar provision which has been construed in a like manner; *Mahomed Askur* v. *Mahomed Wasuck* (24). The same principle was applied by Sir Barnes Peacock, C. J., in the case of sales under section 105 of the Bengal Rent Law, 1859; *Womesh Chander Gooyto* v. *Raj Narain Roy* (25). A similar view has been adopted with reference to sections 70 and 71 of the Assam Land and Revenue Regulation, 1886, *Mahomed Nasim* v. *Kasi Nath Ghose* (26), *Aptar Ali* v. *Brojendra Kishore Roy* (27). This is supported by the decision of the Judicial Committee in *Surja Kanta Acharjya Bahadur* v. *Sarat Chandra Roy* (28), where it was ruled that the period of limitation for adverse possession against the purchaser at a sale for arrears under the Revenue Sale Law, 1859, only commences to run from the date of the sale. It is thus undeniable that, at the time when the Bengal Tenancy Act was passed, the term "incumbrance" had a well-recognised meaning in connection with provisions in Statutes in *pari materia*. It is equally incontestable that, since the Bengal Tenancy Act came into operation, the word "incumbrance" as

(14) (1851) Beng. S. D. A. 116; 11 Ind. Dec. (o. s.) 596.
(15) (1852) Beng. S. D. A. 824; 12 Ind. Dec. (o. s.) 641.
(16) 8 W. R. 62.
(17) 15 W. R. 552.
(18) 4 C. 103; 3 C. L. R. 151; 2 Shome L. R. 78; 2 Ind. Dec. (N. S.) 67.
(19) 22 C. 244; 11 Ind. Dec. (N. S.) 164.
(20) 19 C. 787; 9 Ind. Dec. (N. S.) 968.
(21) 21 C. 702; 10 Ind. Dec. (N. S.) 1099.
(22) 25 C. 167; 13 Ind. Dec. (N. S.) 113.
(23) 5 Ind. Cas. 243; 11 C. L. J. 209; 37 C. 322; 14 C. W. N. 487.
(24) 22 W. R. 413.
(25) 10 W. R. 15.
(26) 26 C. 194; 3 C. W. N. 108; 13 Ind. Dec. (N. S.) 729.
(27) 23 Ind. Cas. 119; 20 C. L. J. 210.
(28) 25 Ind. Cas. 309; 20 C. L. J. 563; 18 C. W. N. 1281; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R. 925 (P. C.),

used in sections 159 and 161 has been interpreted to include a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding: *Karmi Khan* v. *Bro o Nath Das* (19), *Moituddi Biswas* v. *Ishan Chandra Das* (8), *Gokul Bagdi* v. *Debendra Nath Sen* (7) *Arsadulla* v. *Munseb Ali* (10), *Satish Chandra* v. *Muni mali Debi* (12), *Bhusan Chandra Ghosh* v. *Srakanta Banerjee* (11), *Monmotha Nath Mitter* v. *Anath Bundhu Pal* (13). We have been pressed to hold, however, that the view which has obtained in this Court for well-nigh seventy years as to the meaning of the term "incumbrance" is erroneous and is not logically reconcileable with the position maintained in *Kumar Kalanand Singh* v. *Syed Sarafat Hossein* (1), *Rahim-ud-Din* v. *Bhabagana Debya* (2), *Baikuntha Noth Rai* v. *Basanta Kumari Dasi* (3), *Aftar Ali* v. *Brojendra Kishore* (4), *Jitendra Kumar Pal* v. *Mohendra Chandra Sarma* (5) and *Mohim Chan ra Deb* v. *Piyare Lal Das* (6), namely, that the adverse possessor, when his title has ripened by prescription, becomes in essence a co-owner of the estate, tenure or holding, as the case may be, and his interest cannot logically be deemed an incumbrance on the ownership. It need not be disputed that the matter, were it *res integra*, would be open to serious argument, as, indeed, is indicated by the observation of Lord Phillimore in *Bipradas Pal* v. *Kamini Kumar* (29), where the Judicial Committee affirmed the decision in *Kalikonanda Mukherjee* v. *Bipro Das Pal* (9). But in the well-known words of Mr. Justice Holmes (Common Law P. 1), the life of the law is not logic but experience. As pointed out by Blackburn, J., in *Mersey Docks and Harbour Board* v. *Cameran* (30), where an Act of Parliament has received a judicial construction, putting a certain meaning on its words, and the Legislature in a subsequent Act in *pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before, and, unless there is something to rebut that presumption, the Act should be so construed even if they were such that they might originally have been construed otherwise. To the same effect are the observations of Sir John Jervis, C. J., in *Ruckmaboye* v. *Lulloobhboy* (31) and of James, L. J. in *Campbell, Ex parte, Cathcart, In re* (32). We are further of opinion that the case before us belongs to that class where the Court should be reluctant to dissent from the view expressed in long established decided cases and thereby not only to unsettle the law but also to endanger the security of property and title, —dangers which are not associated with changes brought about by legislative intervention: *Young* v. *Robertson* (33), *Owners of Steamship Mediana* v. *Owners, Master and Crew of Lightship "Comet"* (34), *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.* (35). We hold accordingly, in concurrence with Mr. Justice Newbould, that the word incumbrance, as used in sections 159 and 161 of the Bengal Tenancy Act, includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and that such encumbrance cannot be annulled in any manner other than what is provided in section 167.

The result is that the decree made by Mr. Justice Newbould is affirmed and this appeal dismissed with costs.

B. N.

Appeal dismissed.

(29) 66 Ind. Cas. 674; 41 M. L. J. 638; 15 L. W. 180; 30 M. L. T. 133; 26 C. W. N. 465; 49 C. 27; 4 U. P. L. R. (P. C.) 53.

(30) (1864) 11 H. L. Cas. 443 at p. 480; 20 C. B. (N. S.) 56; 35 L. J. M. C. 1; 11 Jur. (N. S.) 76; 13 W. R. 1069; 11 E. R. 1405; 12 L. T. (N. S.) 643; 145 R. R. 255; 144 E. R. 1024.

(31) 5 M. I. A. 234; 8 Moo. P. C. 4; 1 Sar. P. C. J. 423; 18 E. R. 884; 14 E. R. 2; 97 R. R. 1.

(32) (1870) 5 Ch. App. 703; 23 L. T. 289; 18 W. R. 1056.

(33) (1862) 4 Macq. 314 at p. 345; 8 Jur. (N. S.) 825; 131 R. R. 788.

(34) (1900) App. Cas. 113; 69 L. J. P. C. 37; 82 L. T. 95; 48 W. R. 398; 9 Asp. M. C. 41; 16 T. L. R. 194.

(35) (1914) A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

BASHIR HUSAIN v. CHANDRAPAL SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 55 OF 1921.

January 10, 1922.

Present :—Pandit Kanhaiya Lal, J. C.

BASHIR HUSAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHANDRAPAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Factum valet—*Mortgage—Foreclosure proceedings—Voluntary surrender by mortgagor of equity of redemption—Mortgagee in proprietary possession for great length of time—Redemption, suit for, on ground of defects in foreclosure proceedings and surrender, maintainability of—Adverse possession, plea of, by mortgagee.*

A mortgagee applied for foreclosure under Bengal Regulation XVII of 1806 but the case was consigned to the records before the period of one year's grace usually allowed for payment had expired Subsequently, when the mortgagee was contemplating the filing of a suit for proprietary possession of the mortgaged property, the mortgagor voluntarily gave him possession and got mutation effected in his favour. The mortgagee remained in possession of the property for a number of years when the plaintiffs filed a suit contending that the surrender was not valid for want of registration and that they were entitled to redeem the mortgage on payment of the amounts due thereon:

Held, (*i*) that the subsequent proceedings taken by the mortgagor to deliver possession and get mutation effected in favour of the mortgagee operated as a surrender by the mortgagor of his equity of redemption in recognition of the validity of the previous foreclosure proceedings; [p. 224, col, 2.]

(*ii*) that even if there was any defect in the original foreclosure proceedings, the mortgage could not be treated as subsisting and the transaction re-opened after the lapse of a large number of years from the date when the equity of redemption was surrendered; [p 224, col. 2.]

(*iii*) that even if the rights conferred by the private settlement were defective and inchoate or legally insufficient for the extinction of the equity of redemption, the acts of the parties had been such as to supply all defects: and [p. 225, col. 1]

(*iv*) that although exclusive possession by a mortgagee for any length of time short of the statutory period of sixty years would not invest him with an adverse title, yet in this case the possession for more than 12 years of the mortgagee obtained *aliunde* in recognition of his proprietary right after the termination of the foreclosure proceedings operated as a bar or defence to a suit for redemption, more so as by virtue of the mortgage the mortgagee was not entitled to possession of the mortgaged property. [p. 225, cols. 1 & 2.]

Mahomed Musa v. *Aghore Kumar Ganguli*, 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 440; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 18 A. L. J. 279; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.), *Khiarajmal* v. *Daim*, 12 C. 295 at p. 312; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.), followed.

Appeal against a decree of the Officiating Subordinate Judge, Unao, dated the 15th June 1921.

Messrs. *Wazir Hasan* and *Manohar Lal Tewari*, for the Appellants.

Pandit *Gokaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit for redemption brought in respect of a mortgage effected by Yasin Ali, the father of the plaintiffs Nos. 1 to 3, in favour of Umarao Singh, the grandfather of the defendant No. 1, on the 2nd February 1875, and a deed of further charge executed by him in favour of the same person on the 29th June 1875. Both the deeds provided for the payment of compound interest at Rs. 1-8-0 per cent. per mensem with annual rests and contained a further covenant that if the money due on them was not paid within two years the mortgage would operate as a sale.

When the period fixed for payment expired, Sultan Singh, the son and legal representative of the original mortgagee, applied for foreclosure under Bengal Regulation XVII of 1806, stating that he had made a demand for the payment of the money due to him on the said deeds but the mortgagor had paid nothing on account of the same (Exhibit A 2). A notice was issued to the mortgagor, which is said to have been duly served in the manner provided by section 82 of Act X of 1877 then in force. The notice has been weeded out and it is not possible to say what its contents were and by whom it was signed; but a copy of the index has been filed, which mentions among other papers five summons or notices, said to have been issued to the defendants from time to time (Exhibit A 3). On the 23rd November 1879, the case was consigned to the records before the period of one year's grace usually allowed for payment had expired (Exhibit A-4).

Subsequently when Sultan Singh was contemplating to file a suit for proprietary possession of the mortgaged property, the mortgagor voluntarily gave him possession and got mutation of names effected in his favour (Exhibit A-5). The contention of the plaintiffs is that the above proceedings had not in law the effect of foreclosing the mortgage and charge and that they are entitled to redeem the same on payment of the amounts now due thereon. The plaintiffs Nos. 1, 2 and

3 have transferred a portion of their interest in the mortgaged property to the plaintiffs Nos. 4 and 5, who have joined in the suit.

The Court below found that the foreclosure proceedings taken by the mortgagee had the effect of finally extinguishing the right of redemption and that in any case the surrender or renunciation made by the mortgagor of his equity of redemption operated as a valid relinquishment by him of his interest in the mortgaged property so as to bind his heirs and successors and preclude them from claiming a right to redeem the mortgage. Section 8 of the Bengal Regulation XVII of 1806 required that the Court shall cause the mortgagor to be furnished as soon as possible with a copy of the application filed by the mortgagee and shall at the same time notify to him by a *parwana* under its seal and official signature that if he shall not redeem the property mortgaged at any time within one year from the date of the notification the mortgage would be finally foreclosed and the conditional sale would become conclusive. In *Norender Narain Singh* v. *Dwarka Lal Mundur* (1) their Lordships of the Privy Council held that in an action brought to recover possession as upon a foreclosure it was essential for the plaintiff to satisfy the Court that the necessary conditions required by section 8 had been complied with and that the mere return of the *Nazir* on the back of the Judge's *parwana* to the effect that the mortgagor had been duly served was not legal evidence of service. The return of service is not here available; but there is an order of the Deputy Commissioners who then exercised the powers conferred by the above Regulation stating that the "*provisions of section* 82" had been carried out. There was evidently a direction for effecting substituted service, the carrying out of which is therein referred to. That order might be taken as sufficient evidence under section 114, clause (*e*), of the Indian Evidence Act (I of 1872) that the notice had been duly served. It is not, however, possible to say what the contents of the notice were; and as the proceedings were struck off before the year of grace had expired, it cannot be said that the mortgagor had any opportunity of showing that he had really received no notice or that his right to redeem the mortgage had still remained unaffected.

The subsequent proceedings, taken by the mortgagee to obtain possession and get mutation of names effected in his favour with the consent of the mortgagor, however, operated as a surrender by the mortgagor of his equity of redemption in recognition of the validity of the previous foreclosure proceeding. The report of the Tahsildar, dated the 18th March 1881, (Exhibit A-5) recites that the mortgagor, Yasin Ali, appeared and stated that the mortgagee had already got a notice issued, that he, the mortgagor, had not been able to pay the mortgage-money due on the deeds of mortgage and further charge within the year of grace, and that, with a view to obviate future liabilities, he had surrendered his proprietary possession with effect from *rabi* 1288 *Fasli*. It also recites that there had been an oral contract between the mortgagor and the mortgagee that although the mortgagee was given proprietary possession with effect from *rabi* 1288 *Fasli*, the revenue for the entire year 1288 *Fasli* would be paid by the mortgagee. The general agent of the mortgagee admitted the above agreement. An order for mutation of names appears to have been passed in pursuance of that report on the 2nd April 1881 and the name of the mortgagee was substituted in the place of the mortgagor in the *khewat* as the purchaser of his rights (Exhibit A.6). In the recent Settlement, the mortgagee was similarly recorded as the owner by purchase of the property in dispute.

The defendants have since then been in continuous possession and enjoyment of the disputed property in their own right: and even if there was any defect in the original proceedings instituted to foreclose the mortgage, it is no longer open to the legal representatives of the mortgagor to re-open the transaction and treat the mortgage as still subsisting after the lapse of nearly 40 years from the date when the equity of redemption was surrendered to the mortgagee.

Under Act III of 1877 then in force, a surrender of the equity of redemption in immoveable property worth over Rs. 100 could not have been made except by a registered instrument; but as pointed out by their Lordships of the Privy Council in

(1) 3 C. 397; 1 C. L. R. 369; 5 I. A. 18; 3 Suth. P. C. J. 480; 3 Sar. P. C. J. 771; 2 Ind. Jur. 117; 1 Ind. Dec. (N. S.) 839.

JINA JIBHAI v. MATHUR JIBHAI.

Mahomed Musa v. *Aghore Kumar Ganguli* (2) even though the rights conferred by the private settlement were defective and inchoate or legally insufficient to make up a final and validly concluded agreement for the extinction of the equity of redemption, the acts of the parties had been such as to supply all defects. In fact where the actings and conduct of the parties are relied on as showing the performance or part performance of the agreement, the *locus penitentæ*, which exists in a situation when the parties stand upon nothing but an engagement, which is not final or complete, is excluded, for equity will support a transaction, clothed imperfectly in those legal forms to which finality attaches, after the bargain has been acted upon. In *Jhamphu* v. *Kutramani* (3) where one of two brothers, joint owners of certain immoveable property, executed a deed of relinquishment in favour of the other and the deed was never registered, but the brother, in whose favour it was made, remained in possession of the entire property, it was held that the deed of relinquishment was admissible in evidence to prove the nature of the occupant's possession. In *Varada Pillai* v. *Jeevarathnammal* (4) a similar view was taken.

The learned Counsel for the plaintiffs-appellants contends that if the surrender by the mortgagor was not valid for want of registration, the possession of the mortgagee could not be treated as adverse. But the mortgage gave no right to the mortgagee to obtain possession. The mortgagee got possession by virtue of the surrender made by the mortgagor of his equity of redemption in tacit recognition of the validity of the previous foreclosure proceeding and in the capacity of a purchaser or proprietor with effect from *rabi* 1288 Fasli and undertook to relieve the mortgagor of his liability for the revenue for 1288 Fasli which had not till then been paid. It is true that exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years cannot invest him with an adverse title; but as observed by Lord Davey in *Khiarajmal* v. *Daim* (5), a release of the equity of redemption by the mortgagor might operate as a bar or defense to a suit for redemption, more so where by virtue of the mortgage, the mortgagee is not entitled to possession of the mortgaged property but has obtained possession *aliunde* in recognition of his proprietary right after the termination of the foreclosure proceeding. In *Pratap Bahadur Singh* v. *Maheshwar Bakhsh Singh* (6) it was held that where, as in the case of a simple mortgage, the mortgagee is not entitled to possession, his possession of the mortgaged property adversely for more than 12 years against the mortgagor might extinguish the security as regards the property so adversely held. The proprietary title of the defendants has thus been perfected by adverse possession for more than 12 years and the plaintiffs are not now entitled to claim redemption.

The appeal, therefore, fails and is dismissed with costs.

N. K.

Appeal dismissed.

(2) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1. (P. C.)

(3) 42 Ind. Cas. 713; 39 A. 696; 15 A. L. J. 761.

(4) 53 Ind. Cas. 901; 46 I. A. 285; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 43 M. 244; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

(5) 32 C. 296 at p. 312; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

(6) 2 Ind. Cas. 57; 12 O. C. 45.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION NO. 88 OF 1921.

July 1, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

JINA JIBHAI BARIA—DEFENDANT—APPLICANT

versus

MATHUR JIBHAI BARIA—PLAINTIFF—OPPONENT.

Mamlatdars' Courts Act (Bom. Act II of 1906), s. 5, Explanation—Ouster by co-owner, whether amounts to dispossession—Jurisdiction of Mamlatdar *to award joint possession.*

A *Mamlatdar* has no jurisdiction to award joint possession under Bombay Act II of 1906. [p. 226, col. 2.]

GOPIKISHAN v. SORABJEE.

Keso Dinkar v. *Moro Sakharam*, (1883) P. J. 120; *Krishna* v. *Gopala*, (1880) P. J. 316, followed.

The meaning of the explanation to section 5 of the Mamlatdars' Courts Act is that any action of one co-owner who has rights over the whole property, although it may interfere with the joint ownership of his co-owner, does not amount to dispossession under the Act, and it was not intended that ouster by one co-owner of the other should amount to dispossession within the meaning of the Act, so as to entitle the Mamlatdar to award joint possession. [p. 226, col. 2.]

Application under the Extraordinary Jurisdiction of the High Court from an order passed by the Mamlatdar, Borsad.

Mr. *G. N. Thakor*, for the Applicant.

Mr. *H. V. Divatia*, for the Opponent.

JUDGMENT.—The plaintiff filed this suit in the Mamlatdar's Court averring that the defendant had dispossessed him of three acres and seven *gunthas* of land out of Survey No. 51. The order of the Mamlatdar was that the plaintiff should be put in joint possession of the whole of Survey No. 51 with the defendant. It has been contended that that order was without jurisdiction. We have been referred to the decisions of this Court in *Keso Dinkar* v. *Moro Sakharam* (1) and *Krishna* v. *Gopala* (2) which decided that the Mamlatdar had no jurisdiction to award joint possession in proceedings under the Act III of 1876. The Mamlatdar in making this order relied upon the case of *Bai Jamna* v. *Bai Jadav* (3). But the question decided there was one of an entirely different character. The only ground on which we could hold that the Mamlatdar had jurisdiction would be that jurisdiction had been granted by Bombay Act II of 1906. The explanation to section 5 is, as often happens, somewhat obscurely worded and it may be read in two different ways, either as confirming the decisions of this Court to which we have just referred [*Keso Dinkar* v. *Moro Sakharam* (1) and *Krishna* v. *Gopala* (2)], or as altering the law; and at first we thought that the explanation might be read as showing that in certain cases of joint ownership the action of one co owner against the other might amount to dispossession, and, therefore, it might be concluded that where the action amounted to dispossession the Mamlatdar could award joint possession. But we think the proper way to read that explanation is that any action of one co owner, who has rights over the whole property, although it may interfere with the joint ownership of his co-owner, does not amount to dispossession under the Act, and that it was not intended that ouster by one co-owner of the other should amount to dispossession within the meaning of the Act so as to entitle the Mamlatdar to award joint possession. This seems to us to be clear from the provisions of section 19 which prescribe very clearly the points to be decided by the Mamlatdar at the hearing, and the case of a plaintiff who is asking for joint possession against his co-owner is not dealt with either expressly or by implication. We think, therefore, the law still stands as it did when *Krishna* v. *Gopala* (2) was decided, and that the Mamlatdar had no jurisdiction in this case to decree joint possession. The Rule must be made absolute and the decree set aside and the plaintiff's suit dismissed with costs in the Mamlatdar's Court and in this Court.

N. K. *Rule made absolute.*

(1) (1883) P. J. 120.
(2) (1880) P. J. 316.
(3) 4 B. 168; 2 Ind. Dec. (N. s.) 620 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 70 OF 1921.

August 6, 1921.

Present:—Sir HENRY DRAKE-BROCKMAN, KT., J. C.

Seth GOPIKISHAN AND OTHERS—DEFENDANTS—APPLICANTS

versus

SORABJEE—PLAINTIFF—NON-APPLICANT.

Valuation of suit—Suit to redeem usufructuary mortgage and for surplus profits, value of—Court Fees Act (VII of 1870), s. 17, applicability of.

The value, for purposes of jurisdiction and Court-fees, of a suit in which the plaintiff claims to redeem a usufructuary mortgage and a sum of money as surplus profits realized by the mortgagee, is the principal sum expressed to be secured by the mortgage.

Section 17 of the Court Fees Act is not applicable to such a suit because the suit does not embrace two or more distinct subjects, and because under section 76 (*h*) of the Transfer of Property Act a usufructuary mortgagee is bound to pay any surplus realisations to the mortgagor. [p. 227, col. 2.]

RAM CHAND v. RAMA NAND.

Revision against an order of the District Judge, Nimar, dated the 21st January 1921, in Miscellaneous Civil Appeal No. 17 of 1920.

Mr. *Atmaram Bhagwant*, for the Applicants.

Messrs. *V. R. Pandit*, R. B., and *W. R. Puranik*, for the Non-Applicant.

ORDER.—In this case the non-applicant, plaintiff, sued to redeem a usufructuary mortgage alleging himself to be bound to the extent of one-fourth only of the principal amount secured which he put at Rs. 625 and claiming also Rs. 500 as surplus profits realised by the mortgagee. Putting his aggregate claim at Rs. 1,125 he paid Rs. 85 as Court-fee and filed his plaint in the Court of the Subordinate Judge at Khandwa, alleging the value of the claim to be Rs. 1,125 for the purpose of jurisdiction also. After the trial had proceeded for some time, the Subordinate Judge returned the plaint on the ground that the value for purposes of jurisdiction and payment of Court-fees was Rs. 625 only so that the suit was triable by the Local Munsif. This view was rested upon the decision of two Judges of the Allahabad High Court in *Husaini Khanum* v. *Husain Khan* (1) and some remarks in *Kothiram* v. *Ganpati* (2). The plaintiff appealed to the District Judge who relied on *Konna Panikar* v. *Karunakara* (3) and held that Rs. 1,125 was the correct valuation of the suit for jurisdiction as well as Court-fees. It was, therefore, ordered that the Subordinate Judge should continue the trial.

The defendants have come here in revision and for them it is urged that, firstly, on the principle laid down in *Deosthan of Sonegaon* v. *Mukunda* (4) the valuations for Court-fees and jurisdiction must be the same and, secondly, that no additional Court fee is payable on the sum claimed for surplus receipts. For the plaintiff, on the other hand, it is urged that section 17 of the Court Fees Act applies as the suit embraces two or more distinct subjects, namely, recovery of the mortgaged land by redemption and recovery of a sum of money.

In my opinion the view taken in *Husaini Khanam* v. *Husain Khan* (1) is correct. It is true that in that case the plaintiffs claimed payment of any sum which might be due to them after taking of the accounts, whereas in the present case a definite sum of money is sought to be recovered. At the same time, paragraph 11 of the plaint indicates that Rs. 500 is only tentatively mentioned as the amount due, the plaintiff adding that he should be given such sum as might be found proper. Section 17 of the Court Fees Act relates only to suits which embrace two or more distinct subjects. Under clause (*h*), section 76 of the Transfer of Property Act, a usufructuary mortgagee is bound to pay any surplus realisations to a mortgagor and this provision suffices to distinguish the Madras case relied on by the District Judge where there is nothing to show that the claim for arrears of rent added to the claim for redemption arose out of the mortgage sued upon. For a similar reason, the present suit is not analogous to one brought to recover possession of property and mesne profits in respect of the wrongful occupation, claims which appear, from r. 4, O. II, First Schedule to the Civil Procedure Code, to be based on distinct causes of action.

It follows that, in my opinion, the view taken by the Subordinate Judge was correct and the suit should be tried by the Munsif. The order of the District Judge is accordingly set aside and the plaint will now be presented to the Munsif, Khandwa. Costs in the District Judge's Court and in this Court will be costs in the cause. I allow Rs. 15 as legal practitioner's fee for the hearing in this Court.

W. C. A. *Order set aside.*

(1) 29 A. 471 at p. 475; A. W. N. (1907) 133; 4 A. L. J. 375.
(2) 17 Ind. Cas. 886; 8 N. L. R. 179.
(3) 16 M. 328; 5 Ind. Dec. (N. S.) 936.
(4) 14 C. P. L. R. 151 at p. 157.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1350 OF 1916.

March 3, 1921.

Present:—Mr. Justice Leslie-Jones and Mr. Justice Broadway.

RAM CHAND—DEFENDANT—APPELLANT

versus

RAMA NAND—PLAINTIFF AND DAULAT RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—New case.

Where a plaintiff sets up a claim to property attached in execution of a decree on the ground that

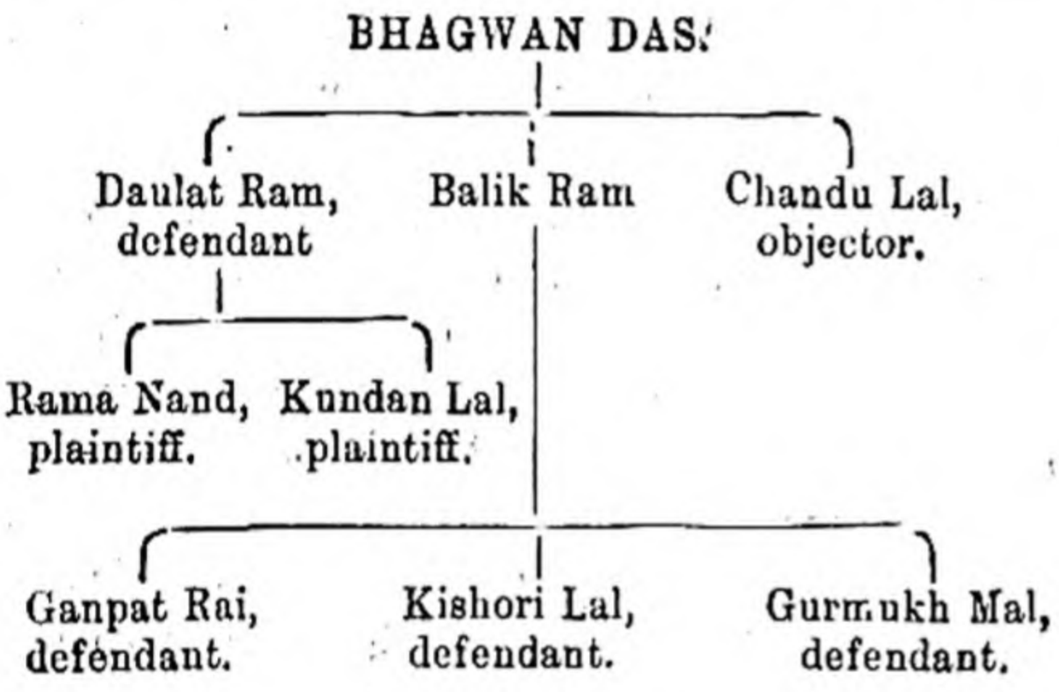
the property belongs to him, having fallen to him on partition, and he fails to prove that any partition has taken place, he cannot be permitted in appeal to take an entirely new point that the property, even though joint family property, is not liable under the decree as necessary partiss were not impleaded in the suit.

Second appeal from a decree of the District Judge, Ferozepore, dated the 3rd March 1917, reversing that of the Senior Subordinate, Judge Ferozepore, dated the 20th March 1915.

Lala *Hargopal*, for Bakhshi *Tek Chand*, for the Appellant.

Mr. *B. P. Khosla*, for the Respondents.

JUDGMENT.—The following pedigree table will afford assistance in an understanding of this and the two connected appeals :—



On the 21st December 1910 Roda Mal and others obtained a decree against Bhagwan Das and his grandsons, the sons of Balik Ram, for Rs. 1,045 and costs. The decree-holders sold this decree to Ram Chand who, in execution thereof, attached certain shops. Rama Nand and Kundan Lal thereupon preferred objections to the attachment claiming to be the sole owners of two of the shops attached. Their objections were disallowed. Thereupon they instituted two separate suits in which they sought to have it declared that the shops claimed by them were their sole property. Chandu Lal, son of Bhagwan Das, also preferred objections claiming that one of the shops attached belonged to him. All three of them asserted that there had been a partition of the joint family property in *Sambat* 1951 when all the family property, with the exception of the land, was partitioned. It was further alleged that in *Sambat* 1951 Daulat Ram and his two sons, Rama Nand and Kundan Lal, effected a further partition of their property. The Trial Court found that these partitions had not been proved and, therefore, dismissed the suits of Rama Nand and Kundan Lal and disallowed the objections filed by Chandu Lal. All three thereupon preferred appeals to the District Judge before whom an entirely new point was raised to the effect that, inasmuch as the suit by Roda Mal and others had not been brought against Bhagwan Das, etc., as managing members of the joint Hindu family, Bhagwan Das' sons and grandsons were not liable under the decree, even though the family was a joint one. This contention was given effect to by the learned District Judge who accepted the appeals and granted decrees in the two suits and allowed the objections by Chandu Lal. Ram Chand has now come up to this Court in second appeal through Mr. Hargopal while Mr. B. P. Khosla has addressed us on behalf of Rama Nand and Kundan Lal. Chandu Lal was represented by Mr. Gulati.

Mr. Hargopal pointed out that the question raised before the lower Appellate Court was never taken in the Trial Court and that it did not form a ground of attack in the appeals to the learned District Judge or to this Court. He contended that this was an entirely new point which should not have been considered by the lower Appellate Court. In our opinion the appellant's contention is correct. The respondents based their claims on certain partitions which they said had taken place. These partitions the Trial Court had held not to have been proved. The learned District Judge came to no decision on this point, but, as has been said above, proceeded to dispose of the case on an entirely new plea. This plea, in our opinion, should not have been entertained by the lower Appellate Court.

We accordingly accept all three appeals with costs and remand the cases to the Court of the District Judge for a decision of the appeals to him in accordance with law.

W. C. A.

Appeal accepted; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1263 OF 1921 WITH RULE No. 128S OF 1921 AND APPLICATION.

July 25, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KATRUNG AND ANOTHER—DEFENDANTS NOS. 1 AND 3—APPELLANTS

versus

CHARU CHANDRA MUKERJEE—DEFENDANT AND ANOTHERS—PLAINTIFF AND ANOTHER—REMAINING DEFENDANT—RESPONDENTS.

Specific Relief Act (I of 1877), s 42—Declaration contemplated by section—Suit for declaration by candidate at Municipal Election that election of his competitor illegal.

Section 42 of the Specific Relief Act does not sanction every form of declaration, but only a declaration that the plaintiff is entitled to any legal character, or to any right as to any property. [p. 230, col. 1.]

Quære.—Whether the provisions of section 42 of the Specific Relief Act are applicable to a suit by an unsuccessful candidate for election as a Municipal Commissioner, for a declaration that the election, being in contravention of the plaintiffs' right and franchise, right of election and right of being present at the election, was not, according to law, proper and valid, and that the election of his competitors was illegal. [p. 229, col 2]

Deokali Koer v. *Kedar Nath*, 15 Ind. Cas. 427; 39 C. 704 at p. 707; 16 C. W. N. 838, referred to.

Appeal against a decree of the Subordinate Judge, Second Court, Hooghly, dated the 17th May 1921, reversing that of the Munsif, Second Court, at Serampur, dated the 22nd of March 1920.

Babus *Narendra Kumar Bose*, *Charu Chandra Biswas* and *Manindra Kumar Bose*, for Defendant No. 1 Appellant, in S. A. No. 1263 of 1921 and in Rule No. 128 S of 1921.

Babu *Hira Lal Sanyal*, for the Plaintiff-Respondent, Babu *Promotha Nath Mittra*, for Defendant No. 2, Respondent, Babu *Bireswar Bagchi*, for Defendant No. 4, Respondent, in S. A. No. 1263 of 1921.

Babus *Bireswar Bagchi* and *Promotha Nath Mitter*, for the Opposite Party, in Rule 128 S of 1921.

Babus *Brojalal Chakraverty* and *Girindra Nath Mookerjee*, in the Application for the Intervenor Abinash Ch. Pal.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by Jotindra Nath Kumar against a judgment which was given by the learned Subordinate Judge of Hooghly, by which he allowed the appeal which had been preferred to him, and set aside the judgment of the Court of first instance and decreed the plaintiff's suit and declared that the election in question was invalid.

Jatindra Nath Kumar is defendant No. 3. He was also made a party as defendant No. 1 in his capacity of the then Chairman of the Municipal Commissioners of Katrung and the other defendants are Commissioners of that Municipality.

The defendants Nos. 2 to 4 and the plaintiff were candidates for election. These three defendants were elected and the plaintiff was not elected, the second defendant obtained 232 votes, the third defendant 200 votes and the fourth defendant 177 votes and the plaintiff obtained 113 votes. The total number of voters on the register was 298, and the total number of voters who registered their votes was 244. The election was held so long ago as the 5th of October 1918.

The suit was filed on the 4th of January 1919. In that suit the plaintiff asked for a declaration that the election, being in contravention of the plaintiff's right and franchise, right of election and right of being present at the following (?) place, was not at all, according to law, proper and valid and fit to be confirmed, that the same was *ultra vires* and that the said election was not fit to be in force and that proper order might be passed setting aside the said election. The second prayer was that it might be declared that the election of defendants Nos. 2, 3 and 4 was illegal. The third prayer was that an injunction should be issued restraining the defendant No. 1 from forming the Municipal Board with the defendants Nos. 2, 3 and 4. Then there was a prayer for incidental reliefs.

The learned Munsif, as I have already mentioned, dismissed the suit. The lower Appellate Court decreed the suit.

There were two grounds which were relied upon before the lower Appellate Court; and the learned Subordinate Judge based his judgment upon one ground, namely, that there were 13 persons who had registered their votes, who, according to his opinion, were not qualified to be on the register as voters.

The learned Vakil who appeared in this Court for the plaintiff, in the first instance, stated that he based his right of action upon section 42 of the Specific Relief Act which runs as follows:—"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief; provided, that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." It was held in the case of *Sobhopat Singh* v. *Abdul Goffur* (1) that "the words 'legal character' are wide enough to include the right of franchise and also a right of being elected as a Municipal Commissioner." The suit in that case was a suit for adjudication and declaration of the plaintiff's right to vote and to stand as a candidate at the election of Municipal Commissioners which was held in Chupra in December 1893, and also for a declaration that he had been duly elected at that election. In the present suit the plaintiff is not asking for any declaration that he was elected at this Municipal election. But it was said that the words "legal character" are sufficient to include a person who as a candidate has a right to be present at the election and further to see that the election is properly held.

I confess I have considerable doubt, having regard to the form of this suit, and having regard to the declarations which were asked for in this suit, to which I have referred, whether this particular case would come within the words of section 42 of the Specific Relief Act. The late learned Chief Justice Sir Lawrence Jenkins had occasion to refer to this section in the case of *Deokali Koer* v. *Kedar Nath* (2) where he said at page 709* as follows: "The section does not sanction every form of declaration, but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property; it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints. If the Courts were astute—as I think they should be—to see that the plaints presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases, would no longer arise." If I may say so, with respect to the learned Chief Justice, I entirely agree with him. During the course of the argument I intimated to the learned Vakil that he might have considerable difficulty in showing that the particular claims in this suit came within section 42 of the Specific Relief Act. The learned Vakil then changed his ground, and urged that section 15 of the Bengal Municipal Act contained a proviso to this effect: "provided that nothing contained in this section nor in any rules made under the authority of this Act shall be deemed to affect the jurisdiction of the Civil Courts." He then argued that the Court which tried the suit has inherent jurisdiction to set aside a Municipal election on the ground that it has not been properly conducted or in accordance with the Statute or the rules framed thereunder, and he stated that there have been many cases in which Courts in this country have set aside elections for such reasons as I have mentioned. For the purpose of my judgment, I propose to assume that the Court which tried this suit had inherent jurisdiction to deal with the suit, and—if a proper case had been made out—to grant such declaration and injunction as were prayed for in the plaint.

I, therefore, have to deal with the facts of this case; and I propose to deal first with the ground on which the learned Subordinate Judge relied, namely, that there were 13 persons who have recorded their votes, and who, according to the judgment of the learned Subordinate Judge, were not qualified to be on the register of voters. The question is whether the facts which the learned Subordinate Judge has found are sufficient to support his judgment. It should be mentioned that the list of voters was settled by the Chairman of the Municipality. The plaintiff did not adopt the procedure which is laid down in the rules and object to the Chairman in respect of any names which were included in the [register] as to which he had an objection. But he did apply to the Magis-

(1) 24 C. 107 at p. 113; 12 Ind. Dec. (N. s) 736.
(2) 15 Ind. Cas. 427; 39 C. 704 at p. 707; 16 C. W. N. 838.

* Page of 39 C.—[*Ed.*]

trate; though there may be some doubt as to whether the Magistrate ought to have gone into the objection which the plaintiff put forward, inasmuch as the plaintiff did not make this objection in the first instance to the Chairman. The Magistrate did investigate the objections which the plaintiff made and he dismissed them; the result was that the persons to whom the plaintiff objected, remained upon the register. When the plaintiff brought his suit he did not specify the names of the persons as to whom he was going to object in the suit; and, at the trial, he seems to have made a somewhat roving attack upon certain persons with regard to whom he thought he could make a case. The learned Munsif came to this conclusion: "It is quite possible," said the learned Munsif "that one or two unqualified men may have been registered as voters but there is no evidence to prove thir," and, yet the learned Subordinate Judge who heard the appeal came to the conclusion that there were 13 persons as to whose qualification he was not satisfied. Assuming that finding to be correct,—as we must, because this is a second appeal—in my judgment, having regard to the facts of this case, that is not sufficient to justify the setting aside of the election: In fact, the learned Vakil who argued this appeal on behalf of the plaintiff did not really base his argument upon this ground, but relied mainly upon another ground to which I shall have to refer directly. It seems to me that even if we accept the finding of fact of the learned Subordinate Judge in the first appeal, it by no means follows that the plaintiff would have been elected even if the votes of all these 13 voters had been disallowed. Indeed, in my judgment, having regard to the number of votes recorded for the successful candidates and for the plaintiff, which I have already mentioned, it is apparent that even if the votes of the 13 voters, who were held to be disqualified, had been disallowed the result of the election would have been the same.

Now I come to the other point, upon which reliance has been chiefly placed in this Court, and that is, that the plaintiff was not allowed to be present at the place where the votes were being recorded. In a sense he was present, that is to say, he was on one part of the premises, whereas the votes were being recorded in another part. But in order to make clear what the position really was I will read a short passage from the learned Munsif's judgment in which he gives a graphic description of what took place. "The voting took place in the Municipal Office.....The votes were recorded by the Deputy Magistrate in the Hall of this building. A little on the south of the entrance the indentification stand was erected. The Head Clerk distributed the identification cards after satisfying himself as to the identity of the persons claiming identification cards. Each voter on receiving the card was examined at the entrance by the Chairman in the presence of the candidates and outsiders as to the correctness of the identity of each of the voters. Objections as to the right of the person to vote were invited at this stage with the idea that if there were any objections the Presiding Officer would be communicated with. There were no objections nor is there any allegation of false personation. From the entrance the passage to the Hall was fenced so that the voter had no other way of getting out except through the Hall where the Presiding Officer was seated." The learned Munsif then proceeds to refer to the fact that "the Act does not give any right to the candidate to be present at the place where the voting is recorded by any positive section." He goes on to say: "The so called right is inferred from the fact that a candidate is required by the Act to take objections, regarding the admissibility or otherwise of a voter, to the Presiding Officer at the time of recording the votes. Here although the candidates were not allowed in at the Hall where the votes were recorded, ample opportunity was provided to the candidates to take objections if they wanted. The Presiding Officer sat within hearing distance and also came out in the verandah to hear complaints if any. The plaintiff's right to be present arises from the fact that he can take objections before the Presiding Officer. Here his privilege of taking objections was not interfered with. The procedure was adopted on the suggestion of the Commissioner of the Division. There were complaints before him that Zemindars intimidated and used undue influence to secure elections in their own way. The Commissioner on enquiry was satisfied as to the truth of these allegations and suggested

the present procedure to secure the free exercise of the right of franchise by the Municipal voters unhampered by threat or permission." That finding of fact has not been interfered with by the learned Judge; and, I should have been prepared to hold upon that finding of fact that there was no ground for setting aside this election.

I do not intend to express any general opinion as to how these elections are to be conducted. That is not my business. I am only concerned with the facts of this particular case; I have stated the facts as found by the learned Munsif; and, as I have already said, if the case rested there I should have been prepared to hold that the facts relating to this point did not disclose a sufficient ground for setting aside this election. I do not mean to say that I approve of the arrangement nor do I mean to say that I disapprove of the arrangement. I express no opinion in one way or the other. But the case does not rest there, because I find that on the day of the election the plaintiff himself wrote a letter to the Presiding Officer—and here I may mention that the Presiding Officer was a Sub-Divisional Officer, Mr. Dutt, against whose integrity and uprightness not a word has been said— the plaintiff wrote to him in these words: "In enclosing herewith a copy of my letter to the Chairman I beg to request that you will kindly consider the facts mentioned therein and either allow me or my agent to be present by the side of the Election Committee or you will kindly record the votes personally as the recording of votes in secret is quite illegal and fraud also might occur in the proceedings." Upon which Mr. Dutt made a note: "I am recording votes personally. So this may be filed." The plaintiff uses the phrase there "recording the votes in secret." It is perhaps right to add that votes were not recorded in secret: the Presiding Officer, as I have already said, was there, and there was a Committee consisting of three men who had been appointed by the Chairman of the Municipality. As against these three men, as far as I know, there is not a word to be said as regards their integrity and honesty.

Having regard to the facts found by the learned Munsif and having regard to the letter which the plaintiff himself wrote, which, in my opinion, amounts to a waiver of his alleged right to be present in the place where the votes were actually recorded, provided the Presiding Officer himself recorded them, in my judgment there is no ground for setting aside the election.

For these reasons, in my judgment, this appeal ought to be allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored.

The plaintiff-respondent will pay the costs of the appellant in this Court and in the lower Appellate Court. The defendants-respondents will pay their own costs in this Court and in the lower Appellate Court. We assess the hearing fee in this Court at two gold *mohurs*.

The appeal being disposed of no order is necessary in respect of the Rule for stay of execution or in respect of the application of the Intervenor to be made a party to the Rule. The Intervenor will pay his own costs. We make no order as to the costs in the Rule.

CHOTZNER, J.—I agree.

W. C. A. *Order accordingly.*

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 35 OF 1921.

December 8, 1921.

Present:—Mr. Lyle, A. J. C.

BISHESHAR SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

MOHAMMAD YASIN ALI KHAN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise decree—Court competent to grant relief agreed to by parties—"So far as it relates to the suit," meaning of—Decree, compromise, interpretation of.

In a decree passed on the basis of a compromise there is nothing whatsoever in the terms of O XXIII, r. 3, Civil Procedure Code, to prevent a Court from granting a relief to a defendant which can be put in execution, so long as that relief has been agreed to by the parties and is one of the lawful considerations on which the compromise is based. [p 234, col. 2.]

The phrase "so far as it relates to the suit", as used in O. XXIII, r. 3, Civil Procedure Code, does not mean that in a compromise decree only such reliefs can be

granted as the Court might have granted on the trial of a suit. All conditions which are considerations for the compromise are conditions relating to the suit and as such should be embodied in the decree. [p. 234, col. 2.]

In order to interpret a compromise which has been embodied in a decree, it should be read as a whole. [p. 234, col. 2.]

In a suit for pre-emption in respect of a 2-annas share in a village, a decree was passed in terms of a compromise according to which the plaintiff's suit in respect of 1-anna share was dismissed and the defendant was held entitled to receive possession of 1-anna share immediately after the termination of the lease under which the plaintiff was holding the village. It was contended that the suit being a simple pre-emption suit the defendant could not be given a decree for possession and that it should be construed as merely declaratory of his rights :

Held, that it was not merely a declaratory decree but one for possession and that the defendant was entitled on the expiry of the lease to apply for delivery of possession in execution of the decree under section 47, Civil Procedure Code, and that a separate suit for possession would not lie. [p. 234, col. 2.]

Appeal against an order of the District Judge, Fyzabad, dated 31st August 1921, upholding that of the Subordinate Judge, Sultanpur, dated 29th July 1921.

Dr. *J. N. Misra*, holding brief of Mr. *G. N. Misra*, for the Appellant.

Mr. *Ali Mohammad*, for the Respondent.

JUDGMENT.—Bisheshar Singh, the appellant, brought a suit for pre emption in respect of a 2-annas share in Mauza Kachnaon. That suit was finally decided by this Court on the 23rd of June 1915. The decree of this Court was in terms of a compromise entered into between the parties. The first two paragraphs of that compromise run as follows:—

"(1) That out of a 2 annas share in suit in Mauza Kachnaon, Pargana Jagdishpur, Tahsil Musafirkhana, District Sultanpur, a decree in respect of a 1-anna share by right of pre-emption on payment of a moiety of the consideration money, Rs. 2,500 be passed in favour of the plaintiff against the defendant and the plaintiff-respondent's claim in respect of the remaining 1-anna be dismissed. Out of Rs. 5,000 the consideration money deposited by the plaintiff respondent in Court, he should withdraw Rs. 2,500 while the defendant appellant should realise from the Court the remaining Rs. 2,500,

"(2) That the plaintiff has continued to be in possession of the entire Mauza Kachnaon aforesaid, the property of Babu Ali Bahadur Khan, under a lease (*mustajiri*) which would expire in January 1919, and after the expiry of the period of lease (*mustajiri*) the plaintiff has the right to hold the said village in his possession on the basis of the mortgage-deed, dated the 16th May 1899, executed by the said Babu Ali Bahadur Khan, till redemption. Besides the said mortgage deed, other deeds of further charge, miscellaneous debts detailed below and other debts create a charge on Mauza Kachnaon and are due to plaintiff. But the defendant appellant shall be entitled to receive possession over his 1-anna share mentioned in paragraph 1 thereof immediately (*fauran qabza pane ka mustahaq hoga*) on the termination of the period of lease (*mustajiri*). The plaintiff-respondent shall be entitled to realise the money due to him in respect of the said mortgage-deed, etc, from Babu Ali Bahadur Khan, the mortgagor, and the defendant-appellant shall not be liable for the said debt in respect of his 1-anna share."

The only question in this appeal is whether under the terms of this compromise Mohammad Yasin Ali Khan who was the defendant in the suit is entitled to be put in possession of his 1-anna share in execution of the decree passed on the 23rd of June 1915 or whether this decree merely declares his title and he cannot obtain possession without bringing a separate suit. Both the Courts below have held that the decree of the 23rd of June 1915 is not merely a declaratory decree so far as the 1-anna share of Mohammad Yasin Ali Khan is concerned but that it is in fact a decree for possession after the expiry of the lease of that share held by Bisheshar Singh. The learned Counsel for the appellant argues that the suit was a simple pre-emption suit, that the plaintiff's claim was in respect of a 2-annas share but he got a decree in respect of a 1-anna share only and his suit in respect of the other 1-anna share was dismissed, that the respondent was defendant in that suit and in such a suit could not be given a decree for possession of a share and that, therefore, paragraph 2 of the decree cannot be interpreted as granting the defendant

the suit a decree for possession of the 1 anna share in respect of which the plaintiff's suit for pre-emption was dismissed but must be construed as merely declaratory of the defendant's rights. R. 3 of O. XXIII of the First Schedule to the Code of Civil Prosedure provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. The interpretation of the phrase "so far as it relates to the suit" has been the subject of discussion in various reported cases. In *Venkatappa Nayanim* v. *Thimma Nayanim* (1) it was held that these words must be restricted to a relief which the Court could have given in the suit, and will not embrace reliefs which could only have been given in a suit based upon a different cause of action. This view, however, was dissented from in *Joti Kuruvetappa* v. *Icari Sirusappa* (2). That was a suit for money where the plaintiff asked for a simple money decree and it was decided by a compromise in which the parties agreed that the amount decreed should be a charge on certain properties, and this agreement was embodied in the decree. It was held that the agreement to make the decretal amount a charge was an agreement relating to the suit and was rightly embodied in the decree. The learned Judges remarked that the language used in section 375 of the old Code, which corresponds to r. 3 of O. XXIII, was wide and general and it would be highly inconvenient if the parties should not be allowed to settle their disputes on such lawful terms as they might agree to without being restricted to such relief as one only of the parties had chosen to claim in the plaint. And in the case of *Purna Chandra Sarkar* v. *Nil Madhub Nandi* (3) it was held that a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject matter of the suit and contains other conditions, and that those other conditions, if they are considerations for the compromise of the subject-matter of the suit, must be incorporated in the decree, but if the other conditions are independent of it they may be regarded as mere surplusage. It seems to me that it would be putting much too restricted an interpretation on the words "so far as it relates to the suit" to hold that in a compromise decree only such reliefs can be granted as the Court might have granted on a trial of the suit and that all conditions which are considerations for the compromise are conditions relating to the suit and as such should be embodied in the decree. In my opinion, in a decree passed on the basis of a compromise there is nothing whatsoever in the terms of r. 3 of O. XXIII to prevent a Court from granting a relief to the defendant which can be put in execution so long as that relief has been agreed to by the parties and is one of the lawful considerations on which the compromise is based. In order to interpret the compromise which has been embodied in the decree it must be read as a whole and the intention of the parties clearly was that the plaintiff should be given a decree for pre-emption of 1-anna out of the 2-annas claimed on condition that the defendant should be given possession of the other 1 anna free altogether of the mortgage debt after the period of the plaintiff's lease had expired. The condition that the defendant should get possession of 1-anna free from the mortgage-debt after the period of the plaintiff's lease had expired was a consideration for the compromise of the suit for pre-emption and was rightly embodied in the decree. The words used both in the compromise and the decree are "that the defendant-appellant shall be entitled to receive possession over his 1 anna share mentioned in paragraph 1 thereof immediately on the termination of the period of lease: *fauran qabza pane ka mustahaq hoga.*" This is not merely a declaratory decree but a decree for possession on the expiry of the lease. The defendant respondent was entitled on the expiry of the lease to apply for delivery of possession in execution of the decree under section 47 of the Code of Civil Procedure and a separate suit for possession would not lie.

(1) 18 M. 410; 6 Ind. Dec. (N. S.) 634.
(2) 20 M. 478, 16 M. L. J. 354.
(3) 5 C. W. N. 485.

The appeal fails and is dismissed with costs.

N. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 59 OF 1921.

May 5, 1922.

Present :—Mr. Justice Gokul Prasad and Mr. Justice Stuart.

RAM KISHAN RAI—DEFENDANT—APPELLANT

versus

CHHEDI RAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 25 (3)—Bond executed by Hindu father in lieu of time-barred debt—Contract, validity of—Sons, liability of, on death of father—Hindu Law—Extinction of claims by efflux of time.

It is within the competency of a Hindu father to execute a bond in lieu of a time-barred debt, and the bond amounts to a valid contract against him, under section 25 (3) of the Contract Act; on his death, therefore, his sons are liable to pay the money which he was bound to pay.

Narayanasami Chetti v. *Samidas Mudali*, 6 M. 293; 7 Ind. Jur. 357; 2 Ind Dec (N. S.) 483, followed.

Hindu Law does not recognise any rule as to the extinction of claims by efflux of time.

Second appeal from a decree of the District Judge, Ghazipur, confirming that of the Munsif.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Uma Shankar Bajpai*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant in a suit brought by the plaintiffs for recovery of the amount due to them on three bonds executed by the father of the defendant. The only plea which has been argued before us is one of limitation. The case has been put before us by the learned Vakil for the appellant in this form. He said that, on the date the father executed the bonds, which are now being sued upon, the earlier bonds in exchange for which the fresh bonds were executed had become barred by time and, therefore, there was no consideration for them, and execution of these bonds would not be binding on the

sons. There is no doubt whatever that the father was competent to execute the present simple bonds in lieu of time-barred debts. Against him the contract would have been a valid one under section 25, clause (3) of the Indian Contract Act. Moreover, the Hindu Law does not recognise any rule as to the extinction of claims by the efflux of time, so that, looked at from any point of view, the bonds in dispute amounted to a valid contract made by the father. The father being dead, the sons were liable to pay the money which their father was bound to pay. This view finds support in *Narayanasami Chetti* v. *Samidas Mudali* (1). In our opinion the decree of the lower Appellate Court was a correct one. We accordingly confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

W. C. A.

Appeal dismissed.

(1) 6 M. 293; 7 Ind. Jur. 357; 2 Ind. Dec. (N. S.) 483.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 140 OF 1921.

November 17, 1921.

Present :—Pandit Kanhaiya Lal, J. C.

Musammat ZAINAB—PLAINTIFF—APPLICANT

versus

Musammat BUDHNA—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 18, 22—Arbitration—Subsequent institution of suit about same subject-matter—Arbitration, supersession of.

The institution of a suit has not *ipso facto* the effect of superseding a previous reference to arbitration dealing with the same subject-matter, but if after the institution of the suit neither party applies for a stay of the hearing of the suit under paragraph 18 of Schedule II, Civil Procedure Code, either at the time of the settlement of issues or before it, the effect of such a failure is to supersede the arbitration for good and any decision which might be arrived at in that suit would be binding on the parties as if no reference to arbitration had been made prior to the suit. [p. 236, col. 2.]

ZAINAB v. BUDHNA.

Where no application for stay of the suit is made within limitation, the effect of the institution of the suit and its decision would be to supersede the arbitration and render any award made therein after the institution of the suit unenforceable. [p. 237, col. 1.]

Sukhnath Rai v. *Nehal Chand*, 59 Ind. Cas. 801: 18 A. L. J. 644: 2 U. P. L. R. (A) 240: 42 A. 661, *Dinabandhu Jana* v. *Durga Prasad Jana*, 51 Ind Cas 80: 46 C. 1041: 29 C. L. J. 399: 23 C W. N. 716, *Ram Prosad Surajmull* v. *Mohan Lal Lachminarain*, 60 Ind. Cas. 895; 47 C. 752, referred to.

A private reference to arbitration of a subject of dispute does not prevent either party from filing a suit in a Court of Law in respect of the same matter, for the effect of paragraph 22, Schedule II, Civil Procedure Code, is to remove the bar which existed to the institution of such a suit. [p. 236, col. 2.]

Appavu Rowther v. *Seeni Rowther*, 42 Ind. Cas 514; 41 M. 115: 33 M. L. J. 177: 6 L. W. 243, *Sheobabu* v. *Udit Narain*, 24 Ind. Cas. 490; 12 A. L. J. 757, followed.

Civil revision against a decree of the Subordinate Judge, Gonda, dated the 30th June 1921, upholding that of the Probationary Munsif, Gonda, dated the 6th December 1920.

Mr. *Mohammad Ayub*, for the Applicant.

Mr. *Mohammad Wasim*, for the Opposite Party.

JUDGMENT.—*Musammat* Zainab and *Musammat* Budhna are the two widows of Makhdum. There was a dispute between them with regard to the property left by Makhdum, which was referred to certain arbitrators for decision by means of an agreement executed by them on the 18th November 1919. The arbitrators did not, however, come to any decision for a long time. On the 13th March 1920 *Musammat* Zainab filed a suit for partition against *Musammat* Budhna in the Court of the Munsif of Utraula. *Musammat* Budhna raised an objection that the value of the property in dispute exceeded the pecuniary jurisdiction of the Munsif. This issue was tried with the result that the plaint was directed to be returned to *Musammat* Zainab for presentation to the proper Court.

During the pendency of that suit no reference was made by either party to the previous reference to arbitration. Under paragraph 18 of the Second Schedule of the Code of Civil Procedure either party could have applied to the Court for the stay of the suit, stating that she was ready and willing to do all things necessary to the proper conduct of the arbitration. Such an application could only have been made at the time of the settlement of issues or before it, but no such application was actually made. The order, returning the plaint, was passed on the 1st June 1920. On the 12th June 1920 the arbitrators made an *ex parte* award after giving due notice to the parties. *Musammat* Zainab appeared, but *Musammat* Budhna decided not to appear before the arbitrators. *Musammat* Zainab next took steps to enforce the award by means of an application under paragraph 20 of the Second Schedule of the Code of Civil Procedure. That application has been thrown out by the Courts below on the ground that the parties had by their conduct cancelled the reference and that the award made thereafter was *ultra vires*.

The institution of a suit has not *ipso facto* the effect of superseding a previous reference to arbitration, dealing with the same subject matter; but if after the institution of the suit neither party applies for a stay of the hearing of the suit under paragraph 18 either at the time of the settlement of issues or before it, the effect of such a failure is to supersede the arbitration for good; and any decision, which might be arrived at in that suit would be binding on the parties as if no such reference to arbitration had been made prior to the suit. As pointed out in *Arpavu Routher* v. *Seeni Routher* (1) and *Sheobabu* v. *Udit Narain* (2), a private reference to arbitration of a subject of dispute does not prevent either party from filing a suit in a Court of Law in respect of the same matter, for the effect of paragraph 22 of the Second Schedule is to remove the bar which existed to the institution of a suit by a person who refused to abide by the contract of reference. If an application is made under paragraph 18 of the same Schedule for the stay of a suit and such stay is granted, the arbitration can proceed; but if such stay is refused and the order refusing the stay becomes final, the arbitrator

(1) 42 Ind. Cas. 514; 41 M. 115; 33 M. L. J. 177; 6 L. W. 243.
(2) 24 Ind. Cas. 490; 12 A. L. J. 757.

becomes *functus officio*. There is, however, a third contingency, namely, where no application for stay is made within the limit allowed by law. The effect of the institution of the suit and its decision would in such a case equally be to supersede the arbitration and render any award made therein after the institution of the suit unenforceable.

The learned Counsel for the applicant, *Musammat* Zainab, contends that the plaint having been returned, the powers of the arbitrators, which had been temporarily suspended, revived, but there is no authority for such a proposition. A revival can only take place by means of a fresh reference to arbitration in Court or out of it in the manner provided by law. In *Sukhnath Rai* v. *Nehal Chand* (3) and *Dinabandhu Jana* v. *Durga Prasad Jana* (4) the effect of an order of stay made in a suit, the subject-matter of which was the subject of a previous reference to arbitration, was considered, and it was pointed out that the arbitrators were bound to wait until the Court in which the suit was instituted determined whether it would proceed with the suit itself or will stay its proceedings and refer the parties to their own chosen tribunal, namely, the arbitrators. In other words, they could not proceed with the arbitration till such a stay was granted. In *Ram Prosad Surajmull* v. *Mohan Lal Lachminarain* (5) it was held that where an action was commenced upon a contract which contained a provision for a reference to arbitration, and a reference to arbitration was made before the commencement of the suit and resulted in an award, the award was of no effect, unless the suit had been stayed pending the arbitration. No such application for stay was made in this instance, and the mere fact that the plaint was eventually returned after the preliminary issue had been decided made no difference. The reference did not revive by reason of the return.

The application is, therefore, dismissed with costs.

N. K.

Application dismissed.

(3) 59 Ind. Cas. 801; 18 A. L. J. 644; 2 U. P. L. R. (A.) 240; 42 A. 661.

(4) 51 Ind. Cas. 80; 46 C. 1041; 30 C. L. J. 399; 23 C. W. N. 716.

(5) 60 Ind. Cas. 895; 47 C. 752.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 226-B OF 1921.

June 19, 1922.

Present:—Mr. Prideaux, A. J. C.

VITHAL—PLAINTIFF—APPELLANT

versus

Shaikh BHOLU AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Perpetual lease in favour of mortgagee—Same transaction—Clog on redemption.

Where a perpetual lease by a mortgagor in favour of the mortgagee of the property mortgaged and the mortgage form one and the same transaction, the lease acts as a clog on the equity of redemption and the Courts are bound on principles of equity to relieve against it.

Appeal from a decree of the First Additional District Judge, West Berar, Akola, in Civil Appeal No. 200 of 1919, dated the 28th February 1921.

Mr. *A. V. Khare*, for the Appellant.

Messrs. *M. K. Phadke* and *M. R. Bobde*, for the Respondents.

JUDGMENT.—There is no force in this appeal. The facts are sufficiently given in the judgments of the two Courts below and it has been held that the document sued on is a usufructuary mortgage and not a perpetual lease. The appellant's prayer for a declaration that he was a perpetual lessee has not been granted and he comes up here claiming that he should have been so declared and contending that in any case the lease of the Inam lands during the lifetime of the executing Inamdar was valid and that three of the four fields were not covered by the mortgage. It was further contended that the condition of perpetual lease did not operate as a clog on the equity of redemption,

ABDUR RAHMAN V. HAR NARAYAN.

The point really at issue is a very short one: it is, whether the lease and the mortgage were or were not parts of the same transaction. It is obvious that they were; and because they were parts of the same transaction the Courts are entitled to apply the principle of equity: see *Bhimrao Nagoirao* v. *Sakharam Sabaji* (1). I have no hesitation in finding that the mortgage and the lease were parts of the same transaction and the perpetual lease is a clog on the equity of redemption.

The result is that this appeal fails and is dismissed with costs. The appellant will pay respondents' costs.

W. C. A.

Appeal dismissed.

(1) 64 Ind. Cas. 612; 23 Bom. L. R. 1268 at p. 1271; 46 B. 409.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 13 OF 1922.

April 7, 1922.

Present:—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

ABDUR RAHMAN—OBJECTOR—JUDGMENT-DEBTOR—APPELLANT

versus

Babu HAR NARAYAN DAS AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 92—Execution sale, application to set aside—Notice of application, when to be given—Time for giving notice not limited.

It is not necessary that the notice required by r. 92, O. XXI, Civil Procedure Code, to be given of an application to set aside an execution sale, should be served on all the parties affected by the sale within thirty days of the date of the sale. The rule prescribes no limitation for giving such notice. Once notice is given to all the parties affected by a sale, the Court has authority to proceed to decide the application on its merits.

Ganesh Bab Naik v. *Vithal Vaman Mahalya*, 19 Ind. Cas. 475; 37 B. 387 at p. 390; 15 Bom. L. R. 244, relied upon.

Appeal against an order of the Subordinate Judge, Unao, dated the 6th February 1922.

Mr. *Zahur Ahmad*, for the Appellant.

Mr. *Makhan Lal*, for Respondents Nos. 1 and 3.

Mr. *G. N. Mukerji*, for Respondents Nos. 4, 5 and 6.

JUDGMENT.—This is an appeal from an order passed by the Subordinate Judge of Unao refusing to set aside a sale on the application of the judgment-debtor. The order of the learned Subordinate Judge points out that when the application to have the sale set aside was made, only two out of the six decree holders auction-purchasers were mentioned in the application. He has held that as the period allowed for making an application to set aside the sale had elapsed the other four decree-holders auction-purchasers cannot now be made parties to the application and that the applicant cannot now question the sale so far as those four persons who were not originally made parties to the application are concerned. He has further held that as those four persons have not been made parties notice cannot be issued to them and as they are persons affected by the sale the sale cannot be set aside under r. 92 of O. XXI. We are of opinion that this argument of the learned Subordinate Judge is fallacious. The application to have the sale set aside was made within the time allowed by law. In that application the number of the execution case was given and certain of the decree-holders auction-purchasers were mentioned. It is true that the names of four of the decree-holders were not included but notice was subsequently served on them of the application. It is not necessary that notice of the application should be served on all persons affected by the sale within 30 days of the sale. R. 92 of O. XXI merely provides that no sale shall be set aside until notice has been issued to all persons affected by it. But there is no limitation provided for giving such notice. In the present case the application to have the sale set aside has been made and notice has been given to all the parties affected by it. The Court is, therefore, in a position to proceed to decide the application on its merits. In the view which we take we are supported by the ruling *Ganesh Bab Naik* v. *Vithal Vaman*

Mahalya (1). We allow the appeal and set aside the order of the learned Subordinate Judge. The case will go back to the lower Court with a direction to readmit it on its original number in the register and to decide it on its merits. The respondents will pay the appellant's costs in this Court.

Appeal allowed.

(1) 19 Ind. Cas. 475; 37 B. 387 at p. 390; 15 Bom. L. R. 244.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 167 OF 1921.

May 8, 1922.

Present:—Mr. Justice Gokul Prasad and Mr. Justice Stuart.

DWARKA DAS AJODHYA PRASAD—PLAINTIFFS—APPELLANTS

versus

RAM RATAN AND ANOTHER—DEFENDANTS—RESPONDENTS

Contract Act (IX of 1872), s 78—Contract to purchase ascertained goods—Delivery postponed by agreement—Property in goods, when passes—Suit to recover price of goods, maintainability of.

When a purchaser of goods agrees to take the goods as ascertained, but at his request delivery is postponed, the property in the goods passes to the purchaser, under section 78 of the Contract Act, as soon as the proposal for sale is accepted, and a suit to recover the price of goods is maintainable.

Second appeal from a decree of the Second Subordinate Judge, Cawnpore, confirming a decree of the Munsif.

Dr. *Kailas Nath Katju* and Mr. *Indu Bhushan Banerji*, for the Appellants.

Mr. *Pearey Lal Banerji*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal has arisen are these:—The defendants' firm are proved to have contracted to purchase from the plaintiffs' firm 22 maunds, 14 seers and 13 chatacks of *Balchar* on the 27th of February, 1920, at a price which was fixed at Rs. 815 1-3.

The lower Appellate Court has believed the evidence of the witnesses produced by the plaintiff upon this point. According to the

evidence the defendants' firm agreed to take these goods as ascertained but requested the plaintiffs' firm to postpone delivery until it was convenient for the defendants' firm to take delivery. In these circumstances, the provisions of the latter part of section 78, Act IX of 1872, come into operation. The parties had agreed that the delivery should be postponed. The property in the *Balchar*, therefore, passed to the defendants' firm on the 27th February 1920 as soon as the proposal for sale was accepted. Such being the case, the plaintiffs' suit, which was a suit for the price of goods sold, was regular and in proper form.

We, therefore, allow this appeal and pass the following decree. A decree will be given to the plaintiffs for Rs. 824-8-3 with interest *pendente lite* and future interest till the date of realization at 6 per cent. per annum from 1st of May 1920 up to the date of realization. The defendants' firm will pay their own costs and those of the plaintiffs' firm in all Courts. These costs will include in this Court fees on the higher scale. This decree will not be put into execution until the plaintiffs' firm deliver the 22 maunds, 14 seers and 13 chatacks of *Balchar* to the defendants of the quality agreed upon or make it available for the defendants' firm to take delivery.

W. C. A.

Appeal decreed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 160 OF 1921.

July 31, 1922.

Present:—Mr. Batten, J. C.

Musammat PURA—JUDGMENT-DEBTOR—APPELLANT

versus

BEHARILAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908)—Appeal—Dismissal in default, effect of—Res judicata—*Execution proceedings—Order determining rights of parties—Execution case struck off in default—Parties, whether have right to re-open the question.*

PURA v. BEHARILAL.

Where an appeal is dismissed in default the effect is to relegate the parties to the position as if there had been no appeal, or as if it had been dismissed on the merits. [p 241, col 1.]

Though an order in execution does not operate as *res judicata* strictly within the meaning of section 11 of the Civil Procedure Code of 1908, such a decision becomes final between the parties upon general principles of law as an interlocutory order in the suit. [p. 241, col. 1.]

Ram Kirpal v. *Rup Kuari*, 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 439; 3 Ind. Dec. (N. S.) 718 (P. C.), followed.

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 2 Ind. Dec. (N. S.) 32 (P. C.), followed.

If an order has been made which directly or by implication determines the rights of the parties to an execution proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle a party to re-open the question upon which there has been a previous adjudication. [p. 241, col. 1.]

Murlidhar Sukul v. *Nursingh Das*, 10 Ind. Cas. 359; 17 C. W. N. 113; 15 C. L. J. 453, followed.

Appeal against a decree of the District Judge, Nimar, dated 6th December 1920, in Civil Appeal No. 145 of 1920.

Messrs. *M. Gupta* and *S. Y. Deshmukh*, for the Appellant.

Mr. *S. B. Gokhale* for the Respondent.

JUDGMENT.—In Suit No. 456 of 1905 a decree was drawn up on the 7th August 1905 which purported to be in accordance with the award of the Board of Conciliators who consolidated two mortgage-debts and other debts and ordered a total sum of Rs. 2,600 to be paid by 15 annual instalments with the direction for sale of two-thirds of the debtor's absolute occupancy fields to the creditor in full satisfaction of all debts in the event of non-payment of three consecutive instalments. The words used in the decree are that the "two-thirds shall be sold to them by him." The award on which the decree was drawn up did not make any mention of the execution of a sale-deed, but said that the property was in case of default to go to the creditor, and it is specifically mentioned that the mortgages will still remain in force.

It is contended here, as it was contended in the lower Courts, that the decree should have been in the form of a mortgage-decree and that, even as it stood, it is a mortgage decree and should not be executed merely by the defendant executing a sale-deed in favour of the plaintiff. It is contended on behalf of the appellant that the application for execution now before the Court should be regarded as an application for a decree final for foreclosure in which case time might possibly be granted to the appellant who does not get any time for payment under the order that a sale-deed should be drawn up. I cannot, however, deal with the matter of the interpretation of the award and the decree on the merits since this has already been the subject of judicial decision, though it is contended, probably correctly, that the decision was a wrong one. On 18th June 1919, the decree-holder applied for execution of the decree and asked that the decree should be executed by the judgment-debtor by executing a sale-deed. The following order was passed by the Court on 11th September 1919 :—

"Decree-holder, Behari Lal, present. Judgment-debtor absent. Order passed. It is ordered that the land is sold to the decree-holder in full satisfaction of the decretal debt now due. Judgment-debtor will execute the sale-deed. If not, the Court will execute it on behalf of judgment-debtor. One month's time is granted to execute the sale deed."

On 8th March 1920 the execution was struck off because the decree-holder had not in time paid the process-fees for noticing the judgment-debtor to execute a sale-deed. Meanwhile the judgment-debtor appealed against the order of 11th September 1919. The appeal was dismissed for default and the Appellate Court refused an application for restoring the appeal to file. Against this order an appeal was made to this Court and was dismissed on 5th November 1920. The decree-holder filed a fresh application for execution on 10th March 1920 and the judgment-debtor objected that the remedy asked for was not one warranted by the decree or the award, and it was contended that the decree holder was, therefore, bound to bring a regular suit either for foreclosure or that he must get the decree made final. On this the Subordinate Judge ordered that he could not re-open the question already decided by his order of 11th September 1919, but the judgment-debtor should execute a sale-deed as ordered. On appeal to the District Judge it was held that the First Court had rightly decided that the nature of the decree had already been determined by the order of 11th September 1919 and could not be re-opened. The District Judge upheld the decision of the Subordinate Judge

BHIKHARI DAS v. ABDULLAH.

In appeal to this Court it is urged that the remedy sought for is not in accordance with the decree based on the award. This may be so, but I have to see whether this matter has been concluded by the order of 11th September 1919. It is urged for the appellant, firstly, that as the appeal against that order was not dismissed on the merits but for default, the original order cannot be regarded as still subsisting. No authority at all to the point has been cited in support of this proposition. There is no doubt that the effect of the dismissal of the appeal for default is to put the parties in the same position as if there had been no appeal or as if it had been dismissed on the merits. This ground of appeal has no force in it.

It is secondly contended that, because the judgment-creditor did not proceed with his execution application but allowed it to be struck off on account of default, the order passed in those proceedings is no longer of any effect, since the proceedings did not come to any final determination on the merits. It has been held by their Lordships of the Privy Council that though an order in execution does not operate as *res judicata* strictly within the meaning of section 11 of the Civil Procedure Code of 1908, such a decision becomes final between the parties upon general principles of law as an interlocutory order in the suit: *vide Ram Kirpal* v. *Rup Kuari* (1), and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2). As to the contention that the decision ceases to be a decision if the case is subsequently struck off, I would refer to *Murlidhar Sukul* v. *Narsingh Das* (3), where it is laid down that if an order has been made which directly or by implication determines the rights of the parties to an execution proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re-open the question upon which there has been a previous adjudication. There can be no doubt that the order of 11th September 1919 was an adjudication upon the question as to what was the nature of the decree and how it should be executed, and the fact that the execution application was subsequently struck off does not entitle the judgment-debtor to question the nature of the decision.

The case has been rightly decided by the lower Courts and the appeal is dismissed with costs. I fix Pleader's fee at Rs. 10.

G. R. D.

Appeal dismissed.

(1) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 439; 3 Ind. Dec. (N. S.) 718 (P. C.).

(2) 8 C. 5; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind Dec. N. S.) 32 P. C.).

(3) 10 Ind. Cas. 359; 17 C. W. N. 113; 15 C. L. J. 453.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1461 OF 1920.

May 2, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Stuart.

BHIKHARI DAS—PLAINTIFF—APPELLANT

versus

ABDULLAH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 103—Suit for possession by decree-holder—Limitation—Limitation Act (IX of 1908), Sch I, Arts. 11, 11A—"Person against whom," meaning of.

A suit for possession by the decree-holder under O. XXI, r. 103, Civil Procedure Code, is governed by Art. 11A of the Limitation Act [p. 242, col. 1.]

Sardhari Lal v. *Ambika Pershad*, 15 C. 521; 15 I. A. 124; 5 Sar P. C. J. 17; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931 (P. C.), followed

The opening words of Art. 11 of the Limitation Act, namely "a person against whom" include a decree-holder [p. 242, col. 1.]

Ganput Rai v. *Husaini Begam*, 60 Ind Cas. 905; 19 A. L. J. 53, followed.

Second appeal from a decree of the First Additional Judge, Aligarh.

Messrs. *Hribans Sahai* and *Panna Lal*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—The plaintiff-appellant obtained a decree in 1913 for possession of certain property against certain persons and in execution of that decree he got possession of the major portion of the property in suit, but he was resisted by one Abdullah, who was not a party to the decree, on the ground that the premises in the possession of Abdullah were his own property and were not covered by the decree. The plaintiff applied to the Executing Court for possession against Abdullah but that Court by an order dated the 31st of July 1915 passed under

SHYAM NARAIN v. JADUNATH SINGH.

O. XXI, r. 99, upheld Abdullah's contention. This suit was brought in 1919 for possession of the property in Abdullah's possession. It has been dismissed on the ground that it was barred by limitation under Art. 11A of the First Schedule to the Limitation Act. In appeal before us it has been argued that that Article does not apply to a suit brought by a decree holder. This point seems to us to be covered by *Sardhari Lal* v. *Ambika Pershad* (1). In that case their Lordships of the Privy Council held that the opening words of Art. 11 of the Limitation Act XV of 1877, namely "a person against whom" included the decree-holder. Article 11A contains words to the same effect and, therefore, the ruling of the Privy Council is equally applicable to this new Article. This view was taken in this Court in *Ganpat Rai* v. *Husaini Begam* (2). R. 103 of O. XXI only enables a party other than a judgment debtor against whom an order is made under r. 98 or 99 or 101 to institute a suit to establish the right which he claims to the possession of the property. That, however, does not touch the question as to the period of limitation within which such a suit must be brought. In our opinion that is settled by Art. 11A of the present Limitation Act. In this view the appeal fails and is dismissed with costs.

N. H.

Appeal dismissed.

(1) 15 C. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210. 7 Ind Dec. (N. S.) 931 (P. C.).
(2) 60 Ind. Cas. 905; 19 A. L. J. 53.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 29 OF 1921.
November 30, 1921.

Present:—Mr. Daniels, A. J. C.

SHYAM NARAIN—DECREE-HOLDER—APPELLANT

versus

JADUNATH SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Hindu Law — Widow — Accumulations — Personal estate—Intention—Accumulations, physical possession of, whether essential—Civil Procedure Code (Act V of 1908), O. XLI, r. 25—Remand—Reconsideration of law competent.

A widow has full power during her lifetime to invest or otherwise dispose of accumulated incom accruing during her possession of a widow's estate. [p 243, col 1]

Srodamini Dasi v. *Administrator-General of Bengal*, 20 C. 433. 20 I. A. 12; 6 Sar. P. C. J. 272; 17 Ind Jur. 223: 10 Ind. Dec (N S.) 293 (P. C.), followed.

The question whether such property would after her death form part of her personal estate, depends on whether she has shown any intention of appropriating it for her own benefit in her lifetime. A mere expression of opinion as to what she would do with it, would not amount to an act of appropriation. But where she has entered into an agreement showing how the property will be appropriated, her intention that it should form part of her personal estate, is sufficiently manifest. [p 245, col 2]

It is not necessary that such property should have come into her physical possession during her lifetime and a widow is competent to appropriate property to which she has established her title even though the same be wrongfully withheld from her by a person in unlawful possession of it. [p. 245, col. .]

Isri Dutt Koer v. *Hansbutti Koerain*, 10 I. A. 150; 13 C. L. R. 4 8; 7 Ind. Jur. 557; 4 Sar. P. C J. 459; 10 C 324; 5 Ind. Dec. (N. S.) 217 (P. C.), *Bhagabati Koer* v. *Sahodra Koer*, 13 Ind. Cas 691; 16 C. W. N. 844, referred to.

In the case of a remand under O. XLI, r. 25, Civil Procedure Code, it is open to an Appellate Court to re-consider the view of the law on which the remand was based. [p. 244, col. 2.]

Masihunnissa v. *Kaniz Sughra*, 60 Ind. Cas. 975; 43 A. 377; 19 A. L. J. 139; 3 U. P. L. R. (A.) 30, followed.

Appeal against an order of the Additional Subordinate Judge, Lucknow, dated the 19th April 1921, confirming that of the Munsif, South Lucknow, dated the 9th March 1921.

Messrs. *Bisheshwar Nath Srivastava* and *Gaya Prasad*, for the Appellant.

Mr. *Surendra Nath Roy*, for the Respondent.

ORDER.

DANIELS, J. C.—(*August* 17, 1921).—*Musammat* Janaka was the widow of Sultan Singh. She is dead. The respondent, Jadunath Singh, is both her heir and the reversioner of Sultan Singh. The decree holder-appellant, Shyam Narain, has obtained a decree against the respondent as heir to *Musammat* Janaka limited to her personal estate. In execution of that decree he seeks to attach a decree for mesne profits obtained by her against one Ram Sahai, the amount of which has been deposited in Court. The question in dispute is whether the amount decreed forms part of the assets of the deceased in the hands of her heir or whether it is an accretion to the estate of Sultan Singh.

Musammat Janaka had mortgaged certain property. She filed a suit for redemption

alleging that the mortgage had been more than paid off from the profits of the property and that there was a surplus in the hands of the mortgagees. Her claim was allowed and she got a decree for redemption and for surplus profits collected by the mortgagees. It is these profits which are now in dispute.

There is no dispute that a widow has full power to dispose of the income of her husband's estate as it accrues. It is also settled by the decision of the Privy Council in *Saodamini Dasi* v. *Administrator-General of Bengal* (1) and subsequent cases, that a widow has full power during her lifetime to invest or otherwise dispose of accumulated income accruing during her possession of a widow's estate. On the other hand, it appears to be equally clear that savings which she does not attempt to appropriate during her lifetime pass to the reversioner as part of her husband's estate. In the words of their Lordships of the Privy Council in *Isri Dutt Koer* v. *Hansbutti Kosrain* (2): "If she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose." The decision in this case, therefore, depends on whether *Musammat* Janaka had shown any intention of appropriating these profits for her own benefit in her lifetime. The learned Subordinate Judge has not considered this point. He seems to have held, on the basis of an unreported Calcutta ruling, that because these profits never actually came into the hands of the widow they must necessarily form part of the husband's estate. I have examined the decision on which the learned Subordinate Judge relied, which is printed as *Bhagabati Koer* v. *Sohodra Koer* (3) and find that it does not lay down any such proposition. The judgment lays down that the true test to determine whether accumulations in the hands of a Hindu widow follow the estate is whether she intended to treat them as part of the estate or as temporary savings to be spent by her subsequently. A part of the property in dispute consisted of accumulations of rent due from tenants. As to this the Court remarked—and this is the passage especially relied on by the respondent—"In so far as the rents not realised from the tenants are concerned, it has not been seriously disputed that they cannot be treated as temporary savings liable to be applied in satisfaction of any personal debts of the widow." The ground of decision in the case appears to have been that there had been no attempt to appropriate this income.

In the present case the appellant relies on two circumstances as showing intention on the part of *Musammat* Janaka to appropriate these profits for her own benefit. The first is that before her death she had put the decree in execution. This circumstance appears irrelevant. It would be equally necessary for her to execute the decree whether the profits were to be spent by her or to be added to the estate. The second circumstance, however, has a very direct bearing on the question at issue. It is that in the very bond in favour of Shyam Narain, appellant, on the basis of which the decree now in execution was obtained, it was expressly stated by *Musammat* Janaka that if she could realise the amount of her decree against Shyam Narain, she would immediately pay off the debt in lieu of which she was executing the bond. This shows that she intended to appropriate the profits now in dispute in payment of her personal debt to the appellant.

It is objected by the respondent that this mortgage-bond is not proved. The document bears the Court's endorsement—"Let it remain on the file" (*shamil misl rahe*), but no other endorsement. Under these circumstances I remand the case under O. XLI, r. 25, to the lower Appellate Court for a finding as to whether the document, dated 18th December 1918, which is to be found at pages 5/1, 5/2, 5/3, of the file B of the Munsif's record, was executed by *Musammat* Janaka. The parties will be at liberty to adduce evidence. Seven days from the date of finding will be allowed for objections.

Messrs. *A. P. Sen*, *B. K. Ghose* and *Gaya Prasad*, for the Appellant.

Mr. *J. K. Banerji*, for the Respondent.

JUDGMENT.

DANIELS, A. J. C.—(*November* 30, 1921).—The facts of this case have been stated in my order of remand of 17th August last

(1) 20 C. 433; 20 I. A. 12; 6 Sar. P. C. J. 272; 17 Ind. Jur. 223; 10 Ind. Dec. (N. S.) 293 P. C.).

(2) 10 I. A. 140; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 10 C. 324; 5 Ind. Dec. (N. S.) 217 (P. C.).

(3) 13 Ind. Cas. 691; 16 C. W. N. 834.

which should be read as part of this judgment. *Musammat* Janaka, deceased, had obtained in her lifetime a decree against one Ram Sahai for redemption of a mortgage and for a considerable sum of surplus profits in the hands of the mortgagee which were due to her. It was found that the mortgage had been more than redeemed out of the profits of the property of which the mortgagee was in possession

On 24th July 1919 *Musammat* Janaka had executed a pro note in favour of Shyam Narain. *Musammat* Janaka died in February 1920. In March 1920 Shyam Narain obtained a decree on the basis of his pro note for a sum of Rs. 566 (as stated in the application for execution) recoverable from the assets of *Musammat* Janaka in the hands of the judgment-debtor respondent, Jadunath Singh. In execution of this decree Shyam Narain, who is the appellant before this Court, obtained an order attaching *Musammat* Janaka's decree for surplus profits already referred to. The judgment-debtor objected on the ground that these profits formed part of the estate of *Musammat* Janaka's husband, Sultan Singh, and were not assets of the deceased in his hands. Both Courts below have allowed his objection and Shyam Narain comes to this Court in second appeal. As was mentioned in my order of remand the respondent is at one and the same time the reversioner of Sultan Singh and the heir of *Musammat* Janaka.

The sole question at issue is whether this decree for surplus or mesne profits formed part of the assets of *Musammat* Janaka or not. In my order of remand I held that this depended on whether she had in her lifetime shown an intention of appropriating them for her own benefit. As evidence that she had done so the appellant relied on a covenant entered into by her in a mortgage-bond executed by her in favour of Shyam Narain in which she undertook to satisfy the debt she was incurring to him whenever she should obtain a decree for mesne profits against Ram Sahai and out of the amount of that decree. By an oversight it was stated in my order of remand that this covenant was contained in the very bond on which Shyam Narain's decree was based. This was not the case. The bond on which Shyam Narain got a money decree was a simple bond, dated 24th July 1919, for Rs. 500. The covenant in question was contained in a mortgage-bond for Rs. 750 executed on 18th December 1918. It was objected by the respondent that this mortgage-bond had not been proved and, therefore, the Court should not take it into consideration. The Trial Court having omitted to endorse on the bond whether it was proved or not, I remanded an issue on this point. The finding on that issue is in favour of the appellant and is not disputed. On the view of the law taken in my remand order that finding should naturally result in a decree in favour of the appellant.

The respondent has contended at the hearing to day,

first, that the money could in no case be treated as assets of the deceased unless it actually came into her hands in her lifetime, and

secondly, that as no decree for mesne profits had been obtained when the mortgage-bond of December 1918 was executed, anything said in that bond was a mere expression of intention as to what *Musammat* Janaka would do in the hypothetical event of her ever becoming possessed of this money and is, therefore, absolutely irrelevant for the purpose of this case.

In the case of a remand under O. XLI, r. 25, nothing has been finally decided and it is open to me, should I see reason to do so, to re-consider the view of the law on which the remand was based—*Mashunnissa* v. *Kanis Sughra* (4).

Before dealing with the respondent's contention it will be convenient to state briefly the history of the ligitation which resulted in the decree for mesne profits. This has been ascertained by reference to the records of this Court.

Musammat Janaka's suit was instituted in the year 1915.

On 28th April 1916, she obtained a decree in her favour from the Court of the Munsif.

On 14th November 1916, that decree was modified adversely to her by the District Judge on appeal. She came to this Court in second appeal. Her appeal was to a large extent accepted and by an order of remand, dated 31st July 1917, the case was sent back to the lower Court for an account to be made up on the basis of this Court's finding.

(4) 60 Ind. Cas. 975; 43 A. 377; 19 A. L. J. 189; 8 U. P. L. R. (A.) 80.

On 16th March 1918, the District Judge recorded a finding showing a sum of Rs. 1,722-5-8 as due to her on account of surplus profits. Both parties objected to the finding. The respondent's objections were rejected and those of *Musammat* Janaka were accepted in part, and by an order of 30th August 1918 this Court again remanded the case to the District Judge to prepare a correct account in accordance with the findings arrived at by this Court. The Munsif had originally found a sum of Rs. 2,512-10-9 to be due to *Musammat* Janaka, a fact which appears on the face of this Court's order and the order of this Court expressly states that the account prepared by the Munsif is to be taken as substantially correct and only to be modified by excluding certain items relating to grove lands.

Finally, on 8th December 1919, this Court gave *Musammat* Janaka a decree for Rs. 2,661-7-6 together with interest and costs.

In support of his contention that no item can be treated as assets of a Hindu widow unless it has come into her physical possession before her death the respondent has cited only one Calcutta case, *Jhagabati Koer* v. *Sohodra Koer* (3). That case has been fully discussed in my order of remand, and the respondent's Pleader has nothing new to say with regard to it. On principle there appears to be no reason why a widow should be precluded from exercising an act of appropriation with regard to property to which she has established her title and which is being wrongfully withheld from her by a person in unlawful possession of it. In this case it was quite certain at the time when she contracted to pay these mesne profits to the appellant, that a considerable sum of mesne profits would be due to her, and the only question remaining for decision was as to the exact amount. This is quite clear from the order of remand of this Court, dated 30th August 1918, which was passed three months previous to the execution of the mortgage-bond. I am quite prepared to agree with the respondent's contention that a mere expression of opinion as to what she would do with property which might at some future time come into her possession would not amount to an act of appropriation on the part of the widow. In this case there was much more than that. In the first place, proceedings for recovery of this money were actually pending, and, as I have said, the order of this Court had left no doubt that a considerable sum of money was actually due to her. In the second place, the contract which she made with Shyam Narain was not a mere expression of intention. There was a distinct agreement that the money should be applied in settlement of the mortgage which she was executing, and there was, moreover, a further covenant entitling the mortgagee to realise the mortgage-money out of the amount of the decree for profits which she expected to obtain. Under these circumstances, I hold that there had been a manifestation of intention by *Musammat* Janaka to appropriate the money sufficient to prevent its passing as a part of her husband's estate.

I accordingly allow the appeal with costs in all Courts and, setting aside the orders of the Court below, direct the Trial Court to restore the execution proceedings to the file and proceed with the execution from the stage which it had reached when the judgment-debtor's objection was allowed. I am informed that after the attachment the money was actually realised and paid into Court and that it was withdrawn after the passing of an order in the judgment-debtor's favour by one of the Courts below. Under these circumstances, the appellant will be entitled to apply to the Trial Court for appropriate relief under the provision of section 144 of the Code of Civil Procedure.

N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1624 OF 1920.

May 4, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Gokul Prasad.

Musammat FATIMA—DEFENDANT—APPELLANT

versus

MOHAMMAD MASHUQ ALI AND ANOTHER—PLAINTIFF—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 16 (2) (a)—Acquisition of property by insolvent after adjudication—Receiver, vesting in—Declaratory suit by Receiver, competent.

NAGESHAR v. BHAGY DUBEY.

All property which is acquired by or devolves on an insolvent after the passing of an order of adjudication and before his discharge, vests in the Court or Receiver and becomes divisible among the creditors in accordance with the provisions of section 16 (2) *a* of the Provincial Insolvency Act, and the Receiver is entitled to a declaration that such property is saleable for the benefit of the creditors; he is under no obligation to sue for physical possession of the insolvent's property and can seek mere declaratory relief.

Second appeal from a decree of the District Judge, Moradabad.

Mr. S. *A. Haidar*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—Although we do not agree with the reasons given by both the Courts below in support of their judgments, we are nevertheless of opinion that the decree in favour of the plaintiff is substantially correct. The plaintiff is Receiver in insolvency of one Abdur Rauf, who was declared insolvent on the 13th July, 1915. More than two years after the adjudication order a sister of the insolvent, *Musammat* Musharraf un nissa, died and Abdur Rauf, as one of her legal heirs, became entitled to a two-ninths share of her estate.

It appears that, after the death of Musharraf-un-nissa, the appellant before us managed in some way or other to have a mutation order made in her favour. It seems that she put forward a Will which she said had been executed in her favour by Musharraf-un-nissa who was her aunt.

The Receiver brought this suit asking for a declaration that a two-ninths share of the estate of Musharraf-un-nissa became the property of the insolvent, Abdur Rauf, on the lady's death and that it was saleable in satisfaction of the amount due to Abdur Rauf's creditors. It was, therefore, prayed that it might be declared that the name of *Musammat* Fatima had been entered in the revenue papers wrongly and contrary to facts.

Both the Courts have found that the story of the Will in favour of Mohammad Fatima is untrue.

A legal plea was raised in both the Courts below, namely, that the plaintiff was under an obligation to sue for possession and could not seek mere declaratory relief under the provisions of section 42 of the Specific Relief Act. Both the Courts below overruled this contention. The learned Judge of the First Court seems to have thought that because the property of an insolvent vests in the Receiver, that is the same thing as the Receiver's actually being in possession of the property. This view, of course, has not been supported. The learned Judge of the Court below held, however, that a declaratory decree was permissible inasmuch as the declaration which was sought for would enable the Receiver to sell or mortgage the property for the benefit of the creditors.

In our opinion the Receiver was entitled to ask for declaratory relief and to obtain it. Under the provisions of the Provincial Insolvency Act (III of 1907), which were in force at the time the inheritance opened, all property such as may be acquired by or devolve on the insolvent after the passing of an order of adjudication and before his discharge, forthwith vests in the Court or Receiver and becomes divisible among the creditors in accordance with the provisions of sub-section (2), clause (*a*) of section 16. In these circumstances, we are satisfied that the plaintiff as Receiver was entitled to the relief which he claimed in paragraph 8, clause (*a*) of the plaint. We do not think that it can reasonably be argued that the Receiver was under an obligation to bring a suit for physical possession of the insolvent's property. The result is that the appeal fails and is dismissed with costs.

N. K. & W. C. A.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 142 OF 1921.

November 18, 1921.

Present :—Pandit Kanhaiya Lal, J. C.

NAGESHAR AND OTHERS—DEFENDANTS—APPLICANTS

versus

BHAGY DUBEY—PLAINTIFF—OPPOSITE PARTY.

Suit, dismissal of, in default—Restoration against some defendants and exemption of others by plaintiff—Court's power to restore against others.

Where after the dismissal of a suit in default the plaintiff applies for restoration against some only of the defendants and exempts the rest, the Court has no power to take action *suo motu* and restore the suit as against those so exempted.

JAGANNATH *v.* BALWANT SINGH.

Revision against the order of the Munsif, Fyzabad, dated the 19th July 1921.

Mr. *H K Ghosh*, for the Applicant.

Mr. *M. Wasim*, for the Opposite Party.

JUDGMENT.—A suit was filed by the plaintiff for partition against two sets of defendants. One set comprised the defendants Nos. 1 to 6 and another set comprised the defendants Nos. 7 to 13. The second set denied the title of the plaintiff. On the date fixed for the hearing of the suit the plaintiff and the defendants Nos. 1 to 6 were not present. The defendants Nos. 9 and 10 were present. The suit was, therefore, dismissed for default. On the same day an application was made by the plaintiff for the restoration of the suit to the file. His allegation was that he was busy negotiating a compromise with some of the defendants and did not hear the call. In support of his allegation he filed a petition of compromise, showing the terms settled between him and the defendants Nos. 1 to 6 and stating that the remaining defendants Nos. 7 to 13 might be exempted from the claim. The Munsif allowed the application for restoration as against the defendants Nos. 1 to 6, who verified the compromise, and passed a decree against them in accordance with its terms.

The plaintiff did not evidently want to proceed with his application as against the remaining defendants, for in his petition of compromise he agreed to exempt them from his claim. No notice of the application for restoration was, therefore, sent to the defendants Nos. 7 to 13. When an application was filed by the plaintiff for the preparation of a final decree for partition, the Probationary Munsif, who succeeded the officer who had originally passed the decree, came to the conclusion that the defendants Nos. 7 to 13 were necessary parties and that they had been wrongly discharged. He further thought that the said defendants could very well question the validity of the preliminary decree for partition and object to its being made final. He, therefore, started proceedings *suo motu* for the restoration of the original suit, in which the preliminary decree was passed, as against the defendants Nos. 7 to 13 and ultimately set aside the *ex parte* order of dismissal and restored the suit as against them also. The procedure adopted by him was, however, absolutely irregular. The plaintiff had himself exempted the defendants Nos. 7 to 13 and contented himself with the restoration being effected as against the defendants Nos. 1 to 6 alone, with whom he had entered into a settlement. The Court had no power to take action of its own motion as against the defendants Nos. 7 to 13 and to restore the suit as against them.

The application is, therefore, allowed and the order of the Court below set aside. No order is made, in the circumstances, as to the costs of this proceeding in either Court.

N. K. *Application allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 25 OF 1921.

May 25, 1922.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Ryves.

JAGANNATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALWANT SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Revenue and Civil Courts, conflict of—Landlord, civil suit by, for declaration that defendant not adopted son of deceased occupancy tenant—Relation of landlord and tenant subsisting between the parties—Civil Courts, jurisdiction of Agra Tenancy Act (II of 1901), ss. 5, 9, 187—Revenue Courts—Jurisdiction to decide questions of status or adoption

While it is necessary to guard against formulating any such general rule as that, a suit for a declaration of legal status cannot be entertained by a Civil Court merely because such a suit may be brought in consequence of a dispute which originally arose between landlord and tenant, nevertheless where it appears on an examination of the plaint in the light of the surrounding circumstances that the suit in fact offends against the provisions of section 187 of the Agra Tenancy Act, the jurisdiction of the Civil Courts is ousted. [p. 248, col .]

In all such cases it must be determined what is the real contest between the parties and what is the real object of the suit. [p 248, col. 2.]

L. an occupancy tenant died The defendant alleging that he was the adopted son of *L* applied for mutation of his name in place of the deceased. The landlord brought this civil suit for a declaration that the defendant was not the adopted son of *L*. From an examination of the pleadings it appeared that the relationship of landlord and tenant subsisted between the parties and the only dispute was as to the nature of the tenancy:

Held, (1) that the appropriate suit by either party would be under section 95 (*a*) and (*b*) of the Agra Tenancy Act, a suit as to which the cognizance of the Civil Courts was expressly ousted; [p. 249, col. 2]

(2) that the object of the present suit being to forestall that suit or else to enable the plaintiff to bring a suit for ejectment under section 8 on the ground that the defendant was a non-occupancy tenant, it was not cognizable by the Civil Court. [p 249, col 2.]

A Revenue Court has jurisdiction to decide a a question of status or adoption. [p. 250, col. 1.]

Letters Patent Appeal from the judgment of Mr. Justice Lindsay, reversing a decree of the Subordinate Judge, Meerut.

Dr. *S. M. Sulaiman* and Mr. *Saila Nath Mukerjee*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are shortly as follows:—Lalji was an occupancy tenant of a holding in the village of Khajuri, of which the plaintiffs-respondents are the Zamindars.

Lalji died recently, and on his death the defendants appellants applied for mutation of their names in the place of Lalji, as being entitled to succeed to his occupancy holding. While those proceedings were pending, this suit was brought in the Court of the Munsif for a declaration that the defendants were not the grandsons of Lalji. The pleadings will be examined in detail later on. One defence to the suit was that it was not cognizable by the Civil Court.

The Munsif held that he had jurisdiction, as the prayer was for a declaration only, and on the merits, decreed the suit.

The defendants appealed and again objected to the jurisdiction of the Civil Court to entertain the suit. The District Judge upheld this contention, and dismissed the suit. The plaintiffs appealed to this Court, and a learned Judge of this Court allowed the appeal and sent the case back to the District Judge to try the appeal before him on the merits.

From that order, the defendants have brought this appeal under the Letters Patent.

After hearing full argument, we think the appeal must be allowed and the suit dismissed on the ground that it was not cognizable by the Civil Court.

This appeal raises the question of the conflict of jurisdiction between the Civil and the Revenue Courts in a particularly convenient form.

Section 167 of the Agra Tenancy Act provides, that all suits.....of the nature specified in the Fourth Schedule shall be heard and determined by the Revenue Courts and, except in the way of appeal as provided in the Act: "No Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit ...might be brought."

In *Ram Charitar Rai* v. *Jiani* (1), (to which decision one member of this Court was a party) it was laid down that, while it is necessary to guard against formulating any such general rule as that, a suit for a declaration of legal status cannot be entertained by a Civil Court merely because such a suit may be brought in consequence of a dispute which originally arose between landlord and tenant, nevertheless an examination of the plaint in the light of the surrounding circumstances may show that the suit in fact offends against the provisions of section 167. It was there pointed out that a plaint might be so drafted in which a mere declaration as to the existence of a valid marriage, or as here, of a valid adoption, might have been sought in respect of which it could scarcely have been held that the jurisdiction of the Civil Court was ousted.

The *ratio decidendi* of that case was that in all such cases we must determine what was the real contest between the parties and what was the real object of the suit. And for this purpose we must examine the plaint with care. Two similar cases are *Dori Lal* v. *Sardar Singh* (2) and *Sri Mahant Bramha Birham Khushal* v. *Umera* (3).

The plaint opens with the statement that Lalji was an occupancy tenant of the plaintiffs who are the Zamindars of the village. He died "*without leaving any son or other legal heirs*" one and a half months before the suit. Thereupon, the defendants, who are described as the grandsons of Lalji's sister, made an application in the Revenue Courts on the 3rd January 1918 for the entry of their names as occupancy tenants in the place of the deceased Lalji. They asserted that Lalji executed a deed of adoption on 11th February 1905 stating that he had adopted Gobind as his son and that the defendants are the sons of Govind, who is also dead.

The plaint goes on to say that Lalji also made two Wills in defendants' favour but

(1) 21 Ind. Cas. 859; 36 A. 48; 11 A. L. J. 1022.
(2) 5 A. L. J. 514; A. W. N. 1909, 240.
(3) 18 Ind. Cas. 957; 35 A. 299; 11 A. L. J. 810.

that both are "legally null and void" and that the defendants have not acquired occupancy rights.

With regard to the adoption, it is stated that Lalji was a Gaur Brahman by caste, and thus could not legally adopt his sister's son. Other objections were taken to the adoption culminating in the assertion that, as a matter of fact, it never took place. Govind died four years before suit in the lifetime of Lalji.

Then comes a very significant statement which really contains the kernel of the case for the plaintiffs:—Paragarph 7. "The defendants are the grandsons of the sister of Lalji deceased. Their father, Govind, was not adopted by Lalji, and *their possession over the occupancy holding of Lalji is simply that of non-occupancy tenants from year to year*"

The cause of action is said to have accrued on the 3rd January 1918 the date of defendants' application for mutation of names, and in the beginning of February 1918 when the defendants refused to withdraw that application. This act is stated to be "prejudicial to the plaintiffs' rights" and hence the suit.

The only relief sought is, "that it may be declared that Govind was not the adopted son of Lalji, and that the defendants are not the grandsons of Lalji."

Now the plaintiffs admit that they are the landlords and that the defendants are in possession as their tenants, but only as non occupancy tenants from year to year and it seems fairly obvious from the plaint itself that the object of the suit is to get a declaration that will prevent the defendants from establishing their claim to succeed to Lalji's occupancy holding.

When we turn to the written statement, the matter is placed beyond all doubt.

The defendants say, in effect, that Lalji who had no son did adopt Govind, and that by a special custom of the brotherhood, the adoption of a sister's son was valid. That ever since the adoption which took place before 1905, (when the deed of adoption was executed), Lalji brought up Govind, got him married, and that Govind and his sons, the defendants, have all along been sharing in the cultivation of the occupancy holding and living with Lalji. After the death of Govind, Lalji executed the two Wills in defendants' favour merely as a precaution, and the plaintiffs have brought this suit to deprive them of their occupancy holding. Lastly, it is pleaded that the dispute can only be decided by the Revenue Courts, and the claim for a declaration cannot be maintained, and the suit is not cognizable by the Civil Court.

Taking the pleadings together, it is admitted that the relationship of landlord and tenant subsists between the parties and that the tenancy is still existing. The only dispute is as to the nature of that tenancy. Is it an occupancy tenancy, as the defendants claim, or a non-occupancy tenancy from year to year, as the plaintiffs assert?

The answer depends, according to the parties, on whether Lalji's alleged adoption is proved and is valid in law.

We must now turn to see whether any one of the suits specified in the Fourth Schedule to the Agra Tenancy Act might be brought in respect of the dispute between the parties; because if there is an appropriate suit provided in the Revenue Court, then the cognizance of the Civil Courts is ousted.

It seems to us that a suit *by either party* would lie under section 95 (*a*) and *b*). A suit under this section is included in group C, item No. 34 in the Fourth Schedule and, therefore, the object of the present suit is either to forestall a suit under section 95 at the instance of the defendants for a declaration that they are occupancy tenants of the holding, or to strengthen the hands of the plaintiffs in the event of it being necessary for them to bring a similar suit for a declaration that the defendants are non-occupancy tenants, or else to enable the plaintiffs to bring a suit for ejectment under section 58 on the ground that the defendants are non-occupancy tenants. The suit being of this nature, we are of opinion that it is not cognizable by the Civil Court.

It was, however, argued by the learned Advocate for the plaintiffs, that the question of jurisdiction was purely academic and that whether the original Court had or had not jurisdiction, once the matter went on appeal to the District Judge, he and this Court have jurisdiction to decide it, having regard to the provisions of sections 196 and 197 of the Act. This view seems to have commended itself to the learned Judge of

this Court. In his judgment he says:—

"It is clear that no Revenue Court has jurisdiction to pronounce a final decision upon a question of status or adoption. If the decision of the lower Appellate Court is maintained and the plaintiffs are referred to a suit under section 95 of the Tenancy Act, in the Revenue Courts, the question of adoption will necessarily come up for disposal. It is only on the basis of an adoption that the defendants in any circumstances could be held to be entitled to occupancy right in this holding.

"I am unable, therefore, to see why in the present case, this suit should not be entertained and disposed of by a Civil Court, which admittedly is the only Court which can come to a final decision upon the question of adoption, and although the purpose of the plaintiffs may be eventually to obtain a decision from the Revenue Court that the defendants are merely tenants-at-will and not occupancy tenants, I fail to see why, having asked the Civil Court for a relief which the Civil Court alone is competent to give, the Civil Court should decline jurisdiction."

The learned Judge's decision seems largely to be based on the assumption that the Civil Court alone could decide the question of adoption. In this view we are unable to agree.

We have, however, to consider whether sections 196 and 197 can apply. Section 197 only applies, if under section 196 the appeal lies to the District Judge or High Court.

In our opinion the appropriate suit for the plaintiffs to have brought was for a declaration under section 95 of the Tenancy Act. Turning to group C of the Fourth Schedule, we find such a suit (item No. 54) is triable by an Assistant Collector of the First Class, and the appeal lies to the Revenue Court and not to the District Judge or High Court.

Section 197, therefore, has no application

The result is we allow the appeal, set aside the order of remand made by this Court, and restore that of the District Judge dismissing the suit.

The appellants will be entitled to their costs throughout, which in this Court, both before the Single Judge and here, will include fees on the higher scale.

N. K. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 327 OF 1921.

January 19, 1922.

Present:—Mr Daniels, A. J. C.

ABDUL GHAFFAR—DEFENDANT NO. 1—APPELLANT

versus

Musammat RASUL-UN-NISA—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENT.

Limitation Act (IX of 1908), s. 12 (2)—Judgment delivered on last day before vacation—Application for copy made on first day after re-opening—Time requisite for obtaining copy—Vacation included.

The general rule is that the time requisite for obtaining a copy does not begin until an application for copy has been made. [p. 252, cols 1 & 2.]

Bechi v *Ahsanullah Khan*, 12 A. 461; A. W. N. (1890) 149, 6 Ind. Dec. (N S.) 1039 F. B.), followed.

Where, however, judgment is not delivered until the last day before the vacation and the application for copy is made on the first day after re-opening, it is only reasonable to include the vacation as part of the time requisite for obtaining the copy. [p. 252, col. 2.]

Saminatha Ayyar v. *Venkatasubba Ayyar*, 27 M. 21; 13 M. L. J 300, *Debi Charan Lal* v. *Mehdi Husain*, 35 Ind Cas. 888; 20 C. W. N. 1303; 1 P. L J. 485; 1 P. L. W. 709, *Sri Chandan Bhuya* v *Haroo Sethi*, 11 Ind. Cas 387; 13 C. L J 544 and *Donopudi Subramanyan* v *Nune Narasimham*, 56 Ind Cas. 67 43 M. 640; 11 L. W. 483; (1920) M. W. N. 293; 38 M. L. J. 465, referred to.

Appeal against a decree of the District Judge, Hardoi, dated the 28th July 1921, confirming that of the Munsif, Sandila, dated the 15th September 1920.

Mr. *Zahur Ahmad*, for the Appellant.

Mr. *Basudeo Lal*, for Respondent No. 1.

JUDGMENT.—The point at issue in this case is whether an appeal filed before the learned District Judge of Hardoi was filed within time or not. The judgment of the Trial Court was pronounced on the last day before the Civil Court vacation. The copy of the judgment was applied for on the day on which the Courts reopened after the vacation. The question is whether under these circumstances the appellant is entitled to include the vacation as part of the time requisite for obtaining the copy under section 12 (2) of the Limitation Act. The appeal was actually filed on 25th November. If the vacation is counted as part of the time requisite for obtaining the copy it was within time; if not, it was time-barred.

So far as I am aware the only direct authority on the points contained in the

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regular law reports is the case of *Saminatha Ayyar* v. *Venkatasubba Ayyar* (1). There are also two other cases in which the question was decided in favour of the appellant. One of these is a Patna case *Debi Charan Lal* v. *Mehdi Hussain* (2). The other is a Calcutta case *Sri Chandan Bhuya* v. *Haroo Sethi* (3). In the former case the leading judgment was delivered by Sir Edward Chamier who held that a case like this was not covered by any general rule but must be decided with reference to its special circumstances. He further remarked that so far as he was aware it was the universal practice to exclude the day on which the case was decided for all purposes connected with the calculation of limitation for an appeal. The Madras case of *Saminathra Aygar* v. *Venkatasubba Ayyar* (1) was followed and approved. The only authority to which I have been referred on the other side is the case of *Donopudi Subramanyam* v. *Nune Narasimham* (4) in which a doubt was expressed of the correctness of the decision in *Saminatha Ayyar's case* (1). The later case was, however, not on all fours with the earlier, as in that later case the application for a copy was not made on the day of re-opening of the Courts but some days later. The general rule, in my opinion, undoubtedly is that laid down by a Full Bench of the Allahabad High Court in *Bechi* v. *Ahsanullah Khan* (5) that the time requisite for obtaining a copy does not begin until an application for copies has been made. The case in which the judgment was not delivered until the last day before vacation and the application is made on the first day after it is, however, in my opinion, an exception to that rule. There is nothing to show at what hour the judgment was delivered. It may have been delivered just as the Court was rising for the day. For practical purposes it must be taken that an application made as soon as the Courts re-open was made on the earliest occasion on which it was possible to make it and under these circumstances it is only reasonable to include the vacation as part of the time requisite for obtaining the copy. If the application had not been made on the day on which the Courts re opened my decision might have been different but under the circumstances o this case I am of opinion that the appellant is entitled to succeed.

I accordingly set aside the decision of the Court below and direct the learned District Judge to admit the appeal and decide it on the merits. The appellant will get his costs of this appeal. Other costs will abide the result.

N. K. *Order set aside.*

(1) 27 M 21; 13 M. L. J. 300.
(2) 35 Ind Cas. 888; 20 C. W. N. 1303; 1 P. L. J. 485; 1 P L. W. 209
(3) 11 Ind Cas 387; 13 C. L. J. 541.
(4) 56 Ind Cas 67; 43 M. 610; 11 L. W. 413; (1920) M. W N. 293; 39 M L. J 415.
(5) 12 A 46 : A. W. N. (1890) 149; 6 Ind Dec. (N. S.) 1089 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1129 OF 1921.

June 9, 1922.

Present:—Mr Justice Stuart and Mr. Justice Sulaiman.

JAGAR NATH UMAR AND OTHERS—APPLICANTS—APPELLANTS

versus

RAM KARAN SINGH AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code Act V of 1908, *O. XXII, r.* 4 (1) —*Preliminary decree—Death of defendant—Representative not brought on record—Abatement of suit*—Locus standi *of heirs to apply for final decree.*

A preliminary decree does not put an end to a suit which remains pending till the final decree. [p. 255, col. 1.]

Moti Lal v. *Ram Narain*, 40 Ind. Cas. 1006; 39 A. 551; 15 A. L. J. 549, followed.

Therefore where after the passing of a preliminary decree the defendant dies and no application is made under O. XXII, r. 4 (1) of the Civil Procedure Code for the substitution of his legal representatives within the period of limitation following his death, the suit abates and his heirs have no *locus standi* to apply for a final decree. [p. 252, col. 1.]

Moti Lal v. *Ram Narain*, 40 Ind. Cas. 1006; 39 A. 551; 15 A. L. J. 549, followed.

Second appeal from a decree of the District Judge, Benares, confirming that of the Munsif, Jaunpur.

Mr. *Iqbal Ahmad*, for the Appellants.

Dr. *Kailas Nath Katju*, for the Respondents.

JUDGMENT.—The facts are as follows:—Baldeo Singh and Lakhpati executed a deed of usufructuary mortgage in favour of Bhurai. Ram Karan Singh and others instituted a suit to set aside the mortgage. On the

8th September 1914 a compromise was executed between the plaintiffs and the defendants to the effect that if the plaintiffs paid Rs. 1,200 to Bhurai on or about the 15th June 1916, the mortgage would stand redeemed and that if they did not pay that amount by that date, the mortgage property should be put to sale and the amount due to Bhurai should be recovered therefrom. A portion of the mortgage money was paid before the 10th July 1916, and the parties agreed to an extension of time by which the remainder should be paid within a year later. Bhurai died, it is not clear when, but at any rate, before the end of 1916. Now, *Moti Lal* v. *Ram Narain* (1), is authority for the view that a preliminary decree does not put an end to a suit which remains pending till the final decree and that, therefore, when a defendant dies after a preliminary decree has been passed, the provisions of O. XXII, r. 4 have application. It is thus clear that in so far as Bhurai was concerned as no application was made under sub-r. 1, O. XXII, r. 4 for the substitution of his legal representatives within the time of limitation following his death, the suit abated against him.

On the 14th June 1919 the sons of Bhurai applied that a final decree should be prepared in the suit. Their application has been dismissed by the Munsif whose order has been upheld by the District Judge. Their application must clearly be dismissed. We need not go into the points taken by the District Judge. It is only necessary to note one point which was fatal to the application at the beginning. The suit had abated against Bhurai. The applicants have no *locus standi*. They profess to represent a man against whom the suit abated some years ago. They may have other remedies. We express no opinion upon that point but they certainly have no remedy in this manner as they are not parties to the proceedings. We accordingly dismiss this appeal with costs.

N. K.

Appeal dismissed.

(1) 40 Ind. Cas. 1006; 39 A. 551; 15 A. L. J. 549.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 211 OF 1920.

June 17, 1922.

Present:—Mr. Prideaux, A. J. C.

DHONDIBA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANDURANG—DEFENDANT—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), s. 70 (b), transfer in contravention of—Consideration not recoverable by vendee on dispossession—Compensation, right of vendee to claim—Sale-deed, admissibility of, in evidence.

Where a person acquires possession of a holding under a sale, which is in contravention of the provisions of the Central Provinces Tenancy Act, he cannot, on being dispossessed, recover the money paid by him as consideration for the sale. But before he is dispossessed he is entitled to claim compensation, and the deed evidencing the sale is admissible in evidence to prove the passing of consideration. [p. 254, cols. 1 & 2.]

Moolchand v. *Chittoo*, 5 Ind. Cas. 43; 6 N. L. R. 12, *Bharath Singh* v *Debi Dayal Singh*, 2 Ind. Cas. 261; 6 A. L. J. 55, *Murlidhar* v. *Pem Raj*, 22 A. 205; A. W. N. (1900) 10; 9 Ind. Dec. (N. s.) 1167 F. B., *Dipan Rai* v. *Ram Khelawan Rai*, 5 Ind. Cas. 567; 7 A. L. J. 30; 32 A. 381 and *Bhikham Singh* v. *Har Prasad*, 19 A. 35; A. W. N. (1896) 167; 9 Ind. Dec. (N. s.) 23, referred to.

Appeal against a decree of the Additional District Judge, Wardha, in Civil Appeal No. 165 of 1919, dated the 10th February 1920.

Mr. *W. V. Gharpure*, for the Appellants.

Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT.—The parties to this appeal are co-sharers in Mouza Keli in the Wardha Tahsil. Defendant holds a one pie share in the village. One *Musammat* Raji was the tenant, in ordinary right, of fields Nos. 40 and 39 at the village. In the plaint the plaintiffs allege that *Musammat* Raji had relinquished her holding and defendant was in possession. They claimed joint possession to the extent of their shares. Defendant pleaded that *Musammat* Raji surrendered the land to him by a registered deed, dated the 28th November 1916, taking Rs. 776 from him. The surrender was with the consent of the *lambardar* Gajrabai, who, on the 16th May 1917, confirmed such consent by a written document. Defendant had, therefore, been recognised as a tenant of the proprietary body and could not be ejected. But should it be held that plaintiffs were entitled to

joint possession they shou'd only be given possession on payment of their *quota* of the amount paid by defendant for the surrender.

The findings of the First Court may be summarised thus :

The *lambardar's* consent was not obtained at the time to the transaction, but was subsequently obtained by the document of 16th May 1917, that the *lambardar* does not represent the proprietary body in matters *inter se* between the co-sharers, and the consent given in the present case was invalid not making the defendant a tenant. The transaction was a sale, not a surrender, but registration of a sale being prohibited under section 71 of the C. P. Tenancy Act, the defendant obtained no absolute title by the document of the 28 h November 1916. The consideration for the sale was held proved, and in equity defendant was entitled to a re-imbursement to the extent of plaintiffs' share before they could obtain possession.

After remanding the case on an allegation regarding improvements said to have been made to the land for trial by the lower Court, the lower Appellate Court held that defendant acquired no proprietary right in the land. Dealing with the question of law the Judge writes: "It is next urged that as the transfer to the defendant was a sale and not a surrender, and as the lands were of ordinary tenure, so the deed was not validly registered and was not admissible in evidence to prove the passing of the consideration. There can be no doubt but that the deed should not have been styled as a deed of surrender. Its registration cannot hence be taken to be valid. The deed would, however, be admissible in evidence to prove a collateral fact like the passing of the consideration which is independent of the purpose to effect which the law requires registration. [*Narayan Bisnoi* v. *Jaswant Singh* (1), *Kalicharan* v. *Lal Inlar Shah* (2) and *Sambu* v. *Nama* (3)]. The plaintiffs seek to share in an advantage gained by the defendant. They are bound to pay their share of the expenses of acquiring the advantage [*Moolchand v. Ohittoo* (4)]." The appeal and a cross objection filed by defendant were both dismissed.

It is here contended that the deed evidencing the transaction was not admissible in evidence and should not have been looked at to prove the passing of consideration and that plaintiffs are entitled to joint possession without payment. It cannot be said that the defendant in taking the fields from *Musammat* Raji represented the proprietary body. The consent of the *lambardar* was not taken at the time. Her subsequent consent given for consideration as expressed in the document of the 16th May 1917 cannot bind the proprietary body: defendant did not obtain tenancy rights in the land, as the deed by which he acquired the land is not a surrender it is a transfer: see *Ramdayal* v. *Gulabia Bai* (5). The defendant, therefore, acquired possession under a sale, and such sale being void under the Tenancy Law, the document should not have been registered. The question, therefore, arises whether money paid in contravention of section 70 (5) of the Tenancy Act can be recovered. It was held in *Bharath Singh* v. *Debi Dayal Singh* (6) that in the case of a sale made to circumvent the Statute prohibiting the sale of ex-proprietary rights the consideration was not recoverable. Similar cases are *Murlidhar* v. *Pem Raj* (7), *Dipan Rai* v. *Ram Khelawan Rai* (8) and *Bhikham Singh* v. *Har Prasad* (9). Defendant, if he had failed to get possession, could not have recovered the consideration from *Musammat* Raji on the ground that the so-called surrender was a sale in contravention of the Tenancy Act, and the registration obtained was a fraud upon the Registration Statute. Can he, nevertheless, claim compensation from the plaintiffs before they are given possession? I think under the law prevailing in this Court, *Moolchand* v. *Ohittoo* (4) he can, and the deed is admissible in evidence to prove the passing of consideration.

The result is that this appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 1 N. L. R. 147.
(2) 48 Ind. Cas. 923; 15 N. L. R. 31.
(3) 12 Ind. Cas. 362; 35 B. 438; 13 Bom. L. R. 867.
(4) 5 Ind. Cas. 431; 6 N. L. R. 12.
(5) 4 N. L. R. 120.
(6) 2 Ind. Cas 261; 6 A. L. J. 555.
(7) 22 A. 205; A. W. N. (1900) 10; 9 Ind. Dec. (N. S.) 1167 (F. B.).
(8) 5 Ind. Cas 557; 7 A. L. J. 330; 32 A. 383.
(9) 19 A. 35; A. W. N. (1896) 167; 9 Ind. Dec. (N. S.) 23.

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PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

March 21, 1922.

Present:—Viscount Cave, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Khan Bahadur MOHAMMAD ABDUL GHANI KHAN, SINCE DECEASED (NOW REPRESENTED BY MOHAMMAD IBDUL GHANI KHAN) AND ANOTHER AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Musammat FAKHR JAHAN BEGAM— DEFENDANT NO. 2 AND OTHERS —RESPONDENTS

Muhammadan Law—Sunni—Gift—Will—Distinction—Gift, essentials of—Usufruct, reservation of, by donor—Possession, constructive, by donee—Registration—Zemindari estate Mutation of names—Construction of document—Gift or Will—Taluqdari *law—Primogeniture* sanads—"*Successor,*" *meaning of.*

In Muhammadan Law the broad distinction between a gift *hiba* and a bequest *wasiat* is that in the case of a gift the immediate right of property in the subject-matter of the gift is conferred and in the case of a bequest the vesting of the right of property is postponed. [p. 259, col. 2]

For a valid gift *inter vivos* under the Muhammadan Law three conditions are necessary:—(1) manifestation of the wish to give on the part of the donor, (2) the acceptance of the donee, either expressly or impliedly, and 3 the taking of possession of the subject-matter of the gift by the donee, either actually or constructively. [p. 260, col. 2]

The reservation of usufruct by a donor does not by itself make a gift of the property void under Muhammadan Law. [p. 260, col. 1.]

A *Taluqdar* made a gift to the following effect: "I have gifted my moveable and immoveable property, all my *Zemindari* and *lambardari* estate, etc. to *M.* with the exception of the villages set out below which will remain in my possession for the duration of my life and dependent relatives free of rent and Government revenue...such villages will be kept by me without transfer by mortgage or sale or gift for my lifetime and after my death the donee will be the proprietor *malik*) of the aforesaid excepted property whose revenue the donee will pay from the *Ilaqa*, and will pay all the debts outstanding against the estate." *M.* did not take physical possession of the excepted villages till after the death of the donor nor did he apply for mutation of names in his favour in respect of them. He, however, obtained mutation of names in his favour of all the other *Zemindari* property and paid the Government revenue which became due in respect of the *taluqdari* part of the entire property:

Held, (1) that the document could not even in regard to the excepted property be regarded in any respect as a Will but was a deed of gift *inter vivos*; [p. 260, col. 1]

(2) that the whole *Zemindari* property mentioned in the deed must be regarded as one property, the taking possession of any part of which being constructively a taking possession of the whole. [p. 260, col. 2.]

(3) that the actual physical possession of the donee over a portion of the *zemindari* estate and the mutation of names in respect thereof and the payment of Government revenue by him in respect of the *taluqdari* part of the entire estate must be regarded as amounting to constructive possession of the donee over the whole property, subject of the gift in question, and that the gift of the excepted villages was also consequently valid. [p. 261, col. 1.]

Nawab Umjad Ally Khan v. *Musammat Mohumdee Begum*, 11 M. I. A 517 at pp. 547, 558; 10 W. R. P. C. 25; 2 Suth P. C. J. 98; 2 Sar. P. C. J. 315; 20 E. R. 195, referred to.

In considering what is the Muhammadan Law on the subject of gifts *inter vivos* it must be borne in mind that when the old and admittedly authoritative texts of Muhammadan Law were promulgated there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land or any *zemindari* estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Muhammadan Law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift. [p. 260, col. 2.]

The word "successors" in a primogeniture *sanad* means those designated persons who would succeed in the event of an intestacy and not persons who may take by sale, gift or bequest. [p. 259, col. 1.]

Consolidated appeals from a judgment and two decrees of the Court of the Judicial Commissioner, Oudh, dated the 19th December 1917, reported as 45 Ind. Cas. 507, reversing a decree of the Subordinate Judge, Kheri.

Mr. *DeGruther*, K. C. and Mr. *Kenworthy Brown*, for the Appellants.

Mr. *Dube*, for the Respondents.

JUDGMENT.

SIR JOHN EDGE.—These are consolidated appeals by the plaintiffs from two decrees, dated the 19th December 1917, of the Court of the Judicial Commissioner of Oudh, which reversed the decree, dated the 13th July 1915, of the Subordinate Judge of Kheri and dismissed the suit.

The suit was brought on the 20th February 1914, in the Court of the Subordinate Judge by Mohammad Abdul Ghani Khan and Mohammad Abdul Rahman Khan against Mohammad Hamidullah Khan, *Musammat* Fakhr Jahan Begum, *Musammat* Asghari Begum, *Musammat* Chand Bibi and Pandit Sheo Dayal for the possession of Mauza Mundia Misir, a 4 annas 5-pies share in

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Mauza Gundhia, and two groves, a house and certain *sir* land in Jalalpur and for mesne profits. It was a suit of ejectment on title. The plaintiffs alleged that the right to possession of all the properties in suit was in them as the heirs of *Mussammat* Munni Bibi, who had died on the 16th June 1906, and that the defendants had no title. The defendants, who are the respondents, were not all jointly interested in any of the properties. Some of the defendants were in possession of some of the properties, others of the defendants were in possession of other parts of the properties in suit, but the different titles of all the defendants originated in a document of the 7th March 1884, which was executed by Munni Bibi, and has been variously construed as a deed of gift and as a Will.

Munni Bibi was the widow of Niamat-ullah Khan, who died childless on the 29th August, 1867. Niamat-ullah Khan, Munni Bibi and the plaintiffs, who were her first cousins, were Muhammadans of the Sunni sect, and the plaintiffs were, when Munni Bibi died in 1906, her heirs, according to the Muhammadan Law applicable to Sunnis. The family to which these Muhammadans belonged had several centuries ago been Thakurs professing the Hindu religion, who were converted to Islam, and at one period of this suit it was contended by the defendants, or some of them, that the family had always continued to be governed in matters of succession and inheritance by the rules of the Mitakshara and not by the Muhammadan Law. That contention has been abandoned.

Niamat-ullah Khan lived in the village of Jalalpur and was a *taluqdar* of Oudh. After the Mutiny of 1857 he received from the British Government the *taluqa* of Agar Buzurg, which included, with many villages not now in question, all the immoveable property in question in this suit except the 4 annas 5-pies share in Mauza Gundhia, which was granted to Munni Bibi on the 15th November 1876 by the British Government absolutely in her own right. Although Niamat-ullah Khan had died in 1867, his name was entered as that of the *taluqdar* of the *taluqa* Agar Buzurg in lists I and II, which were prepared under Act I of 1869. Instances of the names of other persons who had died before 1869 being entered in those lists occur.

The British Government granted to Niamat-ullah Khan in his lifetime a primogeniture *sanad* in which the *taluqa* Agar Buzurg is described as the estate of Jalalpur in Zillah Mohamdi. That *sanad* is as follows:—

"C. WINGFIELD,

"*Chief Commissioner of Oudh.*

"To

NIAMAT-ULLAH OF JALALPUR.

"Know all men that whereas by the Proclamation of March, 1858, by His Excellency the Right Honourable the Viceroy and Governor-General of India, all proprietory rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, Charles John Wingfield, Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title and possession of the estate of Jalalpur in Zillah Mohamdi consisting of the village as per list attached to the *kabuliyat* you have executed, of which the present Government revenue is Rs. 5,752 (five thousand seven hundred and fifty two).

"Therefore this *sanad* is given you in order that it may be known to all whom it may concern, that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform and of showing constant good faith, loyalty, zeal and attachment to the British Government according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

"It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir, according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please.

"It is also a condition of this grant that you will, so far as is in your power, promote

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the agricultural prosperity of your estate and that all holding under you shall be assured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietors of the above mentioned estate, in confirmation of which I herewith attach my seal and signature."

The *kabuliyat* mentioned in the *sanad*, related to more than 30 villages and included Mauza Mundia Misir and Mauza Agar Bozurg (Jalalpur), parts of which are claimed by the plaintiffs in this suit. The plaintiffs do not claim any interest in any of the other villages mentioned in the *kabuliyat*, and do not contend that Munni Bibi was not entitled to give or bequeath those other villages to whom she liked. As will be seen presently, her title to, and interest in, all the villages mentioned in the schedule to the *kabuliyat* was as the devisee of her husband Niamat-ullah Khan.

On the 20th May 1865 Niamat-ullah Khan made the folloing Will:—

"I am Muhammad Niamat-ullah Khan, *talukdar* of Jalalpur, Pargana Karanpur and Aligauj.

"Whereas the Government has asked for a Will from the declarant, and the declarant has no issue and is issueless up to this time, and it is necessary to appoint a legatee after me, I, while in the enjoyment of sound health and perfect intellect, during my litetime, having executed this Will, declare that, after me, my wedded wife shall be the owner and possessor of the moveable and immoveable property, like myself. If the heirs belonging to the brotherhood lay a claim, the same shall be invalid and untenable before the Government. Wherefore I have executed these few presents by way of a Will so that it may serve as an authority and be of use in time of need.

"Scribed by Najju Khan, General Agent. Dated, 20th May 1865.

"Niamat-ullah Khan,

"*Talukdar* of Agar Buzurg."

Under the *sanad* Niamat ullah Khan had power to bequeath the *taluqa* of Bazarg (the estate of Jalalpur) to whom he pleased, and under that Will the *taluqa* passed on his death on the 29th August 1867 to his widow, Munni Bibi. At the date of the Will of Niamat ullah Khan, there were living two younger brothers of Niamat-ullah Khan, of whom Latf ullah Khan was the elder and Ibrahim Khan was the younger. Those younger brothers survived Munni Bibi. One question in this case is whether Munni Bibi was a "successor" of Niamat ullah Khan within the meaning of the *sanad*; if she was, she had power to make a gift of or to bequeath the whole *taluqa* or any part of it to whom she pleased. If she was not a "successor" of Niamat-ullah Khan within the meaning of the *sanad*, she had power to make such a gift as would be recognised as a valid gift by the Mahammadan Law applicable to Sunnis, of the whole *taluqa* or of any part of it to whom she pleased.

On the 7th March 1884 Munni Bibi executed a document which has been construed by the Subordinate Judge as partly a deed of gift and in part a Will, and has been construed by the Judicial Commissioner as a deed of gift. As translated by the official translator it is, so far as is material, as follows:—

'I am Thakurain *Musammat* Munni Bibi, wife of Mohammad Niamat-ullah Khan, *talukdar* of Mirzapur and Jalalpur, Parganas Bhur and Paila, District Kheri.

"Whereas my husband, during his lifetime bequeathed the entire property of the aforesaid *taluqa* to me, and I, in accordance with the said Will, am in possession and ownership of the same; now I, while in sound health and in possession of perfect intellect, without force, and reluctance of my own free will, make a gift of the moveable and immoveable property, the entire *zamindari* and *lambardari* estate, etc., in favour of Mohammad Lutfullah Khan, son of Mohammad Ibad-ullah Khan, the brother of my husband, the detail whereof is being given below with the exception of the villages and *sir* lands, etc., of the estates specified below, which, shall, during my lifetime, remain in my and my relation's possession, free of rent and without payment of Government revenue; and I do hereby invest the donee with the power to have the mutation of names effected in his favour. Now I have nothing to do with the gifted property and estate. I shall keep the villages and *sir* lands, which have been exempted hereunder for my life,

time without the power of alienation by mortgage, sale and gift; and after me the donee shall also be the owner of the said exempted property. The donee shall pay the Government revenue of the exempted estate from the *ilaqa* with the exception of the revenue of *patti* village Gandhia, which I shall pay out of my own pocket. The donee shall pay all the debt with which the estate is encumbered, I, the donor, having nothing to do therewith. Wherefore I have executed these few words by way of a deed of gift on a stamp of Rs. 600 8-0 by fixing the value of the property at Rs. 60,000 (sixty thousand) so that it may serve as an authority and be of use when required.

"Detail of the gifted immoveable property together with the amount of revenue and the boundaries.

"Detail of the moveable property gifted Rs. 2,610

"Detail of the property exempted Rs 1,555.

"Pargana Bhur, Rs. 1,490.
"Village Mundia standing in the name of me, the donee, during life, rent and revenue free Rs. 855
"*Patti* Gundhia standing in the name of me, the donor Rs 280
Gungipur, included in Hindolna standing in the name of Muhammad Ibrahim Khan Rs. 355
"Dated 7th March 1884.
Scribed by the Registration Clerk.

Pargana Paila, Rs. 65.
Sir land at Jalalpur, measuring 135 acres Rs. 65.

Mark of the signature of the Thakurain Saheba, wife of M hammad Niamat-ullah Khan, *talukdar* of Mirzapur, autograph."

Mr. Kanhaiya Lal, in his judgment on the appeal to the Court of the Judicial Commissioner, gives a slightly different translation of part of the document of the 7th March, 1884, as follows:—

"Now in sound health and full possession of my senses, without any persuasion or compulsion and of my own accord I have gifted my moveable and immoveable property, all my *zamindari* and *lumbardari* estate, etc., to Muhammad Lutf ullah Khan, son of Muhammad Ibad-ullah Khan, the brother of my husband, according to the details given below with the exception of the villages and *sir* land, etc., set out below, name by name, which will remain in my possession for the duration of my life and my dependent relatives free of rent and Government revenue, out of the aforesaid estate. At this time having exempted them I have made a gift, and by virtue of the deed have authorised the donor to get mutation of names made in his favour, and now I have nothing to do with the estate and property gifted; and such villages and *sir* land aforesaid as have been at this time for the duration of my life excepted (left out) will be kept by me without transfer by mortgage or sale or gift for my lifetime, and after my death the donee will be the proprietor (*malik*) of the aforesaid exempted property, and of the exempted property the donee will pay the revenue from the *ilaqa* except of the *patti* Mauza Gundhia. Of the *patti* Gundhia, I will pay the revenue from my own pocket and the donee will pay all the debts outstanding against the estate. I have nothing to do with them. Therefore these few words have been written by way of a deed of gift of inheritance and proprietorship on a stamp of Rs. 600-8-0 on a stated value of Rs. 60,000 as a title-deed which will be useful at the time of need."

In the opinion of their Lordships there is no material difference between the two translations, they bear the same meaning. It should be mentioned that the punctuation in each translation is the punctuatin of the person who made the translation. "*Patti* Mauza Gundhia" was the 4 annas 5-pies share in Mauza Gundhia which the Government had, subject to the payment of the Government revenue, granted to Munni Bibi absolutely in 1876.

On the execution of the document of the 7th March 1884 Lutf ullah Khan got actual possession of all the property mentioned in it except Mauza Gangipur and the property now in question in this suit. Of the property now in question Lutf ullah Khan did not obtain physical possession until Munni Bibi died in 1906.

Lutf-ullah Khan mortgaged, on the 27th November 1907, the 4-annas 5-pies share in Mauza Gandhia for Rs. 11,000 to the defendant Pandit Sheo Dayal. Lutf-ullah Khan died some years later, leaving him surviving his widow, *Musammat* Chand Bibi, and his son, Hamid-ullah Khan. Hamid-ullah Khan, after his father's death, transferred to his wives, *Musammat* Fakhr Jahan Begam and *Musammat* Ashgari

Begam, or to one of them, portions of the property now in question. On the 17th January 1913, there being then due to Pandit Sheo Dayal Rs. 20,000 under the mortgage of the 27th November 1907. Hamid-ullah Khan, *Musammat* Chand Bibi and *Musammat* Ashgari Begam sold the 4-annas 5-pies share in Mauza Gondhia to Pandit Sheo Dayal for Rs. 21,000.

Before referring to the judgments of the Trial Judge and in the Court of the Judicial Commissioners, it is advisable to mention some other matters. Niamat-ullah Khan's youngest brother was Ibrahim Khan, who died and left four sons surviving him, of whom Ehsan-ullah was the eldest. Ehsan-ullah and his three brothers on the 20th December 1910, brought a suit against Hamid-ullah Khan, his two wives, and Muhammad Abdul Ghani Khan and Muhammad Abdul Rahman Khan, who are the plaintiffs in the present suit, and in their plaint, alleging that Munni Bibi had by a Will of the 10th June 1906, bequeathed to their father, Ibrahim Khan, Mauza Mundhia Misir, the 4-annas 5-pies share in Mauza Gundhia, and the two groves, the house and *sir* land in Mauza Jalalpur, all of which are claimed by the plaintiffs appelants in the present suit, asked for a decree for possession. To that suit these plaintiffs-appellants offered no defence, and on the contrary the plaintiff appellant here, Muhammad Abdul Gani Khan on the 4th November 1910, wrote to Ehsan-ullah as follows :—

" Claim for possession.

"My dear Muhammad Ehsan-ullah Khan and Abdullah Khan, *raises* of Jalalpur.

"After affectionate greetings I write to say that as regards the property left and possessed by my deceased sister, Munni Bibi, the wife of Niamat-ullah Khan, *taluqdar* and *rais* of Jalalpur, you enquire about, I do not at all turn against the purport of her Will. You can obtain the said property under the Will by bringing a suit or otherwise, and I have no objection. You are quite free to take necessary steps. Abdul Rahman Khan too says the same thing. I have enquired from him also.

" With kindest regards.

" Yours affectionately,

"ABDUL GHANI KHAN,

"*Taluqdar of Kukra.*

" Dated 14th November 1910. "

Muhammad Abdul Ghani Khan was called as a witness for the plaintiffs in the suit of 1910, and on being shown his letter of the 4th November 1910, said: "This letter I wrote with the permission of my brother, Abdul Rahman Khan, who is joint with me " and " I never thought of the matter whether I am entitled to the assets of Munni Bibi or not. I disclaim a share in the property if I am entitled to it." When Abdul Ghani Khan gave his evidence in that suit he was 42 years of age, and it appears to their Lordships impossible to believe that he and his brother had never before 1910 considered the question as to whether they as the heirs in Muhammadan Law of Munni Bibi had any claim to any part of the valuable property which had been hers. The plaintiffs in the suit of 1910 failed to prove the execution of the alleged Will, and their suit was dismissed.

The learned Subordinate Judge, Mahmud Hasan, who tried the present suit, construed the document of the 7th March, 1884, as a Will, so far as it related to the property in question here, and as a deed of gift so far as it related to the other property dealt with by it. He held that section 41 of the Transfer of Property Act, 1882, did not apply to the cases of Pandit Sheo Dayal and of the other transferees, and as he considered that it was not proved that Munni Bibi's heirs had assented to the bequest by her of the property in question, he gave the plaintiffs a decree for the possession of a two-thirds share of that property. It should here be mentioned that it does not appear from the record that Pandit Sheo Dayal had given evidence in this suit or that he had made any enquiry as to the title of Lutf ullah Khan to mortgage, or the title of Hamid ullah Khan and his mother and wife to sell the 4 annas 5-pies share in Mauza Gundhia. From that decree the defendants, *Musammat* Fakhr Jahan Begam and Pandit Sheo Dayal appealed to the Court of the Judicial Commissioner. Their appeals raised the question as to the true construction of the document of the 7th March 1884 and consequently raised the question as to the right of the plaintiffs to maintain this suit. The plaintiffs filed cross-objections.

The appeals and the cross-objections were heard by the learned Judicial Commissioners,

ABDUL GHANI KHAN v. FAKHR JAHAN BEGAM.

Mr. Stuart and Mr. Kanhaiya Lal, and they delivered their very carefully considered judgments on the 19th December 1917. Mr. Stuart held that under the *taluqdari sanad* Munni Bibi was a successor within the meaning of the term "successors" in that *sanad*, and consequently had an absolute power to give or bequeath the *taluqdari* property to whomsoever she pleased, a power of alienation which was not controlled by Muhammadan Law. Mr. Kanhaiya Lal was of the contrary opinion; he rightly held that as Munni Bibi obtained her title to the *taluqdari* property, not by right of inheritance under the *sanad* but under the Will of her husband, Niamat ullah Khan, she was not a successor within the meaning of the *sanad*.

In 192 , the Board, in *Ghulam Abbas Khan* v. *Amatul Fatima* (1), which was an appeal from Oudh, held that the word "successors" in a similar primogeniture *sanad* meant those designated persons who would succeed in the event of an intestacy and not persons who took by sale, gift or bequest. Had it not been for Niamat-ullah Khan's Will the *taluqdari* property would, on his death, have vested by right of inheritance under the *sanad* in Lutf-ullah Khan, who was the elder of his two brothers. Under the circumstances, Munni Bibi's right to dispose by gift or by Will of the *taluqdari* property was the right of an owner under the Muhammadan Law, and was the same right which she had to dispose of the 4-annas 5-pies share in Manza Gandhia.

The Judicial Commissioners agreed in their construction of the document of the 7th March 1884 and held that it was, and operated as, a deed of gift, and that all the property mentioned in it passed as a good and valid gift under the Sunni Law to Lutf-ullah Khan. They held that Munni Bibi by that deed transferred the corpus of the property, the *taluqdari* property and the 4 annas 5-pies share in Manza Gandhia, to Lutf-ullah Khan, reserving to herself for her life the usufruct of the property in question in this suit. Apparently they based their judgments on a decision of the Board in 1867, in *Nawab Umjad Ally Khan* v. *Musammat Mohundee Begum* (2).

It had been contended on behalf of the plaintiffs before the Judicial Commissioners that there had been no possession of this property now in question given to or taken by Lutf-ullah Khan, and that consequently the gift was void under the Muhammadan Law, but they considered that the clear intention of Munni Bibi as shown by her deed was that the title to this property should immediately vest in Lutf-ullah Khan, and that she should have no right to sell, mortgage, or otherwise dispose of the property, and they found that as the usufruct was reserved for her life by Munni Bibi it was not possible for physical possession of the property in the suit to be given to Lutf-ullah Khan in Munni Bibi's lifetime. In the opinion of the Judicial Commissioners everything which was reasonably possible to make perfect the gift had been done and that nothing more was required to make the gift a good gift according to Muhammadan Law. The Judicial Commissioners, by the decree of the 19th December 1917, set aside the decree of the Subordinate Judge, and dismissed the cross-objections and the suit. From the decree of the Judicial Commissioners these consolidated appeals have been brought.

Their Lordships will now consider whether the document of the 7th March 1884 may be regarded, so far as the property now in question is concerned, as a Muhammadan Will, and if it is not a Muhammadan Will, but is a deed of gift, then the question arises whether, in the circumstances of this case, the gift of this property to Lutf-ullah Khan became a valid gift under the Muhammadan Law applicable to Sunnis.

In construing the document of the 7th March 1884 it has to be borne in mind that in Muhammadan Law the broad distinction between a gift (*hiba*) and a bequest (*wasiat*) is that in the case of a gift the immediate right of property in the subject of the gift is conferred, and in the case of a bequest the vesting of the right of property is postponed. Owing to the fact that there is in India no uniform or accurate system of conveyancing, and to the fact that deeds and Wills are in India, as a rule most inartificially drawn up, frequently by persons not possess-

(1) 60 Ind. Cas. 937; 48 I. A. 135; 19 A. L. J. 433; 40 M. L. J. 577; 8 O. L. J. 225; 24 O. C. 118; (1921) M. W. N. 349; 43 A. 297; 29 M. L. T. 409; 34 C. L. J. 113; 14 L. W. 680 (P. C.).

(2) 11 M. I. A. 517 at pp. 547, 558; 10 W. R. P. C. 25; 2 Suth. P. C. J. 93; 2 Sar. P. C. J. 315; 20 E. R. 195.

ed of legal knowledge, it is often difficult to ascertain with certainty what was precisely intended by the document, and, in some cases, to ascertain whether the document was intended to operate as a deed of gift or as a Will. Their Lordships have, for the following reasons, come to the conclusion that the document of the 7th March 1884, cannot be regarded in any respect as a Will,

On the 7th March 1884 Munni Bibi was, as she recited in the document, the owner in possession of the entire property of the *ilaqa* (the *taluqa* of Agar Buzurg) which her husband had bequeathed to her, and she was also the owner in possession of the 4 annas 5-pies share in Mauza Gundhia; that 4-annas 5-pies share and the *taluqdari* property constituted her *zemindari* estate. As their Lordships read the deed, Munni Bibi by it made a gift to Lutf-ullah Khan of "my moveable and immoveable property, all my *zemindari* and *lumbardari* estate, etc," reserving to herself for her life the usufruct of the property now in question, but making it clear that by that reservation of the usufruct she did not reserve to herself any right to transfer by mortgage or sale or gift any part of the property. As their Lordships read the deed, it was intended to be and to operate as an immediate and irrevocable disposition of all Munni Bibi's moveable and immoveable property, and all her *zemindari* and *lambardari* estate mentioned in the deed and in the schedules to it, subject to the reservation for her own use during her lifetime of the usufruct of the property in question here, and it must be construed as a deed of gift and not as a Will.

The reservation of the usufruct did not by itself make the gift of the property now in question void under Muhammadan Law. So far as that is concerned, there is the authority of the Board in *Nawab Umjad Ally Khan* v. *Musammat Mohumdee Begum* (2) for that statement as to Muhammadan Law, although the parties in that case were Shias and not Sunnis. But in the Courts below and in this appeal it has been contended that the deed of the 7th March 1884 is void so far as it purported to be a gift of the property in question, in this suit, on the ground that no possession was actually taken of this particular property and no mutation of names in respect of this particular property was obtained, by Lutf-ullah Khan until Munni Bibi had died in 1906.

That contention has raised a question by no means easy of solution. The solution of that question depends upon what are the facts here and upon what is the rule of Muhammadan Law applicable to those facts. In considering what is the Muhammadan Law on the subject of gifts *inter vivos* their Lordships have to bear in mind that, when the old and admittedly authoritative texts of Muhammadan Law were promulgated, there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land or any *zemindari* estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Muhammadan Law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

For a valid gift *inter vivos* under the Muhammadan Law applicable in this case, three conditions are necessary, which their Lordships consider have been correctly stated thus:—"(*a*) manifestation of the wish to give on the part of the donor; (*b*) the acceptance of the donee, either impliedly or expressly; and (*c*) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively." (Muhammadan Law, by Syed Ameer Ali, 4th Edition, Volume I, page 41). In their Lordships' opinion the whole *zemindari* property mentioned in the deed, and not parts of it only, must, for the purposes of this case, be regarded as one property, the taking possession of any part of it being constructively a taking possession of the whole. The wish of Munni Bibi to give that property to Lutf-ullah Khan and his acceptance of it on the 7th March 1884, are clearly manifest from a perusal of the deed which he received and acted upon The question is, did Lutf-ullah Khan actually or constructively take possession of the

property in question in this suit? That he did not, until Munni Bibi's death in 1903, take physical possession of Mauza Mundia Misir, the 4 annas 5 pies share in Gundhia or the two groves, the house and *sir* land in Jalalpur, or apply for mutation of names in his favour in respect of those particular properties, is admitted. On the execution of the deed of gift in 1884, Lutf-ullah Khan did obtain mutation of names in his favour of all the other *zemindari* property, and from the 7th March 1884, until Munni Bibi died in 1903, he paid the Government revenue which became due in respect of the *taluqdari* part of the property now in question. If Lutf-ullah Khan had received, after the 7th March 1884, and before Munni Bibi died in 1906, any of the rents or profits of the property now in question, he would be held to have received them as a trustee for Munni Bibi although the title to the corpus of the property was in him. In their Lordships' opinion Lutf-ullah Khan must be regarded as having been constructively in possession, although not in physical possession of the corpus of the property now in question from 1884 until 1903, and the gift was a valid gift.

Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs

N. H. *Appeals dismissed.*

Solicitors for Appellants.—Messrs. *Watkins* and *Hunter*.

Solicitors for the Respondents.—Messrs. *Barrow, Rogers* and *Nevill*.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1143 OF 1920.

June 2, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

AMBA PRASAD—PLAINTIFF—APPELLANT

versus

WAHID ULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 82—Mortgagor, rights of, purchased by mortgagees—Redemption.

Where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part, but where the rights of the mortgagors have vested partly in a prior mortgagee and partly in a subsequent mortgagee after a suit has been brought by each of them to enforce his mortgage, the former cannot be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired. In such a case the rights of the parties can be properly safeguarded by applying the principle recognised by section 82 of the Transfer of Property Act and allowing redemption in respect of such rights as have been acquired by each party. [p. 263, cols. 1 & 2.]

Dinanath v *Lachmi Narain*, 25 A. 446; A. W. N. (1903) 152, *Kallan Khan* v. *Mardan Khan*, 28 A. 155; A. W. N. (1905) 215 and *Munshi* v. *Daulat*, 4 A. L. J. 74; 29 A. 262; A. W. N. (1907) 49, followed.

Parasram Singh v. *Pandohi*, 67 Ind. Cas. 433; 20 A. L. J. 401, distinguished.

Second appeal from a decree of District Judge, Agra.

Mr. *B. E. O'Conor*, Dr. *Surendro Nath Sen* and Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for the redemption of a two-thirds share of Katra Gulab Singh situated in Kashmiri Bazar, Agra. The Katra originally belonged to Dhumi Singh who left three sons, Jawala Prasad, Bhawani Shankar and Debi Shankar. On the 28th November 1877 these three brothers mortgaged two stables and a house situated in Katra Gulab Singh in favour of Sukhdeo Rai. The mortgage was simple. On the 6th March 1878 the three brothers mortgaged the said Katra Gulab Singh with other properties with possession in favour of Sheikh Abdullah. On the 30th May 1878 two of them, Bhawani Shanker and Jawala Prasad, mortgaged their two-thirds share of Katra Gulab Singh in favour of Durga Prasad.

On the 15th August 1879 Sukhdeo Rai sued on his mortgage of the 28th November 1877 without impleading Sheikh Abdullah or Durga Prasad and obtained a decree for sale, in execution of which the mortgaged property, namely, two stables and a house in Katra Gulab Singh, was sold by auction and purchased by Sheikh Abdullah, the subsequent usufructuary mortgagee. On the 12th October 1879 Durga Prasad sued on his mortgage of the 30th May 1878 without impleading any of the prior mortgagees and got a decree for sale, in execution of which he brought to sale the two thirds share of his mortgagors in Katra Gulab Singh and purchased it himself.

The present suit has been filed by the plaintiff-appellant, who is the son of Durga

Prasad, for the redemption of the usufructuary mortgage of the 6th March 1875 in respect of that two-thirds share. The defendants are the sons of Sheikh Abdullah. One of them disclaimed any interest in the mortgage; the other defendants pleaded that they had spent a considerable amount in the repairs and improvements of the mortgaged property and that a sum of over a lac and seventy-six thousand was due to them under the mortgage. There were other pleas too, with which this appeal has no concern.

The Court of first instance held that the contesting defendants had spent Rs. 1,000 in repairs, that they were not entitled to claim the cost of any additions or improvements made by them, and that Rs. 8,343 5 4 were due to them on account of a two-thirds share of Katra Gulab Singh purchased by the plaintiff. It decreed the claim accordingly for redemption subject to the payment of the said amount. On appeal the lower Appellate Court allowed to the defendants a right to redeem the mortgage of the 28th November 1877 on the payment of the amount of the decree obtained on foot of that mortgage by Durga Prasad within a certain date, and further directed that if such payment was not made, it shall proceed to determine upon payment of what amount the plaintiff should be allowed to redeem the mortgage held by the defendants. In effect it recognised the right of the defendants, who had purchased two stables and a house in Katra Gulab Singh in satisfaction of the mortgage of the 28th November 1877, to redeem the subsequent mortgage of the 30th May 1878 in preference to the plaintiff who by virtue of his purchase claimed a right to redeem the prior usufructuary mortgage of the 6th March 1878.

No question of preference is, however, really at issue No right of redemption was claimed by the defendants in their written statement or otherwise asserted in the course of the trial. The rights of the original mortgagors have been split up. The defendants have purchased two stables and a house in Katra Gulab Singh in satisfaction of a prior mortgage and they are entitled to retain the same until some person entitled to redeem comes forward to pay the money due on that mortgage. The plaintiff holds the rights of a puisne mortgagee under the mortgage of the 30th May 1878 and has purchased the rights of two of the mortgagors in Katra Gulab Singh in satisfaction of that mortgage. A portion of the rights of the original mortgagors has thus vested in the defendants and another portion in the plaintiff; and the plaintiff cannot be allowed to redeem more than what he has purchased on payment of a proportionate share of the mortgage money any more than the defendants can be allowed to redeem more than what they have purchased on payment of a corresponding part of the mortgage-money.

The claim in the present suit is, however, confined to the redemption of the usufructuary mortgage of the 6th March 1878, and the plaintiff is clearly entitled to a decree for the redemption of that mortgage, so far as it relates to the two-thirds share of his mortgagors, on payment of such proportionate amount as may be found due on that mortgage, including the cost of any repairs, that may have been carried out by the mortgagee, and free from any liability for such improvement as the mortgagee may have made, which were not needed for the protection or preservation of the mortgaged property. The proportionate mortgage money payable on account of such portion of the mortgaged property as has been purchased by the defendants in satisfaction of the prior mortgage, should be determined after excluding the prior mortgage money, computed as laid down in *Mutru Mal* v. *Durga Kunwar* (1) from the value of the said property inclusive of any interest chargeable after decree.

The learned Counsel for the defendants-respondents relies on the decision in *Yad Ali Beg* v. *Tuka Ram* (2), but in that case one of the mortgaged fields had been purchased by a third person before

(1) 55 Ind. Cas. 969; 18 A. L. J. 396; 88 M. L. J. 419; 11 L. W. 529; (1920) M. W. N. 358; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 42 A. 364; 47 I. A. 71; 27 M. L. T. 319; 25 C. W. N. 897 (P. C.).

(2) 57 Ind. Cas. 535; 43 C. 22; (1920) M. W. N. 369; 28 M. L. T. 95; 39 M. L. J. 147; 2 U. P. L. R. (Pat.) 123; 16 N. L. R. 154; 12 L. W. 503; 22 Bom. L. R. 1315; 47 I. A. 207; 25 C. W. N. 124 (P. C.).

the mortgagee had sued to enforce his mortgage. In the present case the rights of the mortgagors had not passed to any third persons on the dates on which the suits on either of the mortgages of Sukhdeo Rai and Durga Prasad were filed. The mortgagors were parties to those suits; and the only effect of not making the prior or subsequent mortgagees parties to them was to leave their rights of sale or redemption unaffected. The father of the plaintiff and that of the defendants subsequently purchased the rights of the mortgagors in certain portions of Katra Gulab Singh in satisfaction of their respective mortgages: and the only manner in which the rights of the parties can now be properly safeguarded is by applying the principle recognised by section 92 of the Transfer of Property Act (IV of 1882) and allowing redemption in respect of such rights as have been acquired by each party subsequent to the above suits. A reference has also been made to the case of *Parasram Singh* v. *Pandohi* (3). In that case one of the parties had sued the mortgagors and obtained a decree for foreclosure without making the subsequent mortgagee a party to the suit, but no rights in the mortgaged property had been acquired by the subsequent mortgagee. Section 60 of the Transfer of Property Act lays down that where a mortgagee has acquired in part the share of the mortgagor, a person interested in the remaining portion of the mortgaged property is entitled to redeem the same on payment of a proportionate part of the mortgage-money. As observed in *Dinanath* v. *Lachmi Narain* (4), *Kallan Khan* v. *Mardan Khan* (5) and *Munshi* v. *Daulat* (6), where the integrity of a mortgage is broken, a mortgagor, who owns a part of the equity of redemption, can redeem his own part, but where the rights of the mortgagors have vested, as in this case, partly in a prior mortgagee and partly in a subsequent mortgagee after a suit had been brought by each of them to enforce his mortgage, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired.

The question of the costs of repairs and improvements claimed by the mortgagee does not present any difficulty. The parties agree that the cost of the repairs should be charged against the mortgaged property in connection with which such costs have been incurred. The mortgagee has no right to claim any cost of the improvements made by him but if he has re built any fallen portion in order to retain the income which was derivable from the same, he can legitimately get the cost thereof and charge the same on the property in connection with which such expense was incurred. In other respects the mortgagee can only claim a right to remove the materials of any improvements which may have been made by him, unless the portions so improved are such as can be allotted to him when a partition takes place, without impairing the rights of the plaintiff. But in no event he can claim the cost thereof from the persons, who have acquired the rights of the mortgagors therein.

The appeal is, therefore, allowed and the suit remanded to the lower Appellate Court with a direction to re admit the appeal under its original number and to dispose of it in accordance with the directions above given. The costs here and hitherto will abide the result.

N. K. *Appeal decreed.*

(3) 67 Ind. Cas 533; 20 A. L. J. 40 .
(4) 25 A. 448; A. W. N. (1903) 15 .
(5) 28 A. 155; A. W. N. (1905) 22
(6) 4 A. L. J. 74; 29 A. 262; A. W. N. (1907) 49.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 527 OF 1921.

March 3, 1922.

Present:—Mr. Justice Broadway.

CHANDAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAHADUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—Vacant site in village—Temporary user, if assertion of ownership.

In the case of a vacant site situated in a village, possession goes with title, and where a person sets up a plea of adverse possession he must prove that this possession has been adverse for a period of at least 12 years. [p. 264, col. 2.]

The mere storage of bricks and wood and the tethering of cattle on such a site would not amount to an assertion of ownership on the part of the person so using the site [p. 265, col. 1]

Framji Cursetji v. *Goculdas Madhowji*, 13 B. 338; 8 Ind. Dec. (N. S.) 703, followed.

CHANDAN v. BAHADUR.

Second appeal from the decree of the District Judge, Karnal, dated the 5th January 1921, reversing that of the Munsif, First Class, Sonepat, dated the 31st July 1919.

Lala *Jagan Nath*, for the Appellants.

Messrs. *N. C. Mehra* and *Shamir Chand*, for the Respondents.

JUDGMENT.—The suit giving rise to this appeal relates to a piece of land situated in Pana Chandan, *Mauza* Hilalpur, Tahsil Sonepat, in the District of Rohtak. The plaintiffs are some of the proprietors of Panna Chandan while the two contesting defendants are proprietors in Pana Resan. These two defendants were Daryao Singh and his brother Mukhtar Singh. Daryao Singh was a *Zaildar* and *Safedposh* and died while the appeal was pending in the Court below. Daryao Singh owned a *baithak* which abutted on a road or lane on the opposite side of which is situated the plot in suit. On the other sides of this plot are houses belonging to the residents of Pana Chandan. The plaintiffs sued for possession of this plot on behalf of themselves and the other proprietors of Pana Chandan alleging that it belonged to them and had been wrongly occupied by Daryao Singh and Mukhtar Singh. These two defendants denied the plaintiffs' title and also asserted that they had been in adverse possession of this plot for a period exceeding 12 years. The Trial Court found that the plaintiffs were the original proprietors of the site in suit, but that the defendants had been in adverse possession of it for more than 12 years. On these findings the suit was dismissed. The plaintiffs thereupon preferred an appeal to the District Judge. The respondents attacked the finding of the Trial Court on the question of proprietorship of the site, and the learned District Judge dealt with this contention first in his judgment and arrived at the same view as that taken by the Trial Court. He then proceeded to deal with the question of adverse possession and, holding that the defendants had failed to prove their assertion, decreed plaintiffs' suit. The defendants have now come up to this Court in second appeal through Mr. Jagan Nath, and I have heard Mr. Nihal Chand Mehra for the plaintiffs. Mr. Jagan Nath contended that the learned District Judge had approached the case from an erroneous point of view and had dealt with the respondents' contention first. There is, however, no force in this, for it is perfectly clear that the learned District Judge had two points on which he had to adjudicate. One was as to the proprietorship of the land and the other was the question of adverse possession. The Trial Court had held that the plaintiffs had proved that they were proprietors. As the then respondents (now appellants) contested the correctness of that finding, and as a finding on that point in their favour would have disposed of the case, the learned District Judge very naturally dealt with that part of the case first.

Mr. Jagan Nath then contended that this case was not governed by the decision reported in *Framji Cursetji* v. *Goculdas Madhowji* (1) as held by the learned District Judge, and urged that it was incumbent on the plaintiffs to show that they had been in actual possession of this plot of land within a period of 12 years prior to suit. The learned Vakil showed me the plan which I have considered, and it seems to me that there can be no doubt at all that the plot in suit is a vacant site. It is not enclosed by walls as alleged by Mr. Jagan Nath, although it is correct to say that on three sides of it, the walls of houses exist, whereas on the other side is a road. The site being thus a vacant one in a village, I consider that possession must be held to go with title and that, therefore, it was incumbent on the defendants-appellants to prove that their possession had been adverse for a period of at least 12 years. Had the learned District Judge definitely stated that he found that the defendants-appellants had not been in adverse possession for 12 years, no further discussion would have been necessary as that would have been a finding on a question of fact. He has, however, expressed himself so as to leave room for argument that he had not arrived at a clear finding on this point, although I must confess that as I read his judgment that is what he intends to hold. Now to establish their adverse possession the defendants had led a mass of evidence to show that they had been using this plot for a very long time. This evidence consists of the testimony of Police and other officials and neighbouring *Zaildars* who say that on occasions when they visited the

(1) 16 B. 238; 8 Ind. Dec. (N. S.) 703.

defendant's village they had put up at the defendants' *baithak* and had seen the defendants' oxen tied on the site in dispute and their own horses had been tethered there. They also say that they have been in the habit of easing themselves there and that latrines had also been placed there, Bricks belonging to the defendants were also found there when the Munsif visited the spot. It appears that a manger had also been erected by the defendants on the site.

Having regard to the fact that Daryao Singh was a *Zamindar* it was only natural that officials and others visiting the village would put up at his *baithak*, and as this open site was situated in front of the *baithak* on the opposite side of the road, it was also natural that the horses and cattle of visitors would be tethered on this site which was obviously a convenient place for that purpose. The proprietors of Pana Chandan would certainly not object to this being done. Mere storage of bricks and wood and tethering cattle on a site of this nature would also not be regarded as objectionable by the proprietors of the land, and such acts of user would not, as pointed out in *Framji Oursetji* v. *Goculdas Madhowji* (1), amount to an assertion of ownership on the part of defendants. In these circumstances, I consider that the case is covered by *Framji Oursetji* v. *Goculdas Madhowji* (1) and that the decision of the learned District Judge is correct.

I accordingly dismiss this appeal with costs.

R. N. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN FIRST APPEAL No. 255 OF 1920.

May 6, 1922.

Present :—Mr. Justice Piggott.

RUP NARAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BISHWA NATH SINGH—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (c), (v) (a)—Suit for cancellation of sale-deed and possession—Suit essentially for recovery of possession - Property in suit assessed to revenue—Valuation for purposes of Court-fee—Decree for possession—Appeal—Court-fee.

The share of the plaintiff in a joint property was sold by his co-sharer without his concurrence. The suit, which he brought, however, instead of being framed as one for recovery of possession pure and simple, asked for the cancellation of the sale-deed as well. The property being *Zamindari* property, the plaintiff valued the suit for purposes of jurisdiction at Rs. 10,000 but paid Court-fee on ten times the Government revenue under section 7 *(v) (a)* of the Court Fees Act which worked out only at Rs 75. The lower Court gave a decree for possession merely and the defendant appealed, also paying Rs 75 as Court-fee. On a stamp reference that the suit as well the appeal should have been assessed under section 7 *(iv) (c)* of the Court Fees Act on the stated value of the property:

Held, (1) that the essential relief sought being recovery of possession, the suit could have been framed for recovery of possession pure and simple; [p. 264, col. 2.]

Dhakeswar Prasad Singh v. *Jioo Chowdhry*, 46 Ind. Cas 385; 3 P. L. J. 448, distinguished.

(2) that it was against the intention of the Legislature that in a suit or appeal where the question in issue is the possession of land assessed to revenue, the valuation of the property for purposes of the court-fee assessment should be otherwise than under section 7 *(v)* of the Court Fees Act; [p. 266, col 2]

(3) that, however, the plaint as worded fell within the purview of section 7 *(iv) (c)* and the plaintiff must pay Court-fee accordingly unless he was permitted to amend either *(a)* the plaint itself or *(b)* the statement of "the amount at which the relief sought is valued" in the said plaintiff at the hearing of the appeal [p. 266, col 2.]

(4) that the position of the appellant was different who was entitled to appeal against the decree as it stood and to value his appeal for purposes of Court-fee under section 7 *(v) (a)* of the Court Fees Act. [p 267, col 1.]

Mr. *Kamalakant Verma*, for the Appellants.

Mr. *Surendra Nath Sen*, for the Respondents.

FACTS appear from the following—

OFFICE REPORT.—The suit giving rise to this appeal was brought for cancellation of a sale deed and possession over the Zamindari property involved in the said sale deed. The suit wes valued at Rs. 10,000, for purposes of jurisdiction but the Court fee was paid on Rs. 1,000 being 10 times the Government Revenue.

In view of a ruling reported in *Dhakeswar Prasad Singh* v. *Jioo Choudhry* (1), which lays down that in a suit for a declaration that the sale was invalid and for restoration of possession the plaintiff must pay an *ad valorem* Court-fee on the value of the whole estate sold and was not entitled to calculate an *ad valorem* fee on 10 times the amount of the Government revenue, the Court fee payable on the plaint of this suit is to be calculated on Rs. 10,000, being the price of the property in dispute, which comes to Rs. 475. Deducting Rs. 75 already paid, there is

(1) 46 Ind. Cas. 385; 3 P. L. J. 448.

a deficiency of Rs. 400 payable by plaintiff-respondent for the Court below.

The Court below decreed the plaintiff's suit subject to payment of Rs. 4,000 by the plaintiff to defendants Nos. 1 to 6. The said defendants appealed to this Hon'ble Court with the prayer that the decree of the Court below be set aside and that the plaintiff's suit dismissed. They valued their appeal at Rs. 10,000 and paid Rs. 75, the same Court-fee as was paid on the plaint. For the reasons stated above, the memorandum of appeal to this Court was deficiently stamped by Rs. 400.

The result is that the deficiency payable by defendants appellants for this Court is Rs. 400 and due from the plaintiff-respondent for the lower Court is Rs. 400.

OBJECTION.—I dispute the correctness of the stamp report. The facts of the case reported in *Dhakeswar Prasad Singh* v. *Jioo Choudhry* (1) are entirely different and that case does not apply to the present case. There it was held by the Patna High Court that the relief for declaration was essential and that the plaintiff could not succeed without the declaration sought for.

In the present case the suit is by a Hindu co parcener for possession of family property (which belonged to him as much as to his father and brother) on the ground that it had been transferred by the father and the brother without legal necessity. Such a suit is essentially a suit for possession. It is settled law that, so far as limitation is concerned, such a suit is governed by the twelve years rule of limitation, and not by the three years rule under Art. 91, or by the six years rule under Art. 120, of the Limitation Act, the reason being that in such a suit the main relief is one for possession and it is not necessary for the plaintiff to obtain a declaration or cancellation of the sale deed, as a condition precedent for getting possession. In the present case itself the suit has been brought about eight years after the execution of the sale-deed. Such a suit, therefore, falls under section 7, clause (v) of the Court Fees Act. The ruling reported in *Dhakeswar Prasad Singh* v. *Jioo Choudhry* (1), therefore, does not apply. But if it be held to apply to a case like the present, then I contend that it does not lay down the law correctly.

JUDGMENT.—The Stamp Reporter has done no more than his duty in bringing this question forward, and the position taken up by him can be supported by strong arguments based upon the actual wording of the relevant clauses of the Court Fees Act. Nevertheless, I cannot escape from the feeling that the line of action suggested does violence to the spirit of the Act. The plaintiff's case is, that property of which he is the joint owner has been sold without his concurrence or authority, and the essential relief sought is recovery of possession upon such terms as the Trial Court may see fit to impose. The suit could have been framed as one for recovery of possession pure and simple; this is made the more apparent by the form of decree actually passed. The case of *Dhakeswar Prasad Singh* v. *Jioo Choudhry* (1) is not really in point. The sale in that case had been held by order of a public officer acting under statutory powers; it conveyed a good title to the purchaser unless it could be set aside on the ground of irregularity or fraud. "The declaratory relief sought was a necessary part of the suit." Here no relief by way of declaration has been granted; the decree passed is one for recovery of possession of property paying annual revenue to Government. It seems to me clearly against the intention of the Legislature that in a suit (or appeal) where the question in issue is the possession of land so assessed to revenue the valuation of the property for purposes of Court fee assessment should be otherwise than under section 7 (*v*) (*a*) or (*b*) of the Court Fees Act.

The difficulty remains that the plaint has been so worded that it falls within the purview of section 7 (*iv*) (*c*). This difficulty is a real one, and I do not think it can be got over unless the plaintiff can be permitted even at this stage to amend either

(*a*) the plaint itself, or

(*b*) the statement of "the amount at which the relief sought is valued" in the said plaint.

I hold, therefore, that, as against the plaintiff, who is the respondent to this appeal, the report must be affirmed. It will remain open to the said plaintiff to move the Bench, hearing the appeal, for leave to amend either the plaint or the valuation as above suggested. I would,

however, warn him that he would do well to present himself at the hearing with the money necessary to make up the reported deficiency in his hand: if he is refused leave to amend, he may be required to make good the deficiency before he is heard on his petition of cross-objections.

The position of the appellants is different. Even on the principle suggested by the Stamp Reporter, the report is unjust to them; for the *ad valorem* fee would require to be calculated on Rs. 10,000, less Rs. 4,000 which the plaintiff has been ordered to pay, *i. e.* on Rs. 6,000. I think, however, that they are entitled to appeal against the decree as it stands and to value their appeal for the purposes of the Court Fees Act, under section 7 (*v*) (*a*) of the said Act. I hold that the memorandum of appeal is sufficiently stamped.

N. H.

Report partly accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No 131 OF 1921.

December 13, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

GANGA DIN—DECREE HOLDER—APPLICANT

versus

DIP SINGH—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Execution proceedings—Execution application, dismissal of, in default—New application filed before dismissal—Proceedings, whether independent—Limitation, plea of, not raised in previous proceeding—Objection, whether entertainable in subsequent proceeding.

Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. [p. 268, col. 1.]

An application for the execution of a decree was made more than three years after the last application for execution. One of the judgment-debtors appeared and raised various objections but did not take any objection about limitation. This application was dismissed for want of prosecution. Before the dismissal of the above-mentioned application, another application for execution was made;

Held, (1) that the present application for execution was substantially an independent proceeding;

(2) that the judgment-debtor, not having raised an objection about limitation in the previous execution proceeding, was precluded from raising the said objection in regard to that execution in the present execution proceeding [p. 268, col 1.]

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C 51: 11 C. L. R. 113: 8 I. A. 12?; 4 Sar. P. C. J. 2?9; 4 Ind. Dec. N. S.) 32 (P. C., *Lakshmanan Chetti* v. *Kuttayan Chetti*, 24 M. 669, *Gauri Shankar* v. *Musammat Lachhmin Kunwar*, 33 Ind. Cas. 663; 18 O. C. 37? and *Sri Ram* v. *Mohan Lal*, 34 Ind. Cas. 280; 19 O. C. 17, followed.

Revision against the order of the Subordinate Judge, Kheri, exercising Small Cause Court Jurisdiction, dated the 30th June 1921.

Mr. *Ram Prasad Varma*, for the Applicant.

Mr. *Raj Narain Shukla*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order, dismissing an application for execution as barred by time. The decree was passed on the 21st February 1911. After some previous attempts at execution an application was made for execution on the 21st August 1917 on which a notice was issued to the judgment-debtors under O. XXI, r. 22, of the Code of Civil Procedure. The judgment debtors were served and one of them appeared and filed an objection on the 8th November 1917, which was disallowed on the 1st December 1917 and an order for the attachment of certain moveables was directed to issue. The decree-holder did not, however, file the requisite process fee and the application for execution was accordingly dismissed for default on the 10th January 1918.

On the 25th November 1920 a fresh application for execution was made by the decree holder, crediting Rs. 10 as having been received from the judgment-debtors. The office reported that the application was barred by time unless the alleged payment saved limitation. A notice was issued to the judgment-debtors under O. XXI, r. 22, of the Code; and after several unsuccessful attempts at service, they were served. One of them, Dip Singh appeared and objected that he had paid Rs. 50 in satisfaction of the decree on the 14th March 918. The Court executing the decree refused to take cognizance of the alleged payment on the ground that it had not been certified within the time allowed by law and directed attachment to issue. The decree-holder did not, how-

ever, prosecute that application further and it was dismissed on the 30th April 1921.

The present application for execution had, meanwhile, been filed on the 27th April 1921, which the Court below has held to be barred by time. With regard to the previous application for execution, made by the decree holder on the 25th November 1920, the Court below observes that it was barred by time, and therefore, a nullity in the eyes of law. But as pointed out by their Lordships of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for such execution has been regularly made by a competent Court, having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. In *Lakshmanan Chetti* v. *Kuttayan Chetti* (2) it was held that a judgment-debtor, to whom a notice of the previous execution was issued was precluded from raising a question of limitation in regard to that execution in a subsequent execution proceeding, if he had omitted to raise that question at the time when the notice of the previous execution was issued to him. In *Gauri Shankar* v. *Musammat Lachhmin Kunwar* (3), and *Sri Ram* v. *Mohan Lal* (4) a similar view was taken.

The learned Counsel, who appears for the opposite party, contends that the present application for execution is virtually a continuation of the previous execution proceeding and that the question of limitation can, therefore, be re-opened. But the present application for execution is substantially an independent proceeding, and the judgment-debtor-objector is precluded from raising an objection, which it was open to him to raise in the course of the previous execution proceeding in his defence. The present application is within time from the date of the issue of the notice on the previous application for execution.

The application is, therefore, allowed and the case remanded to the Court below with a direction to reinstate the execution proceeding under its original number and to dispose of it in the manner provided by law. The decree holder applicant will get his costs from the judgment-debtor objector, who will bear his own costs throughout.

N. H.

Application allowed;
Case remanded.

(1) 8 C. 51; 11 C. L. R. 113 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).
(2) 24 M. 669
(3) 34 Ind Cas 633; 18 O. C. 374.
(4) 34 Ind. Cas. 280; 19 O. C. 17.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 8 OF 1921.
June 22, 1922.

Present :—Mr. Hallifax, A. J. C.

GANGA PRASAD—PLAINTIFF—APPELLANT
versus
MOTIRAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Deed, alteration of—Explanatory alteration immaterial—Deed not vitiated.

A deed is vitiated and deprived of all its effect by the making in it of a material alteration without the knowledge of the party affected by it. But the alteration must be material, the mere addition to a deed of words explaining it, would not vitiate it. [p. 269, col 1.]

Sonajee Mali v. *Uttamchand Bania*, 12 C. P. L. R. 33, *Ganpat Ramkrishna Puri*, 5 Ind. Cas. 425; 6 N. L. R. 1, *Ananda Mohan Saha* v. *Ananda Chandra Saha*, 35 Ind. Cas. 182; 44 C. 154; 25 C. L. J. 155, referred to.

Appeal from a decree of the District Judge, Raipur, in Civil Appeal No. 70 of 1920, dated the 2nd October 1920.

Mr. *P. Gupta*, for the Appellant.

Messrs. *G. P. Dick* and *O. B. Parakh*, for the Respondents.

JUDGMENT.—That the interlineated words and figures in the *ikrarnama* were written after it had been signed by the defendant, Motiram, has to be assented as a fact and undoubtedly is a fact. But that fact does not appear to vitiate the document. In *Sonajee Mali* v. *Uttamchand Bania* (1) and *Ganpat* v. *Ramkrishna Puri* (2) and a number

(1) 12 C. P. L. R. 33.
(2) 5 Ind. Cas. 425; 6 N. L. R. 1.

of other cases it has been held that a document is vitiated and deprived of all its effect by the making in it of a material alteration without the knowledge of the party affected by it. But the alteration has to be material. Here the plaintiff's allegation, which is certainly supported by evidence, is that there was an agreement made before the execution of the *ikrarnama* that the share should be sold for Rs. 2,000 and the *sir* surrendered for Rs. 1,200. There is no finding on this point, but if the allegation is true, the additions to the document do not alter it in the least but merely explain it. The case of *Ananda Mohon Saha* v. *Ananda Chandra Saha* (3) is almost exactly similar. In a mortgage-bond for Rs. 200 the interest was stated as "one rupee per mensem" and the mortgagee added the words "per centum" after the word "rupee." As this was proved to be in fact the agreement between the parties, which had been inaccurately recorded, the High Court awarded interest at one per cent. per mensem, which was two rupees per mensem.

We have then to treat the document as if the additions had not been made. The plaintiff is permitted by proviso (2) of section 92 of the Evidence Act to adduce oral evidence of the oral agreement between himself and Motiram in respect of the apportionment of the Rs. 3,200 between the two transactions. The matter was in issue and there is evidence in respect of it, but it has been left undecided by the lower Appellate Court. All other matters having been settled, the decision of the case rests now entirely on the answer to the question, whether the agreement between the plaintiff and Motiram before the execution of the *ikrarnama* was that Rs. 3,200 should be paid in a lump for both share and *sir*, or that Rs. 2,000 should be paid for one and Rs. 1,200 for the other. In the former case, the suit must be dismissed, and in the latter, the claim must be decreed. The decree of the lower Appellate Court is, therefore, set aside and the case is remanded to that Court for a fresh decision. Costs of this appeal will follow the event.

W. C. A.

Case remanded.

(3) 35 Ind. Cas. 182; 44 C. 154; 25 C. L. J. 155.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No 437 OF 1921.

February 8, 1922.

Present:—Mr. Justice Kumaraswami Sastri.

P. ALBUQUERSQUE AND SONS—PETITIONERS

versus

THE SOUTH INDIAN RAILWAY COMPANY, LIMITED—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Consignment of goods under Risk Note, form H—Contract, if legal—Suit for damages—Onus probandi—*Undue delay, if actionable without proof of its being wilful.*

When goods are consigned under a special Risk-Note form exempting a Railway Company from liability except under certain contingencies, the liability of the Company is not the general liability imposed on common carriers or imposed by section 72 of the Railways Act and the onus of proving the fact necessary to bring the Company within the terms of the contract is on the consignor. [p. 270, col. 1.]

Jhunni Lal v. *Bombay Baroda and Central India Railway Company*, 35 Ind. Cas. 265; 14 A. L. J. 396, *East Indian Railway Company* v. *Nilkanta Roy*, 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95, *East Indian Railway Company* v. *Nathmall Behari Lal*, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321, *Bombay Baroda and Central India Railway Company* v. *Ranchhodlal Chhotalal & Co.*, 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779, referred to.

Sesham Patter v. *L. S. Moss*, 17 M. 445; 6 Ind. Dec. (N. S.) 303, *Choutmull Doogur* v. *Rivers Steam Navigation Co.*, 24 C. 786; 1 C. W. N. 201; 12 Ind. Dec. (N. S.) 1193, *Rivers Steam Navigation Company* v. *Choutmull Doogar*, 26 C. 398; 26 I. A. 1; 3 C. W. N. 145; 13 Ind. Dec. (N. S.) 857 (P. C.), *India General Steam Navigation Co.* v. *Bhagwan Chandra Paul*, 19 Ind. Cas. 245; 40 C. 716; 17 C. L. J. 639; 17 C. W. N. 633, distinguished.

There is nothing illegal in a consignor, in consideration of the reduced rates charged, agreeing to hold the Company liable only on certain specified contingencies. [p. 270, col. 1.]

Delay in the delivery of goods in order to be actionable must be shown to be wilful. It does not follow that because there was delay it was wilful. [p. 270, col. 2.]

Petition under section 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the Subordinate Judge, South Kanara, in Small Cause suit No. 551 of 1920, dated the 13th December 1920.

FACTS appear from the judgment.

Mr. *Manna A. T. Coelho*, for the Petitioners.—The general liability of Railway Company for liability for damages for loss or destruction or deterioration of goods consigned is imposed by section 72 of the Railways Act. The facts relating to the loss are within their special knowledge and the onus lies on them to show that they

are not liable. Section 106 of the Evidence Act applies.

See *Jhunni Lal* v. *Bombay Baroda and Central India Railway Company* (1), *Sesham Fatter* v. *L. S. Moss* (2), *Ghoutmull Doogur* v. *Rivers Steam Navigation Co.* 3), *Rivers Steam Navigation Company* v. *Ghoutmull Doogar* (4), *India General Steam Navigation Co.* v. *Bhagwan Chandra Paul* (5).

There was also an undue delay of 40 days in the carriage of the goods.

Mr. *Visvanatha Sastri*, for the Respondents.—The consignor here agreed to consign the goods under a special Risk Note. The onus is on him to show that the Company are liable under the contract. *East Indian Railway Company* v. *Nilkanta Roy* (6), *East Indian Railway Company* v. *Nathmal Behari Lal* (7), *Bombay Baroda and Central India Railway Company* v. *Ranchhodlal Ohhotalal & Co.* (8).

JUDGMENT.—The goods were consigned under Risk Note, form H, which saves the Railway Company from liability for loss, destruction or deterioration of or damage to the consignment from any cause whatever except for the loss due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, etc.

The liability of the Railway Company is, therefore, not the general liability imposed on common carriers or imposed by section 72 of the Railway Act. Under section 72, the Company was entitled to contract themselves out of the provisions of the Act if the form of the contract was approved by the Governor General in Council and there is nothing illegal in the consignor, in consideration of the reduced rate charged, agreeing to hold the Company liable only on certain specified contingencies.

In such cases the onus of proving the fact necessary to bring the Company within the terms of the contract and the liability imposed by it will be on the consignor. I need only refer to *East Indian Railway Company* v. *Nilkanta Roy* (6), *East Indian Railway Company* v. *Nathmall Behari Lal* (7), *Bombay Baroda and Central India Railway Company* v. *Ranchhodlal Ohhotalal & Co.* (8), *Jhunni Lal* v. *Bombay Baroda and Central India Railway Company* (1) where it was held that the onus lies on the person who alleges that the case fell within the exceptions mentioned in the Risk Note to prove the fact necessary to charge the Company with liability. It has been argued for the petitioner that section 106 of the Evidence Act applies and that as the facts which relate to the loss of the oil can only be in the special knowledge of the Railway Company the onus lies on them. Reference was also made to *Sesham Fatter* v. *L. S. Moss* (2), *Ghoutmull Doogur* v. *Rivers Steam Navigation Company* (3) which was approved by the Privy Council in *Rivers Steam Navigation Company* v. *Ghoutmull Doogar* (4), *India General Steam Navigation Co.* v. *Bhagwan Chandra Paul* (5). These cases did not relate to the carriage of goods by a Railway Company under a special form or Risk Note exempting the Company from liability except in certain specified cases. If in all cases or loss of destruction or deterioration of goods consigned the onus will be on the Company to prove how it came about, the special contract will be useless.

It is also argued that there was undue delay in the carriage of the goods. There was a delay of 40 days between the consignment and delivery. It is not shown that the delay was wilful. The consignment was in March 1919 and the delay may well be due to want of rolling stock. It does not follow that because there was delay it was wilful. As there is no evidence to charge the Company with liability under the terms of the contract the suit was rightly dismissed.

The revision petition fails and is dismissed with costs.

R. N.

Petition dismissed.

(1) 85 Ind. Cas. 265; 14 A. L. J. 396.
(2) 17 M. 445; 6 Ind. Dec. (N. S.) 308.
(3) 24 C. 786; 1 C. W. N. 201; 12 Ind. Dec. (N. S.) 1193.
(4) 26 C. 398; 26 I. A. 1; 3 C. W. N. 145; 13 Ind. Dec. (N. S.) 857 P. C.).
(5) 19 Ind. Cas. 245; 40 C. 716; 17 C. L. J. 639; 17 C. W. N. 683.
(6) 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95.
(7) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.
(8) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779.

CALCUTTA HIGH COURT.

CIVIL RULE No. 839 OF 1920.

July 18, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Richardson.

MAHABIR PRASHAD SINGH—PETITIONER

versus

NOGENDRA NATH MANDAL—DECREE-HOLDER AND ANOTHER—JUDGMENT DEBTOR—OPPOSITE PARTIES.

Mortgage decree for sale—Execution—Claim to mortgaged property, if entertainable—Civil Procedure Code (Act V of 1908), O. XXI, r. 58, applicability of.

It is not open to an Execution Court to entertain and adjudicate upon a claim to property under O. XXI, r. 58 of the Code of Civil Procedure in the course of executing a mortgage-decree which contains a provision that the property in question should be sold. [p. 272, col. 1.]

Deefholts v. *Peters*, 14 C. 631; 7 Ind. Dec. (N. S.) 418, followed.

Rule made against the judgment of the Sub-Judge, First Court, Howrah, in Execution Case No. 111 of 1920.

Babus *Ram Chandra Majumdar* and *Baranasbasi Mukherjee*, for the Petitioner.

Babus *Bepin Behary Ghose* and *Nagendra Nath Ghose*, for the Opposite Party.

JUDGMENT.

SANDERSON, C. J.—This is a Rule granted by my learned brother and myself calling upon the opposite party to show cause why a certain order should not be set aside. The order in question is an order of the 27th of November 1920 made by the learned Subordinate Judge. The facts of this case, which it is necessary for me to state, are as follows: It is alleged in the petition that the petitioner purchased the property in question on the 30th of November 1915 at a sale in execution of a decree for rent and obtained possession through the Court. It is then alleged that the judgment-debtor borrowed money from the decree-holder; and, it now appears that the money was borrowed before the sale of 1915 on a promissory note; and it is also stated that there was an equitable mortgage. The decree-holder obtained his decree on the 17th of January 1917 for the sale of the above mentioned property and for the realization of the money. There was an application for execution in March 1918 and the sale was fixed for the 8th of July 1918. Then a claim was put in by the petitioner—a claim to the properties in question. In the order-sheet of that case appears this passage: "18th June 1918. One Mahabir Prasad Singh prefers claim of the entire properties attached. Register it. Put up on 22nd June next for orders." I need not go through all the orders in the case, but the decree holder appears to have taken no steps, and the result was that the execution case was dismissed for default. It is not clear whether the properties had in fact been attached: I should infer from the previous orders in that execution case that the properties had not been attached, because I find on the 8th of May there was an order directing proclamation of sale to issue. However, in my judgment, it is not material to come to any final decision upon that point in this case. The first execution case having been dismissed, a second execution case was instituted in 1920, and a sale proclamation was issued fixing the sale for the 13th of December 1920. But prior to that the petitioner lodged a petition on the 17th of November 1920. We are informed by the learned Vakil that the petition was lodged under the provisions of O. XXI, r. 58 of the Civil Procedure Code. When the application was heard by the learned Subordinate Judge he declined to entertain the claim and to register it: and his judgment which is very short is as follows: "The execution is of a mortgage decree, and no attachment has been effected; and so no claim is competent. That there was a claim before, which was allowed, does not I think stand in the way; for there might have been attachment in the other execution, treating it as a money decree: *Joy Prokash Singh* v. *Abhoy Kumar Chund* (1) may be cited in support of this view, and so I decline to entertain this claim and decline to register it." The strongest way, it seems to me, the case could be put up for the petitioner is that the learned Subordinate Judge had jurisdiction to adjudicate upon this matter, and he declined to exercise his jurisdiction: and, consequently, we should have power to interfere under section 115 of the Civil Procedure Code. The circumstances of this case, I admit, do seem, to lead to a curious result, looking at them from one point of view. In the first execution case the claimant lodged a claim to this property protest-

(1) 1 C. W. N. 701.

ing against the execution of this decree, and upon such claim being considered by the Court the claimant succeeded and the first execution case was dismissed. Now the decree-holder has again applied for execution of the decree and the Court has declined to entertain the petition of the petitioner.

In my judgment, however, we are bound to discharge this Rule on the authority of the case, *Deefholts* v. *Peters* (2). There the proceedings by way of claim were taken under section 278 of the Code of Civil Procedure which was then in force and which corresponded to O. XXI, r. 58 of the present Code of Civil Procedure. There the learned Judges distinctly held that the procedure under that section was not applicable to a mortgage decree which contained a provision that the property in question should be sold. In this case there is no doubt that the decree was what is called a mortgage-decree, and contained a provision that this property should be sold. Consequently, it was not open to the Execution Court to entertain and adjudicate upon a claim, which was presented by the petitioner under O. XXI, r. 58. The learned Judges in that case said as follows: "We think that proceedings by way of claim are not applicable to a case of this kind. Proceedings by way of claim are applicable only in cases of money-decrees where property of the judgment-debtor has been attached; that is, where some property of the judgment-debtor is attached for the purpose of satisfying any general money claim. In that kind of claim it is clear that there should be some speedy remedy for the purpose of ascertaining whether the property claimed is the property of the judgment-debtor at all; but in a case like this, where the property has been dealt with in a solemn way by the decree of the Court, and has been declared liable to sale under the mortgage, that remedy would not be applicable." Then they proceeded to point out that the petitioner would have other remedies. On the authority of that case, which, to my mind, covers this case, we have no option but to direct that this Rule should be discharged with costs—hearing fee, one gold *mohur*.

RICHARDSON, J.—I agree.

Rule discharged.

B. N.

(2) 14 C. 631; 7 Ind. Dec. (N. S.) 418.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 94 OF 1921.

July 14, 1922.

Present:—Mr. Batten, J. C., and Mr. Hallifax, A. J. C.

BHAGCHAND—PLAINTIFF—APPELLANT

versus

MUSAJI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVI, r. 1 s. 99 Case not closed—Suit adjourned—Parties right of, to summon witness—Discretion of Court—Exclusion of evidence Merits of case not affected—Appellate Court, whether bound to interfere—Evidence believed to be based on hearsay—Court, if can refuse to record.

As long as the hearing of a suit stands adjourned in the ordinary course of trial and so long as the party who wishes to summon witnesses has not closed his case, the Court is bound to summon them. There is nothing in O. XVI, r. 1 of the Civil Procedure Code to show that the adjournment of which a party may take advantage must be granted at his own instance: he can take advantage of the adjournment granted to his adversary. [p 273, col. 2]

Under section 99 of the Civil Procedure Code an Appellate Court is not bound to interfere in appeal unless the exclusion of evidence has affected the merits of the case. [p. 273, col. 2.]

A particular answer, after it is given by a witness, may be ruled out as irrelevant but no Court can say beforehand that the whole of the evidence to be given by the witness is going to be irrelevant, and the Court's belief that the evidence is biassed is not a valid ground for refusing to record it. [p. 274, col. 1.]

Appeal from a decree of the District Judge, Nimar, dated the 30th September 1921, in Civil Suit No. 2 of 1919.

Mr. *M. Gupta*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondent.

JUDGMENT.—The first four grounds of appeal complain that the learned District Judge has improperly excluded evidence which ought to have been admitted. We must, therefore, deal first with these grounds of appeal.

The circumstances leading to the first ground of appeal are as follows. On the 17th February 1921 the following was the order passed in the order-sheet:—

"Parties file lists of witnesses. For evidence of plaintiff, on 14th April 1921. Process fees in three days."

The plaintiff failed to pay his process-fees within three days and paid them on the

14th March. The following is an extract from the order-sheet of the 14th April :—

"Process-fee was paid on 14th March 1921. It should have been paid on 20th February 1921. The only reason given for an adjournment is that the plaintiff is a pauper. I cannot give an adjournment on this ground. Mr. P. C. Lal is not served. He is reported gone on tour. Komalram is reported gone to Seoni,.....Other summons are not returned. .....No adjournment can be given to the plaintiff as process-fees were paid late. For evidence of defendant on 21st July 1921."

Thus though the plaintiff was refused permission to summon his witnesses again for a future date, that is to say, though he was refused an adjournment for that purpose, the hearing of the case was adjourned to the 21st July for the purpose of hearing the evidence of the defendant. R. 1 of O. XVI, First Schedule of the Civil Procedure Code, is as follows :—

"At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents."

It was observed by Bose, A. J. C. in *Moti* v. *Kanhya* (1): "All the High Courts are at one in holding that under section 159 of the old Civil Procedure Code corresponding with O. XVI, r. 1 of the new Code the Court had no discretion in the matter of an application for summonses on witnesses if such application be made before the day of hearing. The hearing may not be concluded on the date fixed and an adjournment may take place in the usual course of the progress of the trial and the Court cannot refuse to allow any of the parties to reap the benefit of such an adjournment in the matter of giving evidence." The law on the subject has been well stated in *Indro Chunder Baboo* v. *Mr. Hamilton Grant Dunlop* (2): "There is nothing whatever in the Code of Civil Procedure which either expressly or impliedly declares that witnesses must necessarily be summoned before the day fixed *for the first hearing* of the suit. If a day, whether it be the first or a subsequent day, is fixed for hearing a case, the Court is not bound (and ordinarily ought not), without very good reason being shown, to adjourn the hearing in order to give a party time to summon or produce his witnesses. Nor, if the case of a party (whether plaintiff or defendant) has been gone into *and closed* is the Court bound (nor ought it ordinarily) to summon further witnesses for him. But as long as the hearing of the suit merely stands adjourned, and so long as the party who wishes to summon witnesses has not closed his case, the Court is bound to summon them." Since the above ruling, the word : "At any time after the suit is instituted" have been added to the provisions of law, as it now stands, which makes the case even clearer. Though the plaintiff was not entitled to ask for an adjournment, he was entitled to take advantage of any adjournment given for other reasons and there is nothing in the rule to show that the adjournment of which he may take advantage must be granted at his own instance. The law, in our opinion, is quite clear, that as an adjournment of the case was ordered and the plaintiff had not closed his case, the Court was bound on being so requested to grant summonses for witnesses named by the plaintiff. The three witnesses whom the plaintiff-appellant wishes so to be summoned are Mr. P. C. Lal and Komalram mentioned in the order-sheet and Govindram who, it is alleged, was one of the witnesses summoned whose summonses have not been returned. The plaintiff is undoubtedly entitled to have summonses issued for Mr. P. C. Lal and for Komalram and is also entitled to have a summons issued for Govindram if it is a fact that Govindram was one of the witnesses for whom summons had been issued,

Under section 99 of the Code we are not bound to interfere in appeal unless the exclusion of evidence has affected the merits of the case. There can be no doubt that Mr. P. C. Lal was an important witness, as that fact appears from the order-sheet of the 5th February 1921, and we are satisfied that both Komalram and Govindram were witnesses whom the plaintiff had good reasons to call,

(1) 4 Ind. Cas. 797; 5 N. L. R. 181.
(2) 9 W. R. 530.

H. D. CHATTERJEE v. L. B. TRIBEDI.

The second ground of appeal complains that the lower Court erred in not allowing the plaintiff's eighth witness Battulal to be examined. The record of the evidence of Battulal shows that after he was asked a very few questions the Judge recorded on the evidence sheet: "This cannot be admitted as evidence," and in the order-sheet the Judge has written as follows:—

"Plaintiff has filed an application requesting that P. W. No. 8 may be examined in full. It is clear that the evidence is based on hearsay, and biassed by the evidence he has heard as an arbitrator, and in any case his evidence could only come in in case the agreement about the rates is not proved. I must, therefore, decline to examine him."

The reasons given by the Judge for refusing to allow the evidence of Battulal to be recorded are unsound. Any particular answer, after it is given, may be ruled out as irrelevant, but no Court can say beforehand that all the evidence not yet taken is going to be irrelevant and the Court's belief that the evidence is biassed is not a valid ground for refusing to record it.

The third and fourth grounds of appeal are to the effect that the lower Court erred in rejecting the certified copies of the final bills and other papers in connection with the defendant's contract with the Government. These copies have been tendered in this Court. The learned Pleader for the respondent does not object to the admission of these documents in evidence. In fact the District Judge did not himself exclude them from consideration, for he refers to some of the copies in paragraph 30 of his judgment, but on the day that the judgment was delivered all these papers which had been filed before the umpire and were brought in before the arbitration proceedings were endorsed "Returned as not proved," and the endorsement was initialled by the District Judge. This appears to have been done from an inadvertence. The order sheet of the 6th April 1920 just before the reference to arbitration shows that the originals of these copies had been produced in Court and that both parties agreed that the copies might be furnished and retained on the record. The copies are certified copies of public documents and the order that they should be returned to the plaintiff as not proved was quite unjustified.

At the request of both parties, instead of calling for evidence to be submitted in this Court under rr. 27 to 29 of O. XLI, we set aside the decree of the lower Court and remand the case for further trial. The District Judge should, subject to the plaintiff's making the necessary payment, summon the three witnesses referred to in the first ground of appeal, provided as regards Govindram that he was one of the witnesses summoned to appear on the 14th April 1921, and to take their evidence so far as that evidence relates to the issues involved in the appeal to this Court. The evidence of Battulal should also be allowed to be taken according to law on the plaintiffs again tendering him as a witness. The documents referred to in the third and fourth grounds of appeal are filed with the documentary evidence in the case, and will be sent to the lower Court. The defendants should be permitted to call evidence in rebuttal of the further evidence now ordered to be admitted in this appeal. Costs will be costs in the suit. The Pleader's fee in this Court will be Rs. 100.

G. R. D. *Order accordingly.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 522 OF 1921.

August 22, 1921.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Cuming.

H. D. CHATTERJEE—PETITIONER

versus

L. B. TRIBEDI—OPPOSITE PARTY.

Calcutta Rent Act (III B. C. of 1920), ss. 15, 18—Standard rent, application for fixing—Order of Rent Controller dismissing application without fixing rent, whether open to revision by President, Improvement Trust Tribunal - Rent Controller, whether Court of Civil Jurisdiction - High Court's power of revision—Government of India Act, 1915, (5 & 6 Geo. V, Ch. 61), s. 107—Application for fixing standard rent, if can be made before expiry of lease.

A Rent Controller is bound to fix the standard rent on an application for that purpose being made to him and to certify it under the provisions of section 15 of the Calcutta Rent Act. If he refuses to do so the High Court has jurisdiction to set aside his order and direct him to fix the standard rent according to law. [p. 276, col. 1.]

H. D. CHATTERJEE v. L. B. TRIBEDI.

The President of the Improvement Trust Tribunal has no jurisdiction under section 18 of the Calcutta Rent Act to revise an order of the Rent Controller refusing to fix standard rent [p. 276, col. 1.]

The Rent Controller is a Court of Civil Jurisdiction [p. 276, col. 1.]

The High Court has the power of revision under its general powers of superintendence over the Rent Controller's Court under section 107 of the Government of India Act. [p. 277, col. 1.]

Bata Kristo Pramanik v. *A. K. Roy*, 65 Ind. Cas. 177; 26 C. W. N. 30, *Gobind Coomar Chowdhry* v. *Kisto Coomar Chowdhry*, 7 W. R. 520, *Nilmoni Singh Deo* v. *Taranath Mukerjee*, 9 C. 295; 12 C. L. R. 361; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547; 4 Ind Dec. (N. S.) 846 (P. C.), *Chaitan Patjosi* v. *Kunja Behari*, 11 Ind. Cas. 207; 15 C. W. N. 863; 38 C. 832; 14 C. L. J. 284, *Kali Dassi* v. *Kanai Lal De*, 64 Ind. Cas. 709; 26 C. W. N. 52, *Administrator-General of Bengal* v. *Land Acquisition Deputy Collector, 24-Pergannahs*, 12 C. W. N. 241, *Krishna Das Roy* v. *Land Acquisition Collector of Pabna*, 13 Ind. Cas. 470; 16 C. W. N. 927; 16 C. L. J. 165, referred to.

There is nothing to prevent the Rent Controller from fixing the standard rent during the currency of a lease. [p. 277, col. 1.]

Rule issued against the order of the Court of the President of the Calcutta Improvement Trust Tribunal, in Revision Case No. 174 of 1921 and of the Court of the Controller of Rents, Calcutta, in Suits Nos. 157 and 591 of 1921.

FACTS appear from the judgment.

Babu *Charu Chandra Biswas*, for the Opposite Party.—I beg to take a preliminary objection to the hearing of the Rule on the ground that this matter cannot be dealt with by this Court in its revisional jurisdiction. The Rent Controller is not a Court of a Civil Jurisdiction.

Babu *Surendra Mohan Mullick*, for the Petitioner.—The facts arising out of this Rule are shortly these. I applied under section 15 of the Calcutta Rent Act for the standardisation of the rent of the premises. The opposite party is the tenant. The Rent Controller held that the existing rent being fair and equitable no standard rent should be fixed. He rejected my application. I then moved the President of the Improvement Tribunal but he too dismissed my application holding that the order was not revisable under section 18 of the Rent Act. Against that order the present Rule is directed. As regards the power of this Court to interfere I submit this Court has ample powers inasmuch as the Rent Controller and the President of the Improvement Tribunal are Civil Courts. Refers to r. 24 framed under section 23 of the Act. *Bata Kristo Pramanik* v. *A. K. Roy* (1). Further, even if it be conceded that you have no power under section 115, Civil Procedure Code, you have unquestionably powers under section 107 of the Government of India Act. Refers to *Gobind Coomar Chowdhry* v. *Kisto Coomar Chowdhry* (2), *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3), *Chaitan Patjosi* v. *Kunja Behari* (4) and *Kali Dassi* v. *Kanai Lal De* (5). Refers to section 72 of the Calcutta Improvement Act. I submit the Rent Controller is bound to fix standard rent under section 15 of the Act, more specially so as he has held that the lease has expired.

Babu *Charu Chandra Biswas* (with him Babu *Monindra Kumar Bose*), for the Opposite Party.—I submit as regards the merits that the finding that the existing rent was fair is sufficient to dispose of the case. The Controller shall fix the standard rent when it considers the existing rent unduly low. Refers to section 15. Further the lease has not expired. Hence no such application is maintainable. They have not applied for certification of standard rent. I submit there having been no decision by the Controller the President was perfectly right in dismissing their application. That order is not revisable.

Babu *Surendra Mohan Mullick* replied in brief.

JUDGMENT.—This was a Rule calling upon the opposite party to show cause why the application (made by the petitioner) under section 18 of the Rent Act for revision of the order of the Rent Controller should not be heard by the President of the Improvement Tribunal; or, in the alternative, why the order of the Rent Controller should not be set aside and such other order passed as to this Court may seem proper.

It appears that the petitioner applied to the Rent Controller for fixing the standard rent of certain premises occupied by the opposite party as tenant. The Rent Controller discussed certain matters in his judgment and was of opinion that the rent paid by the tenant was fair; but he

(1) 65 Ind. Cas. 177; 26 C. W. N. 30.
(2) 7 W. R. 520.
(3) 9 C. 295; 12 C. L. R. 361; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547; 4 Ind. Dec. (N. S.) 846 (P. C.).
(4) 11 Ind. Cas. 207; 15 C. W. N. 863; 38 C. 832; 14 C. L. J. 284.
(5) 64 Ind. Cas. 709; 26 C. W. N. 52.

did not fix the standard rent and dismissed the application. The petitioner then applied to the President of the Tribunal under section 18 of the Rent Act. The learned President held that the order of the Controller could not be regarded as a decision fixing the standard rent of the premises concerned, and that section 18 of the Act did not confer any jurisdiction upon him to revise such an order. The petitioner thereupon obtained this Rule.

As there was no decision by the Rent Controller fixing the standard rent, the learned President was right in holding that he had no jurisdiction under section 18 of the Rent Act to revise the order.

The next question is, whether the order of the Rent Controller should be set aside by us and he should be directed to fix the standard rent.

A preliminary objection has been taken by the opposite party to the hearing of this Rule on the ground that the Rent Controller is not a Court of Civil Jurisdiction, and that even if he is, the High Court has no power of revising his orders.

Now, r. 24 of the Rules framed by the Local Government under section 23 of the Calcutta Rent Act, lays down that in all proceedings before them under the Act, the Controller and the President of the Tribunal shall have all the powers possessed by a Civil Court for the trial of suits, see also r. 4, which says that in making inquiries under the Act, the Controller or the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure, 1908, for the regular trial of suits, the substance only of the evidence being recorded as in unappealable cases.

It is clear, therefore, that the Rent Controller is a Court of Civil Jurisdiction. The same view has been taken in Civil Revision Case No. 322 of 1921 [*Bata Kristo Pramanik* v. *A. K. Roy* (1)].

Then the question is whether the High Court has the power of revising the order of the Rent Controller under section 107 of the Government of India Act.

There is no doubt that under section 15 of the Charter, (now section 107 of the Government of India Act), the High Court has powers of superintendence over all Courts subject to its Appellate Jurisdiction.

The question whether the High Court has the power of revising the orders of Courts (other than Civil Courts) exercising civil jurisdiction, under its general powers of superintendence under section 15 of the Charter, has been considered in several cases in connection with orders of the Collector's Court under Rent Act X of 1859, and under the Land Acquisition Act. One of the earliest cases on the point is *Gobind Coomar Chowdhry* v. *Kisto Coomar Chowdhry* (2), where it was held by the Full Bench that the High Court has the power of revising an order of the Deputy Collector under Act X of 1859. In the case of *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3) it was held by the Judicial Committee that the High Court has power to interfere with the orders of the Collector under Act X of 1859. See also the case of *Chaitan Pateesi* v. *Kunja Behari* (4). Then, again, in proceedings under the Land Acquisition Act it has been held that the order of the Collector when acting judicially is subject to revision by the High Court. See *Administrator-General of Bengal* v. *Land Acquisition Deputy Collector. 24-Pergannahs* (6) and *Krishna Das Roy* v. *Land Acquisition Collector of Pabna* (7).

Under the Calcutta Rent Act, in the recent Civil Revision Case No. 401 of 1921 [*Kali Dassi* v. *Kanai Lal De* (5)] the High Court, Appellate Side, revised an order of the Rent Controller, and in Civil Revision Case No. 322 of 1921 [*Bata Kristo Pramanik* v. *A. K. Roy* (1)] it revised an order of the President of the Tribunal.

It is to be observed that under section 18 of the Rent Act an application against the decision of the Controller fixing the standard rent is to be made to the President of the Tribunal appointed under section 72 of the Calcutta Improvement Act in respect of premises in Calcutta, and such an application in respect of premises outside Calcutta is to be made to the principal Civil Court of original jurisdiction in the district. Such principal Civil Court is certainly within the Appellate Jurisdiction of the High Court. As

(6) 12 C. W. N. 241.

(7) 13 Ind. Cas. 470; 16 C. W. N. 927; 16 C. L. J. 165.

stated above, the President of the Tribunal is also within the Appellate (Revisional) Jurisdiction of this Court.

We are accordingly of opinion that this Court has the power of revision under its general powers of superintendence over the Rent Controller's Court under section 107 of the Government of India Act.

The next question is, whether in the present case the order of the Rent Controller should be revised.

Now, section 15, sub-section (1) lays down that the Controller shall, on application made to him by any landlord or tenant, grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, as the case may be.

The Rent Controller has in the present case gone into the question of rent, and has expressed his opinion that the existing rent is fair, and even in one place of his judgment he has stated that the present rent may be the standard rent of the premises under section 2 (*f*) (*ii*) but he has not fixed the standard rent. If he had fixed the standard rent, the petitioner might have asked the President of the Tribunal to revise the order under section 18 of the Act.

It is contended on behalf of the opposite party that the petitioner applied for *fixing* the standard rent and not for *certifying* the standard rent. But the standard rent cannot be certified unless it is first fixed.

The Rent Controller says that the application does not lie because it was made before the expiry of the lease. We do not see, however, anything to prevent an application being made before the expiry of the lease for fixing the standard rent.

We are of opinion that the Rent Controller was bound to fix the standard rent and certify it under the provisions of section 15 of the Act.

We do not express any opinion on any question as to the merits of the case which must be dealt with by the Rent Controller.

We accordingly set aside the order of the Rent Controller and direct him to fix the standard rent according to law. Costs two gold *mohurs* to abide the result.

We trust the case will be taken up by the Rent Controller as early as possible.

B. N. & N. H. *Rule made absolute.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 758 OF 1920.

October 14, 1921.

Present:—Mr. Justice Shah and Mr. Justice Pratt.

MADHAVRAO MORESHWAR BHANDARKAR—PLAINTIFF—APPELLANT

versus

KRISHNAJI SATURAO RANE AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4—RESPONDENTS.

Khoti Settlement Act (Bom. Act I of 1880), s. 10—"His land", meaning of—Khoti *lands—Occupancy tenant—Unauthorised transfer of part of land—Forfeiture by landlord—Statutes, construction of—Clauses involving forfeiture.*

Where the occupancy tenant of Khoti land transfers a portion thereof without the consent of the landlord the latter is not entitled to take possession of the entire land comprising the tenancy under section 10 of the Khoti Settlement Act. [p. 279, cols. 1 & 2.]

Per *Shah, J.*—In the case of an unauthorised transfer of any part of Khoti land by the occupancy tenant the consequences must be limited to the land transferred and cannot be reasonably extended to the entire holding or to all the lands comprised in the occupancy. For this purpose the smallest unit recognised by the Khoti Settlement Act must be taken, *i. e.*, a Survey Number or a recognised sub-division thereof, as defined by the Bombay Land Revenue Code. [p. 279, col. 1.]

The Courts must construe clauses of forfeiture in Statutes so as to involve the least interference with the existing rights consistently with the plain meaning of the words used by the Legislature. [p. 279, col. 2.]

Per *Pratt, J.*—The phrase "his land" in the penal part of section 10 of the Khoti Settlement Act means the portion of the land in the holding which is purported to be transferred or in which an interest is purported to be transferred. [p 281, col. 2.]

If there is any ambiguity in a Statute, the Courts may adopt that construction which avoids hardship or injustice. [p. 280, col. 2.]

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 60 of 1920, reversing a decree passed by the Second Class Subordinate Judge at Dapoli, in Civil Suit No. 141 of 1918.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *A. G. Desai*, for Respondents Nos. 1, 2 and 4.

JUDGMENT.

SHAH, J.—The question of law that arises in this second appeal relates to the construction of section 10 of Bombay Khoti Settlement Act of 1880 as amended by Bombay Acts VIII of 1912 and IV of 1913.

The facts, which are not in dispute, are these. The plaintiff is the Khot and the

defendants are the occupancy tenants and their transferee. It appears that there are several Survey Numbers referred under six serial numbers in the plaint in which the occupants had a certain share. The interest of the occupants in one of these lands referred to in the plaint as Serial No. 1 was mortgaged by them in January 1914. It appears from the mortgage-bond that they had already mortgaged this property so far back as 1872, and this was a fresh mortgage. We are, however, concerned with the fresh mortgage effected in 1914 after the amending Acts of 1912 and 1913. The Survey Numbers have been described as appertaining to four different Khatas, and it is claimed for the plaintiff that in virtue of the provisions of section 10 of the Khoti Settlement Act, as it stood at the date of this transfer by way of mortgage, all the lands constituting these different Khatas, of which the land, referred to as Serial No. 1 in the plaint, is a part, and in which the defendants as occupants have an interest, are at his disposal, as the transfer was without his consent.

The Trial Court accepted this view and passed a decree in favour of the plaintiff in respect of all the lands constituting the different holdings, of which the land mortgaged forms comparatively a small part.

The Appellate Court, however, did not accept that view, and held that the lands which were at the disposal of the Khot in virtue of the provisions of section 10 were really those lands which formed the subject-matter of the transfer, and accordingly dismissed the plaintiff's suit, except as to land Serial No. 1.

The question that has been argued in this appeal by the Khot is as to whether on a proper construction of section 10 all the holdings, of which Serial No. 1 forms a part are at the disposal of the Khot or only that part of the land which is transferred. The section as amended by Bombay Acts VIII of 1912 and IV of 1913 runs as follows:—

"If the land held by a privileged occupant lapses for failure of heirs or is forfeited on the occupant's failing to pay the rent due in respect thereof, or if any permanent tenant resigns his land or any portion of his land or does any act purporting to transfer his land or any portion thereof or any interest therein without the consent of the Khot (except in the cases provided for in section 9), his land shall be at the disposal of the Khot as Khoti land free of all incumbrances, other than liens or charges created or existing in favour of Government.

"But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector."

I need not quote sections 9 and 10 as they stood prior to the Amending Act of 1912. The effect of these sections prior to 1912 was that, except in certain cases expressly provided for by section 9, the occupancy was not transferable. But no consequence of a transfer of any interest in the occupancy, contrary to the provisions of section 9, was stated in the Act. Among other things by the amendment of 1912 the Legislature provided that any transfer contrary to the provisions of section 9 would involve the consequence that the land would be at the disposal of the Khot free of all encumbrances.

The question to be considered is whether the Legislature intended by the transfer of any part of the land or of any interest therein, only that land was at the disposal of the Khot, or whether all the lands comprised in different Khatas, of which the land wherein in the interest of a sharer is transferred formed a part, were at the disposal of the Khot. It appears that by the Act of 1913 certain alterations were made in sections 9 and 10, as enacted by the Amending Act of 1912. But those alterations were apparently the result of the change in the definition of the word "holding" as given in the Act of 1913. In any case it seems to me that all the alterations made by the Act of 1913 were merely consequential and do not affect the point under consideration. The alteration, with which we are concerned, is the substitution of the word 'his' for 'such' in section 10. The section provides that on the transfer of "his land or any portion thereof or any interest therein" 'his land' shall be at the disposal of the Khot. This means that where the transfer be of any portion of the land or any interest therein, what shall be at the disposal of the Khot is not merely that portion or that interest but the land

itself. But the section gives no indication as to whether it means all lands comprised in the different Khatas of which the particular land forms a part or merely the land, *i. e.*, the particular Survey Number or any recognised sub-division in respect of which there has been a transfer. The section does not state as to what is to be treated as the unit for the purpose of giving effect to the provision that his land shall be at the disposal of the Khot. This provision deprives the occupant of his existing rights in consequence of a transfer of his interest in the land not allowed by law. In the absence of any clear indication to the contrary it seems to me that such a provision should be so construed as to limit the forfeiture to the land, the interest wherein is transferred. There is no indication in the section that all the lands of the occupant are intended to be at the disposal of the Khot even though one of them or only a portion of one land may have been transferred. The second paragraph of the section, so far as it provides that it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot, suggests, if at all, that but for that provision the meaning of the first paragraph as regards the resignation in respect of any land or portion of the land would be that the land resigned and not necessarily the entire holding would be at the disposal of the Khot. The consideration that an occupant cannot resign a part of the entire holding without the consent of the Khot would not, in my opinion, justify the wider construction of the section which the Trial Court accepted in this case as regards the effect of an unauthorised transfer.

However that may be, it seems to me clear that as regards an improper transfer the consequences must be limited to the land transferred and cannot be reasonably extended to the entire holding or to all the lands comprised in the occupancy. For this purpose the smallest unit recognised by the Khoti Settlement Act must be taken, *i. e.*, a Survey Number or a recognised sub-division thereof as defined by the Bombay Land Revenue Code.

The land affected by the transfer in the present case is only Serial No. 1, and that, in my opinion, is the land at the disposal of the Khot under section 10 of the Khoti Settlement Act in consequence of the transfer effected in 1914.

If this reading of the section does not represent the true intention of the Legislature, it seems to me that the section must be amended so as to convey the true meaning. The Courts have to construe such clauses of forfeiture strictly so as to involve the least interference with the existing rights consistently with the plain meaning of the words used by the Legislature.

I would confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

PRATT, J.—Defendants Nos. 1 to 4 and 6 represent four brothers and are permanent tenants in the Khoti village of Ghousari and have four holdings or Khatas which include twenty-eight different Survey Numbers and Pot Numbers in that village.

Survey No. 268, Pot No. 2 is common to the four holdings and each holding comprises a one-fourth share of it.

These defendants mortgaged that Pot Number on the 27th January 1914 to defendant No. 5. This mortgage was not justified by the provisions of section 9 of the Khoti Settlement Act.

The question for decision in this appeal is what penalty attaches under section 10. Are all the lands (all the Survey Numbers and Pot Numbers) in the four holdings at the disposal of the Khot or only the particular Pot Number mortgaged?

The District Judge has held that the Khot is only entitled to the particular Pot Number. The District Judge has based his decision on a consideration of section 10 of the Khoti Settlement Act of 1880 as amended by Bombay Act VIII of 1912 but overlooked the amendment made by Bombay Act IV of 1913. This is a very excusable error, for the Legislative Department of the Government of Bombay have issued no edition of the Khoti Settlement Act since 1904, and no edition of the Bombay Code later than 1909.

It is, therefore, desirable to set forth in parallel columns the section as it stood after the Amending Acts of 1904, 1912, and 1913, and for more convenient study I shall put the clauses in parallel columns:—

1904	1912	1913
If a privileged occupant resign the land or any portion of the land in his holding,	If the land in the holding of a privileged occupant lapses for failure of heirs,	If the land held by a privileged occupant lapses for failure of heirs,
or if any such occupant's land lapse for failure of heirs, or other persons entitled thereto,	or is forfeited on the occupant's failing to pay the rent due in respect thereof,	or is forfeited on the occupant's failing to pay the rent due in respect thereof,
or is forfeited on the occupant's failing to pay the rent due in respect thereof,	or if any occupancy-tenant resigns the land or any portion of the land in his holding	or if any permanent tenant resigns his land or any portion of his land,
	or does any act purporting to transfer such land or any portion thereof or any interest therein without the consent of the Khot except in the cases provided for in section 9),	or does any act purporting to transfer his land or any portion thereof or any interest therein without the consent of the Khot (except in the cases provided for in section 9),
the land so resigned, lapsed or forfeited, shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.	such land shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.	his land shall be at the disposal of the Khot as Khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.
But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot, and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.	But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.	But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the Khot: and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.

In 1904, the penalty attached in cases of resignation, lapse for failure of heirs and forfeiture for non-payment of rent.

In 1912, the penalty was extended to cases of transfer unauthorised by section 9, and this was in consequence of the decision in *Yesa* v. *Sakharam Gopal* (1).

In 1913, the amendments were merely verbal, the phrase "permanent tenant" being substituted for "occupancy tenant" and "his land" for "such land."

Now the case to be considered is one of unauthorised transfer referred to in the fourth clause of the section of 1913. The penalty refers to "his land" and this penalty attaches if "*his land or any portion thereof or any interest therein*" is unauthorisedly transferred.

Literal grammatical construction would lead to the consequence that a transfer of a portion of the land or an interest in that portion would involve all the land held by the permanent tenant being at the disposal of the Khot. But if there is any ambiguity in the language, the Court may adopt that construction which avoids hardship or injustice. For it is a recognized principle that the construction which appears to be the most agreeable to reason and justice should in all cases be presumed to be the true one. The phrase "his land" applies as well to all the land in the holding as to the portion transferred. It is, therefore, ambiguous, and it is more reasonable to construe it as referring to the portion transferred rather than to the whole, for if the Legislature intended to impose the severer penalty, it would have made that clear by the use of some such

(1) 30 B. 290; 7 Bom. L. R. 941.

words as "all his land" or "the whole of the land in his holding"

Cases of lapse for failure of heirs or forfeiture for failure to pay rent necessarily affect the whole holding and need not, therefore, be considered. But the case of resignation may either be of the whole or of a part and, therefore, affords a guide to the intention of the Legislature.

Now in 1904 it was quite clear that resignation of "the land or any portion of the land in his holding" involved a penalty affecting only "*the land so resigned.*"

The Legislature, when inducting a penalty for unauthorised transfer in 1912, could not have intended to enhance the penalty for resignation. So the words "such land" in the penal clause in 1912 and "his land" in the same clause in 1913 must mean the land *or portion of land resigned.* And indeed this must be so, for a resignation of a portion is only effective with the consent of the Khot and, therefore, the very phrase implies that Khot takes back a portion and the permanent tenant continues his permanent tenancy of the remainder. If the word "such" in the penal clause in 1912 includes a portion with reference to resignation, it must also be similarly construed with reference to the clause dealing with unauthorised transfers.

There could be no doubt about this but for the unfortunate phrase in that clause "such land or any portion thereof." This clause follows on the resignation clause where the words are "the land or any portion of the land in his holding." "Such land" should, therefore, refer back to this phrase and include the portion and so the words "or any portion thereof" are redundant and meaningless. If these words are omitted from that clause, all the clauses of the section of the Act of 1912 are harmonious and consistent. It is the unskilful draftsmanship of the section of 1912 that is the cause of the obscurity. And this was not remedied in 1913 when the word "his" was substituted for "such" overlooking the fact that the word 'such' had two different meanings in the fourth clause and in the penal clause of the section of 1912.

It is true that transfer stands on a different footing to resignation. There can be no resignation of a portion without the consent of the Khot. The tenant may cease cultivating a portion but he would still have to pay the rent of the whole tenancy. The resignation is only effective when the Khot accepts the portion surrendered and then there is a proportionate remission of rent presumably under section 23, r. 11 (*b*). The penalty in the case of resignation of a portion is not so much a penalty as a statement of the consequence of the resignation. An authorised transfer is similarly ineffective but it calls for a penalty inasmuch as it introduces a tenant whom the Khot may not like, and who may, by prescription, acquire the right of a permanent tenant and prejudice the Khot's reversionary interest. Can it be said that these considerations induced the Legislature to impose a severer penalty for the unauthorised transfer? or that the effect of limiting the penalty to the portion is to allow the tenant to do indirectly what he cannot do directly by resignation? I think not. In the first place no prescriptive title would be acquired against the Khot unless he accepted rent from the transferee and that would in itself involve consent to the transfer. Nor would the attempted transfer of the portion be equivalent to a resignation of that portion for the tenant would still have to pay the whole rent of his holding.

On the whole my conclusion is that the difficulty is due merely to unskilful draftsmanship. In *Salmon* v. *Duncombe* (2) the Privy Council declined to allow a Statute to be reduced to a nullity by the draftsman's unskilfulness and ignorance of law, and I think we would be justified in refusing to allow the same defect to lead to hardship and injustice. I, therefore, think that the phrase "his land" in the penal part of the section means the portion of the land in the holding which is purported to be transferred or in which an interest is purported to be transferred.

I, therefore, agree that the appeal should be dismissed with costs.

N. H. *Appeal dismissed.*

(2) (1886) 11 App. Cas. 527; 55 L. J. P. C. 69; 55 L. T. 446.

NEHAR BEWA v. KADOR BAKAS MOHAMMED.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 596 OF 1920.

May 15, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

NEHAR BEWA AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

KADOR BAKAS MOHAMMED—DEFENDANT—RESPONDENT.

Evidence—Document relevant as evidence of transaction—Recitals, if and when relevant.

Where a document containing assertions by a person who is alive is admitted in evidence as evidence of a transaction, the recitals in the document do not become part of the evidence unless the person making the assertions is brought before the Court.

Appeal against a decree of the Offisiating Subordinate Judge, Dinajpur, dated the 31st of October 1919, reversing a decree of the Munsif, Thakurgaon, dated the 21st of September 1918.

FACTS appear from the judgment.

Babu *Chunidra Lal Moitra*, for Babu *Girija Prasanna Sanyal*, for the Appellants.—The lower Appellate Court has not come to any definite finding upon the question of title. He has not definitely found whether the property standing in the name of Bhedu belonged to all the brothers including Kanu through whom the plaintiffs claim. The learned Judge below has disposed of the suit by simply relying upon a deed of release said to have been executed by Nanu, a brother of the plaintiffs. The recitals in that dead are no evidence against the plaintiffs.

[MOOKERJEE, J.—Is Nanu alive?]

Yes.

Babu *Jatindra Nath Lahiri*, for the Respondent.—The learned Judge below has in effect come to a finding upon the question of title.

If the case is to go back, your Lordships will give directions for the examination of Nanu as a Court witness. The question of adverse possession by the defendants should also be taken into account.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of possession upon establishment of title. The Court of first instance decreed the suit. Upon appeal that decision has been reversed by the subordinate Judge. We are unable to affirm the decision of the Subordinate Judge as not liable to be successfully challenged in second appeal. There are two points which have been urged against the judgment on behalf of the appellant. In the first place, it has been contended that there is no clear and definite finding upon the question of title. The property stood originally in the name of Bhedu, one of three brothers (Bhedu, Saidu, and Kanu). One side affirmed that although the property stood in the name of Bhedu it was owned by all the three brothers. Another side asserted that Kanu had no interest in the property so that after the death of Bhedu the property, passed to Saidu and after his death to Kalua, the predecessor-in interest of the defendants. Upon this fundamental question of title the lower Appellate Court does not come to any definite finding. In the determination of this question the fact of possession of the property must be taken into account and when the evidence of possession is considered, it must also be borne in mind that Bhedu, Saidu and Kanu were members of a joint family and the question of adverse possession as between co-sharers may consequently have to be taken into consideration.

In the second place, it has been urged against the judgment of the Subordinate Judge that he placed reliance upon recitals in a deed of release executed by Nanu (the son of Kanu and brother of the two plaintiffs) in favour of the defendant. No doubt the fact that Nanu executed a deed of release constitutes a transaction which is relevant for the purpose of investigation of the question in controversy. But the recitals in the document do not become a part of the evidence. They are assertions by a person who is alive and who might have been brought before the Court if either of the parties to the suit had so desired. This distinction is frequently overlooked and when a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein, as relevent evidence.

We are of opinion that in the circumstances of this case the appeal should be allowed, the decree of the Subordinate Judge set aside and the case remanded to him for re-consideration in accordance with law. The Subordinate Judge will take steps to have Nanu examined as a Court witness with

liberty reserved to both sides to cross-examine him if so advised. Costs will abide the result.

R. M. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 266 OF 1921.

December 19, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

BINDESHARI SINGH—DEFENDANT—APPELLANT

versus

AUDESH PRASAD SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Debts—Joint family property—Liability for father's debts—Pious obligation of sons to pay father's debts during his lifetime—Property passed out of family in satisfaction of father's debts—Sons' right to recover back.

Under the Hindu Law, subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father unless the debts are taken for illegal or immoral purpose. There is a pious obligation on the sons to pay such debts. This liability, however, so long as the father is alive is only contingent. [p. 284, col. 1.]

Although where the father is alive the sons may be able to question a debt incurred by their father before the family property is sold in satisfaction of the same, if the property has passed out of the family without any objection having been taken by them or on their behalf, and rights of persons outside the family have sprung up with regard thereto, those rights cannot be defeated by the sons simply questioning the necessity for the debt. They have further to establish that the debt was one for the payment of which there was no existing or contingent obligation on them to discharge: or, in other words, that it was a debt taken for illegal or immoral purposes. [p. 284, col. 2.]

Suraj Bansi Koer v. *Sheo Persad Singh*, 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. ; 3 Suth P. C J. 589; 2 Shome L. R. 242; 2 Ind. Dec (N. S.) 705 (P.C.) and *Nanomi Babuasin* v. *Modhun Mohun*, 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 15; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.), followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. A. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), *Balwant Singh* v. *Aman Singh*, 7 Ind. Cas. 112; 33 A. 7; 7 A. L. J. 852, *Kehri Singh* v. *Chunni Lal*, 9 Ind. Cas. 476; 33 A. 436; 8 A. L. J. 216, *Bharat Singh* v. *Sarsuti Singh*, 60 Ind. Cas. 137; 23 O. C. 244; 7 O. L. J. 459, *Parmeshur Dat* v. *Debi Sahae*, 6 O. C. 101, *Basdeo Lal* v. *Mahabir*, 59 Ind. Cas. 570; 3 O. C. 344; 8 O. L. J. 18; 3 U. P. L. R. (J. C.) 1, *Sheo Shankar Lal* v. *Jaddo Kunwar*, 24 Ind. Cas. 504; 36 A. 83; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.), *Sheo Dayal* v. *Jagat Nath*, 12 Ind. Cas. 111; 8 A. L. J. 922, referred to.

Appeal against a decree of the District Judge, Fyzabad, dated the 30th May 1921, confirming that of the Additional Subordinate Judge, Fyzabad, dated the 31st September 1920.

Messrs. *A. P. Sen* and *N. N. Dutt*, for the Appellant.

Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.—The plaintiffs are the grandsons of Nageshar Singh and seek to impeach a mortgage by conditional sale effected by the latter in favour of Jaimal Prasad, the predecessor-in-title of the defendant, on the 16th December 1892. The mortgage comprised a 10-*biswas* share in *Mahal* Jaimal Prasad, village Mustafabad. The share in question was ancestral property. Nageshar Singh had a son Brahmadeo Singh, who lived jointly with him when the said mortgage was executed. Jaimal Prasad sued Nageshar Singh for foreclosure on foot of that mortgage and obtained a preliminary decree for foreclosure which was made absolute on the 9th May 1898. Brahmadeo Singh was not a party to that suit or decree. In execution of that decree Jaimal Prasad got possession of the mortgaged property on the 15th July 1898.

The plaintiffs are the sons of Brahmadeo Singh and had not till then been born. Nageshar Singh had some other share left in the *mahal* by virtue of which he continued to be the Lambardar thereof. On the 12th June 1901 Jaimal Prasad got the 10-*biswas* share obtained by him by foreclosure partitioned into a separate *mahal*. One of the plaintiffs was born before that partition. The other plaintiff was born later.

On the 24th October 1911 Jaimal Prasad sold a 9-10ths share of the 10 *biswas* share, which had been formed into a separate *mahal*, to Bindeshari Singh and his remaining 1-10th to Brahmadeo Singh, the father of the plaintiffs. Brahmadeo Singh filed no suit to impeach the mortgage made by his father but the plaintiffs now seek to impeach it on the ground that the property

in question was ancestral property and that the mortgage was made without any legal necessity. The defendant pleaded that he was a transferee in good faith for value, that the mortgage was made to pay certain prior debts and for legal necessity with the consent of Brahmadeo Singh, the father of the plaintiffs, and was binding on them and that the claim was barred by limitation.

The Court of first instance found that the mortgage in question had not been proved to have been made for legal necessity or to pay an antecedent debt or with the consent of the father of the plaintiffs that there was no pious obligation on the plaintiffs to pay the debt of their granfather so long as their father was alive, and that the mortgage and the decree for foreclosure were consequently not binding on them. It further found that Jaimal Prasad got actual possession in July 1901, and that by reason of the previous minority of one of the plaintiffs and the existing minority of the other the claim was not barred by time. In regard to the plea of *bona fide* purchase for value, it held that section 41 of the Transfer of Property Act (IV of 1882) was inapplicable. The lower Appellate Court upheld that view

It is well-established that under the Hindu Law, subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of sons for the debts of their father unless the debts are taken for illegal or immoral purpose. There is a pious obligation on the sons to pay such debts. Where the father is alive, the obligation is only contingent, for the father may discharge the same in his lifetime or there may be ample personal estate belonging to the father available out of which the debts might be discharged or no joint family property left from which their satisfaction might be possible. Accordingly, where ancestral property has passed out of the family, either under a conveyance executed by the father in consideration of an antecedant debt, or in order to raise money to pay off an antecedant debt, or under a sale in execution of a decree for the father's debts, the sons by reason of their duty to pay their father's debts cannot recover that property, unless they can show that the debts were of a kind for which they would not have been liable and that the purchasers had notice to that effect. That principle was recognised by their Lordships of the Privy Council in *Suraj Bansi Koer* v. *Sheo Persad Singh* (1) and re-affirmed in *Nanomi Babuasin* v. *Modhun Mohun* (2). In the former case, the father was dead; in the latter case, the father was alive on the date on which the property passed out of the family by sale. In *Sohu Ram Chandra* v. *Bhup Singh* (3) their Lordships of the Privy Council pointed out that the responsibility to meet the father's debts was one thing, and the validity of the mortgage over the joint estate was quite another thing; and after referring to the necessity of protecting the rights of third persons, say the purchasers of the property, who had taken their title for onerous consideration and in good faith, they observed: "A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head." Where the father is alive the sons may be able to question a mortgage made by their father before the property effected is sold or foreclosed in satisfaction of that mortgage; but if the property has passed out of the family without any objection having been taken by them or on their behalf and rights of persons outside the family have sprung up with regard thereto, those rights cannot be defeated by the sons simply questioning the transaction of mortgage. They have further to establish that the debt was one for the payment of which there was no existing or contingent obligation on them to discharge, or, in other words, that it was a debt taken for illegal or immoral purposes.

(1) 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind Dec. (N. S.) 510 (P. C.).

(3) 39 Ind. Cas 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; 1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

The learned Counsel for the plaintiffs respondents urges that it would be open to the sons to show that the debt was not one, which they were bound to discharge, because it was not taken for legal necessity. But as pointed out by Lord Hobhouse in *Nanomi Babuasin* v. *Modhun Mohun* (2), sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt and the question how far the sons can be precluded by the proceedings taken by or against the father alone from disputing that liability. If the debt was of a nature sufficient to support a sale of the entirety, the father might legally have sold it without suit or the creditor might legally procure a sale of it by suit, and all that the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. In *Balwant Singh* v. *Aman Singh* (4) and *Kehri Singh* v. *Chunni Lal* (5), it was held in somewhat similar circumstances that a suit by the great grandson of the original mortgagor to impeach a sale held in execution of a decree obtained on foot of a mortgage would not lie on the ground that he had not been impleaded. In *Bharat Singh* v. *Sarsuti Singh* (6) it was held that where the property has passed out of the family to pay off an antecedent debt either under a conveyance executed by the father or under a sale in execution of a decree for the father's debt, the son could not recover back the property unless he could show that the obligation arising out of the antecedent debt was of a character which he was not *in any contingency* liable to discharge. In *Parmeshur Dat* v. *Debi Sahae* (7) and *Basdeo Lal* v. *Mahabir* (8) a similar view was taken.

It makes no difference in principle whether the property passed out by foreclosure or by sale. In *Sheo Shankar Ram* v. *Jaddo Kunwar* (9) their Lordships of the Privy Council pointed out that there might be occasions, including foreclosure actions, when the mortgagors of a joint Hindu family might so effectively represent all other members of the family that the family as a whole might be bound. In *Sheo Dayal* v. *Jagannath* (10) it was held that a suit by the sons to set aside a decree absolute for foreclosure was not maintainable except on some ground which would relieve them from liability to pay the debt for the satisfaction of which the foreclosure was effected. There is no allegation in this case that the debt in question was taken for illegal or immoral purposes.

The appeal must, therefore, be allowed and the suit of the plaintiffs dismissed with costs here and hitherto.

N. H. *Appeal dismissed.*

(4) 7 Ind. Cas. 112; 33 A. 7; 7 A. L. J. 852.
(5) 9 Ind. Cas. 476; 33 A. 436; 8 A. L. J. 216.
(6) 60 Ind. Cas. 137; 23 O. C. 24[illegible]; 7 O. L. J. 459.
(7) 6 O. C. 101.
(8) 59 Ind. Cas. 570; 23 O. C. 3[illegible]; 8 O. L. J. 18; 3 U. P. L. R. (J. C.) 1.

(9) 24 Ind. Cas. 504; 36 A. 333; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 P. C.
(10) 12 Ind. Cas. 111; 8 A. L. J. 922.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 961 TO 979 OF 1920.

February 24, 1922.

Present :—Mr. Justice Newbould and Mr. Justice Panton.

MOHAMMED HYDER ALI KHAN PANI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MOHAMMED WAJID ALI KHAN PANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Joint possession, suit between co-owners for—Partition suit pending between the parties—Court, if should disturb existing possession—No hard and fast rule—Justice, equity and good conscience.

No hard and fast rule can be laid down for the decision of the question whether a co-owner has the right to joint *khas* possession of the lands which have been exclusively occupied by another co-owner. Each

case must be decided on its merits according to justice, equity and good conscience. [p. 287, col. 1.]

Watson & Co. v. *Ramchund Dutt*, (8 C. 10; 17 I. A. 110; 5 Sar. P. C J. 535; 9 Ind. Dec. (N. S.) 7 (P. C *Lachmeswar Singh* v. *Manowar Hossein*, 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 133; 9 Ind. Dec. (N. S.) 614 P. C.) relied on.

Where during the pendency of a suit for partition one co-owner brings a suit against another for joint possession of certain lands comprised in the joint estate, the Court should be unwilling to disturb the existing possession of the lands during the pendency of the suit for partition between the parties, unless it feels bound to do so for very cogent reasons. [p. 287, col. 1.]

Appeals against the decrees of the Subordinate Judge, Fourth Court, Mymensingh, dated the 20th November 1919, affirming in Nos. 961 to 963 and 978 and 979 and modifying in Nos. 964 to 977 of 1920, decrees of the Munsif, Second Court at Tangail, dated the 31st July 1918.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Monindranath Banerjee*), for the Appellants.—This was a suit by the plaintiffs for the joint possession of certain lands. Both the plaintiffs and defendants are co-sharers. The lands in suit appertain to lands which the defendants Nos. 1 and 2 made *khas*. So the plaintiffs as co sharers are entitled to joint *khas* possession of these lands.

I submit that the learned Subordinate Judge has applied the decisions he has quoted to the facts of the case in a wrong way. Every case must be decided on its own facts and circumstances.

It may be that the defendants are expired by lofty motives in acquiring exclusive possession of these lands as they intend to set up a College and a School. But I submit that your Lordships will not be influenced by such sentimental grounds. We insist on justice at your hands. Joint possession should be given to co-owners against other co-owners who have taken possession of the land from their common *raiyats*. Refers to *Surendra Narain Sinha* v. *Hari Mohan Misser* (1), *Watson & Co.* v. *Ramchand Dutt* (2) and *Lachmeswar Singh* v. *Manowar Hossein* (3) are clearly distinguishable from the facts of the present cases before your Lordships.

Babu *Dwarkanath Chakerbutty* (with him *Maulvi Md. Nur-ul-Haq Chowdhury*), for the Respondents.—I submit as a suit for partition of this estate is now pending the present possession of the lands by defendants should not be disturbed. No very good reasons have been shown why your Lordships should set aside the judgments of the learned Subordinate Judge. The defendants offered to compensate the plaintiffs by granting them the lands. A huge sum has been spent by the defendants for setting up educational institutions on the lands. Apart from any question of law, justice and equity demand that there should be no disturbance of possession at the present stage.

Dr. *D. N. Mitter* replied.

JUDGMENT.—These 19 appeals arise out of the decision of the lower Appellate Court in the same number of appeals heard by him against the decision of the Munsif, Second Court, Tangail. In the First Court there were 19 suits which were tried jointly. Against the decision of these 19 suits 20 appeals were preferred, some by the plaintiff and some by the defendants. In one of these, Suit No. 2751 of 1917, no second appeal has been preferred as the findings of fact in the first appeal relating to that suit are conclusive. All these suits were brought by the plaintiffs against the defendants Nos. 1 and 2 who are their co-sharers for joint possession of certain lands. In 13 of these cases the First Court gave decrees for joint *khas* possession which were reversed by the lower Appellate Court. In the remaining six cases both Courts refused *khas* possession, one of these six being Suit No. 2751 already referred to.

The plaintiffs and defendants Nos. 1 and 2 are co-sharers in estate No. 10 of the Mymensingh Collectorate and the lands to which the suits relate are situated in Mouzah Karatia. The plaintiffs' case is that the lands in suit appertain to lands which the defendants Nos. 1 and 2 made *khas* either by purchase or by inducing the tenants to vacate them, and that the defendants having taken *khas* possession of these lands they are entitled to recover joint *khas* possession in proportion to their share in the estate. The lower Appellate Court has held that on

(1) 33 C. 1201.
(2) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.)
(3) 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 133; 9 Ind. Dec. (N. S.) 614 (P. C.).

the principle laid down by the Privy Council in the cases of *Watson & Co.* v. *Ramchund Dutt* (2) and *Lachmeswar Singh* v. *Manowar Hossein* (3) the plaintiffs are not entitled to *khas* possession. These appeals depend on the principles which apply in deciding whether a co-owner has the right to joint *khas* possession of the lands which have been exclusively occupied by another co-owner. Several cases have been cited in which the leading cases already mentioned above have been referred to and discussed. Before dealing with the other aspects of the cases it should be mentioned that these cases differ from all reported cases in one very material particular, and that is, that there is a suit for partition of this estate now pending between the parties. In that suit the rights of the parties to *khas* possession of different lands will be finally decided and we should be unwilling to disturb the existing possession of the lands during the pendency of this suit, unless we felt bound to do so for very cogent reasons. These we do not find in the present suits. From the decisions of the Privy Council cited above no hard and fast rule can be laid down. Each case must be decided on its merits according to justice, equity and good conscience.

On the facts found in the present cases we are not inclined to hold that the lower Appellate Court was wrong in refusing the plaintiffs' decrees in these suits. It is not necessary to state all the facts, but those which appear to us to have the most bearing on this point are the following. The share of the principal defendants in the lands in suits is 12 annas and odd and the plaintiffs' share is 3 annas and odd. The area of the land in suit is nearly $2\frac{1}{2}$ *khadas* and there are about 60 *khadas* in Mouzah Karatia. Of the lands in suit only $6\frac{3}{4}$ *pakis* would be the plaintiffs' share. The main object for which the defendant No. 1 has taken possession of the land is for founding a new School and College and for this purpose he has already spent about 2/3 lakhs of rupees in improving the land building *pucca* structures on portions of the same. The plaintiffs have been acquiring these lands and building on them since 1313 and some of the buildings were erected about two years before the institution of the suit. A portion of the land in suit has also been included in the defendants' *qari*, a portion having been made into a tank and another portion into an orchard. They have also erected quarters for their Hindu *amlas*. There is another Mouzah Gorai Khamarchhata in the estate No. 10 in which the plaintiffs have 75 29 acres of *khamar* land, while the defendant No. 1 has 1. 82 acres of *khamar* land there, though in this village the plaintiffs' share is 7 annas $1\frac{1}{2}$ pies and defendant No. 1's share is 8 annas $2\frac{1}{2}$ *gandas*. The plaintiffs as proprietors have no *khamar* land in the village Karatia but they have 3 *khadas* of *khas* land in this village and the defendants have offered them other lands in that village to compensate them for $6\frac{3}{4}$ *pakis* which is the plaintiffs' share in the land and of which the defendants have taken possession.

On behalf of the appellants it was not argued that there had been any serious injustice to the plaintiffs. It was contended that they were entitled to insist on their rights and the rights of the parties should not be decided on sentimental consideration. The decision in *Surendra Narain Sinha* v. *Hari Mohan Misser* (1) has been cited. It was argued that the main principle to be followed in this case is that joint *khas* possession, should be given to co-owners against other co-owners who have taken possession of land from *raiyats* who are *raiyats* of all the co-sharers. It is said that this distinguishes the facts of this case from the facts of the two cases which have been decided by the Judicial Committee of the Privy Council. This certainly is an important distinction. But we do not think it sufficient, having regard to all the circumstances of the case, to justify the reversal of the decision of the lower Appellate Court; nor has that rule been always applied for in the case of *Basanta Kumari Dasya* v. *Mohesh Chandra Shaha* (4) a co-sharer defendant had taken possession of land which was formerly occupied by a family of barber who held at a nominal rent and used to do services for both the plaintiffs and the defendants.

Having regard, therefore, to these facts and particularly that the subject-matter of these suits is now under partition and also that on the facts found no serious injustice appears to have been done to the plaintiffs

(4) 21 Ind. Cas. 621; 18 C. W. N. 328.

and there has been no denial of the plaintiff's title and no ouster we think that the suits were rightly dismissed. We accordingly dismiss these appeals with costs.

B. N. *Appeals dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 872 OF 192 .

August 1, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Musammat ADAY ABATI—PLAINTIFF—APPELLANT

versus

JANARDAN THAKUR—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885*)*, *ss.* 60, 72—*Registered proprietor—Rent-suit—Defendant paying rent to transferee under* kabuliyat *for long time whether protected.*

Plaintiff, the registered proprietor, sued the defendant for rent The defendant pleaded payment to transferee from the proprietor. The Courts below found that although the plaintiff was the registered proprietor, his rights had long since been purchased by the transferee to whom the defendant had executed a *kabuliyat* and had been paying rent for a long time. The Courts, thereupon, dismissed the suit, being of opinion that section 60 of the Bengal Tenancy Act had no application to the facts of the case:

Held, (1) that the fact that the plaintiff was a registered proprietor was enough to bring the case within section 60 of the Act and the defendant was not entitled to plead in defence that the rent was due to any third person;

Hardayal Mahton v. *Wazir Mahton*, 41 Ind. Cas. 97; 3 P L. W. 351, *Hira Singh* v. *Lala Keshwar Lal*, 52 Ind. Cas. 523, referred to.

(2) that section 72 of the Act which protected only a tenant to whom the transferee had given notice of the transfer had no application to the case.

Appeal from a decision of the District Judge, Darbhanga, dated the 28 h August 1920, affirming that of the Munsif, Madhubani, dated the 10th May 1920.

Mr. *Ray T. N. Sahay* for Mr. *Ray Guru Saran Prasad*, for the Appellant.

Mr. *P. Dayal* for Mr. *L. K. Jha*, for the Respondent.

JUDGMENT.

COUTTS, J.—This appeal arises out of a suit for rent which was brought by the registered proprietor. The defendant pleaded payment to the transferee from the proprietor. The suit was dismissed in the Court of first instance and on appeal this decision has been upheld, it having been found by the learned District Judge that although the plaintiff is the registered proprietor her rights have been transferred to one Madho Sahu and that the defendant executed a *kabuliyat* in favour of Madho Sahu in 1895 and has since then been paying rent to him. In these circumstances the learned District Judge has found, that section 60 of the Bengal Tenancy Act has no application.

I am unable to understand how this could be so. By section 60 it is enacted that, where rent is due to the proprietor, the receipt of the person registered under the Land Registration Act shall be a sufficient discharge for the rent and that the person liable for the rent shall not be entitled to plead, in defence to a claim by the person so registered, that the rent is due to any third person. In the present instance the plaintiff is the person registered under the Land Registration Act, so that the case comes completely within section 60 of the Bengal Tenancy Act. It is hardly necessary to quote decisions in support of this view, but I may refer to the cases of *Hardayal Mahton* v. *Wazir Mahton* (1) and *Hira Singh* v. *Lala Keshwar Lal* (2).

It has been argued that section 72 of the Act modifies section 60 and protects the defendant. Section 72, however, applies to a case in which a transferee claims rent and it protects the tenant to whom the transferee has given notice of the transfer and has nothing to do with the case now before us. Moreover, there is nothing to show that the transferee has given notice to the tenant of the transfer. In my opinion, the decision of the Courts below is wrong and must be set aside. I would accordingly set aside the decision and decree the plaintiff's suit. In the circumstances of the case, I would pass no order as to costs.

DAS, J.,—I agree.

N. H. *Appeal allowed.*

(1) 41 Ind. Cas. 97; 3 P. L. W. 351.
(2) 52 Ind. Cas. 523.

SHAMRAO *v.* SHRI SITARAM MAHARAJ.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 4-B OF 1921.

August 1 , 1922.

Present:—Mr. Kotwal, A. J. C.

SHAMRAO—DEFENDANT No. 3—APPELLANT

versus

SHRI SITARAM MAHARAJ AND OTHERS—PLAINTIFFS RESPONDENTS.

Hyderabad Assigned Districts Land Revenue Code of 8 6—"*Ante-*jagir *tenant*" *of alienated land, payment by, whether revenue or rent – Charge under s.* 56.

Under section 4 (12 of the Hyderabad Assigned Districts Land Revenue Code an ante-*jagir* tenant of alienated land is an inferior holder and not a tenant and the amount payable by him to the *jagirdar* is not rent as defined in section 4 24) of the Code, but land revenue which, under section 56 of the Code, is a paramount charge on the holding.

Appeal from a decree of the Additional District Judge, Amraoti, dated the 24th August 1920, in Civil Appeal No. 125 of 1919.

Sir *B. K. Bose* and Messrs. *V. Bose* and *P. N. Rudra*, for the Appellant.

Mr. *V. V Ohitale*, for the Respondent.

JUDGMENT —The plaintiff is the *jagirdar* of Kasba Valgaon and sues for arrears of rent of a field for seven years 1911 12 to 1917 18. Defendant No. 1 was the ante-*jagir* tenant of the field. He sold the field to defendant No. 2 in 1911-12 who sold it to defendant No. 3 in 1916-17. Defendant No. 3 is the appellant in this Court. The lower Appellate Court has passed a decree against him for the rent of all the years in dispute on the ground that the amount payable by the ante-*jagir* tenant to the *jagirdar* is revenue and a charge on the holding. This finding is attacked and it is urged that the amount payable by the tenant was rent and not land revenue and that even if it was land revenue it was not a charge on the holding. The holding in suit is admittedly alienated land; section 4 (17), Hyderabad Assigned Districts Land Revenue Code, 1896. Under section 4 (12) the holder is an inferior holder. Being an inferior holder he is not a tenant: section 4 (13). What he pays is, therefore, not rent as defined in section 4 (4) but land revenue as described in the latter part of section 4 (23), since it is rent for land imposed by the Government. The sum payable being land revenue and the ante-*jagir* tenant a land-holder as defined in section 4 (9), it is

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a paramount charge on the holding under section 56.

It is contended that even if the sum claimed is land revenue the *jagirdar* cannot claim a charge under section 56 as that section creates a charge only in respect of land revenue as described in the first part of section 4 (23), that is, a payment due to the Government. It is said that the sections preceding section 56 commencing from section 49 show that section 56 gives a charge in respect of land revenue payable to the Government only. I can see nothing in those sections to justify the contention that section 56 gives no charge in respect of land revenue which is not a payment due to the Government. The section itself refers to an alienated holding such as the one in suit. The provision in the section of a remedy in case of failure in payment, particularly suitable in the case where the land revenue is payable to the Government, does not lead to the conclusion that the right to the charge is confined only to the Government. The decision of the lower Appellate Court is correct. The appeal is dismissed with costs.

W. C. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 16 OF 1921.

July 21, 1921.

Present:—Sir Lancelot Sanderson, KT. Chief Justice, and Mr. Justice Chotzner.

SARADA KRIPA LALA—PETITIONER

versus

HORENDRA KUMAR DAS AND ANOTHER —OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 89, *application under – Execution sale—Private sale by judgment-debtor before confirmation—Purchaser, application by, for setting aside sale on deposit, whether competent.*

A purchaser from a judgment-debtor of his immoveable property after its sale in execution of a decree and before the confirmation of the sale, is not entitled to make a deposit under O. XXI, r. 89, of the Code of Civil Procedure, and to apply to have the sale set aside.

Anantha Lakshmi Ammal v. *Kunnanchankarath Sankaran Nair*, 18 Ind. Cas. 579; 1913) M. W. N. 101; 13 M . T. 123; 24 M. L. J. 205, *Ishar Das* v. *Asaf Ali Khan*, 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19, *Dhanwanti Kuer* v. *Sheo Shankar Lal*, 51 Ind. Cas. 873, 4 P. L. J. 340, referred to,

SARADA KRIPALALA v. HORENDRA KUMAR DAS.

Pandurang Laxman Uphade v. *Govinda Dadu Uphade*, 37 Ind. Cas. 211; 40 B. 557; 18 Bom. L. R. 571, considered.

Dulhin Mothura Koer v. *Bansidhar Singh*, 10 Ind. Cas. 881; 15 C. L. J. 83; 16 C. W. N. 904, cited.

Rule against an order of the Officiating Subordinate Judge, Chittagong.

Babu *Chandra Sekhar Sen*, for the Appellant.

Babu *Kanaidhon Dutt*, for the Respondent.

JUDGMEMT.

SANDERSON, C. J.—This Rule arises out of an order of the Officiating Subordinate Judge of Chittagong, by which he overruled the decision which had been arrived at by the learned Munsif. It appears that the petitioner to this Court had obtained a money-decree against one Romesh Chandra Das and that, in execution of the decree, the property of Romesh Chandra Das was put up to sale by auction. The petitioner, the decree holder, purchased the property at the auction sale, for Rs. 375. Two days after the auction sale the judgment-debtor purported to sell the property by means of a *kabala* to a third party whose name was Harendra Lal Das. Hardendra Lal Das then applied under O. XXI, r. 89, Code of Civil Procedure, for the purpose of making the deposits which are therein specified. The learned Munsif came to the conclusion that Harendra Lal Das was not qualified to make the deposit under O. XXI, r. 89. The learned Munsif held that the private sale was void as against the decree-holder, who was the auction-purchaser and referred to section 64 of the Civil Procedure Code, and he confirmed the sale to the auction-purchaser. The result was that Harendra Lal Das appealed to the Subordinate Judge, who reversed the learned Munsif's order and remanded the case for taking the deposit and making the necessary orders thereon if not otherwise barred. This Rule was issued at the instance of the decree holder calling upon the opposite party to show cause why the order of the learned Subordinate Judge should not be set aside.

The question which has been argued on this Rule is, whether Harendra Lal Das was a person entitled, within the meaning of O. XXI, r. 89, to apply to have the sale set aside upon complying with the terms of that rule.

The learned Vakil who has argued this case in support of the Rule has drawn our attention to several cases, the decisions in which go to show that there is a considerable difference of opinion as to the meaning of the terms of this Rule. As for instance, the case of *Anantha Lakshmi Ammal* v. *Kunnanchankarath Sankaran Nair* (1) of the Madras High Court where the learned Judges took the view that the subsequent purchaser, if I may so call him, (Harendra Lal Das in this case) would be qualified to apply under O. XXI, r. 89; the case of *Ishar Das* v. *Asaf Ali Khan* (2) of the Allahabad High Court, where the learned Judges took a contrary view to that which was taken by the Madras High Court. Again, in the case of *Dhanwanti Kuer* v. *Sheo Shankar Lal* (3) a view contrary to that of the Madras High Court was taken by the learned Judges of the Patna High Court. The last case, to which I need refer to, is the case of *Pandurang Laxman Uphade* v. *Govinda Dada Uphade* (4) of the Bombay High Court. In some of those cases there was a discussion as to the effect of the auction sale, as to whether by reason of the auction sale the judgment debtor was divested of all his interest in the property sold. The High Court at Patna seems to have taken the view that he was: on the other hand, the learned Judges of the Bombay High Court seem to have taken the view that the judgment-debtor was not divested of all his interest in the property by reason of the auction sale, at all events, until it was confirmed. That point was raised during the argument on this Rule but I do not intend to express any opinion upon it, for, I do not think it necessary for the purpose of my judgment. I base my judgment upon what I consider to be the true interpretation of O. XXI, r. 89. So far as it is applicable to the facts of this case the rule runs as follows: "(1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court"—then follow the particular sums to

(1) 18 Ind. Cas. 579; (1913) M. W. N. 101; 13 M. L. T. 128; 24 M. L. J. 205.
(2) 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19.
(3) 51 Ind. Cas. 873; 4 P. L. J. 340.
(4) 37 Ind. Cas. 211; 40 B. 557; 18 Bom. L. R. 571.

be deposited, which are specified in the section.

The view which was taken by the Bombay High Court in *Pandurang Laxman Uphade* v. *Govinda Uphade* (4), as appears from the head-note, was that a judgment-debtor, whose property had been sold at a Court sale in execution of decree against him, had a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of r. 89, O XXI, of the Civil Procedure Code of 1908, in spite of the fact that he had transferred his interest in the property after the Court sale. That is not a decision expressly on the point now under consideration but there are some observations in the judgments, which are applicable. Batchelor, J., at page 561* said: "I am not able to adopt the view that it is open to the subsequent purchaser to apply under this rule, for, as it seems to me, he is excluded by the terms of the rule" and later, on the same page: "For myself I can see no serious difficulty in holding that for the purpose of this rule the judgment-debtor in the position of the present applicant is still the owner of the property in the eye of the law, the auction sale being still unconfirmed;" and Shah, J., at page 563* said: "It seems to me that a person owning the property or holding an interest therein by virtue of a title acquired before the sale is within the rule, provided he owns it or holds an interest therein at the date of the sale by the Court."

In this case I have only to deal with the application by Harendra Lal Das, who purported to purchase the property from the judgment-debtor 2 days after the execution sale by the Court, and before the sale was confirmed and to decide whether he was entitled to make the deposit under O. XXI, r. 89, and to apply to have the sale set aside.

In my judgment, Harendra Lal Das, "the subsequent purchaser" as he has been called, is excluded by the express terms of the rule. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale: his interest, if any, was by virtue of a title acquired after such sale and, consequently, in my judgment, he is precluded by the very terms of the rule from applying under O. XXI, r. 89. That is the only point which I decide upon this application; and, in my judgment, it is sufficient to justify me in holding that this Rule should be made absolute.

It was agreed by the two learned Vakils who argued this case that there is no decision of this Court upon the point. Reference was made to the case of *Dulhin Mothura Koer* v. *Ganesidhar Singh* (5). In that case the point, which is now before us, did not arise and was not dealt with by the learned Judges. For the above-mentioned reasons, in my judgment, this Rule should be made absolute. The result is, that the order of the learned Officiating Subordinate Judge is set aside and the order of the learned Munsif is restored. We make no order as to costs.

CHOTZNER, J.—I agree.

B. N. *Rule made absolute.*

(5) 10 Ind. Cas. 880; 15 C. L. J. 83; 16 C. W. N. 904.

* Pages of 40 B.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 114-B OF 1922.

July 21, 1922.

Present:—Mr. Kotwal, A. J. C.

GOPALRAO AND ANOTHER—APPLICANTS

versus

SHRAWAN AND ANOTHER—NON-APPLICANTS.

Guardians and Wards Act (VIII of 1890), ss. 11, 18, 48—Application for appointment as guardian refused—No appeal—Second application by same person, whether entertainable—Application for appointment as guardian after removal of existing guardian, rejection of—Appeal—Procedure under Act, whether summary—Provisions of Act ignored—Material irregularity.

Where an application for appointment as guardian of a minor is refused, and there is no appeal against the order of refusal, a subsequent application by the same person for a similar purpose, cannot be entertained.

No appeal lies from an order rejecting an application charging a guardian with misappropriation and asking for the appointment of the applicant as guardian, but it is open to the High Court to treat the appeal as an application for revision, under section 48 of the Guardians and Wards Act.

Pran Bandhu Singh v. *Brahmamoyi Dasya*, 1 C. W. N. 693, followed

Proceedings under the Guardians and Wards Act are not intended to be summary, and the procedure of a District Judge in appointing a guardian would

be materially irregular, if he ignored the procedure enacted in sections 11 and 13 of the Act, and failed to consider whether the guardian was by character and capacity a fit person, and whether his appointment was for the welfare of the minor.

Revision against an order of the District Judge, Amraoti, dated the 14th March 1921, in Miscellaneous Case No. 52 of 1919.

Mr. *M. D. Karondekar*, for the Applicants.

Messrs. *C. B. Parakh* and *A. Bhagwant*, for the Non Applicants.

JUDGMENT.—In the petition of Kashibai, the mother-in-law of the minor, Shrawan, the minor's father was mentioned as the only near relative of the minor. Kashibai alleged that he had misappropriated certain property belonging to the minor. The order-sheet of the 23rd June 1919 shows that Shrawan had filed a written reply. This document is not to be found in the record. On the 25th August 1919 the District Judge appointed Kashibai guardian of the property. On the 1st May 1920 Kashibai presented an application alleging that her agent had misappropriated some of the property in her charge and asked the Court to sanction Rs. 300 for expenses of legal proceedings against him. On this application being filed, notice was issued to Shrawan to appear in the District Judge's Court if he was willing to take over the guardianship. On the 2nd August 1920 Shrawan, who was present in Court, was appointed guardian without any inquiry as to his fitness, and was asked to furnish sureties. Before the sureties were accepted Gopalrao, a first cousin of the minor's husband, Anandrao, applied to be appointed guardian. His application was rejected without any inquiry, and the order of appointment of Shrawan was issued on the 29th October 1920. On the 14th March 1921 Gopalrao and Ajabrao, another cousin of Anandrao, filed two separate applications, each praying for his appointment as guardian. Both these applications were rejected by the District Judge for reasons given in the order of the 29th October 1920. Gopalrao and Ajabrao filed an appeal against the order rejecting their applications.

Gopalrao's appeal cannot be entertained. As his application to be appointed guardian was rejected on the 29th October 1920 and he did not appeal therefrom, the second application by him was not entertainable. Ajabrao alleged that Shrawan intended to wrongfully dispose of the minor's property and had already disposed of some, and prayed for his own appointment. There is no express prayer for the removal of Shrawan but it is involved in the prayer for his own appointment. No appeal lies from the order refusing Ajabrao's application: *Pran Bandhu Singh* v. *Brahmamayi Dasya* (1). I, however, take up the matter in revision under section 48, Guardians and Wards Act. The order appointing Shrawan was passed without any inquiry at all into the allegations made against him in Kashibai's petition. We do not know what his reply was, as it is not to be found on the record. In appointing him the District Judge ignored the procedure laid down by the Guardians and Wards Act in sections 11 and 13 and failed to consider whether the guardian was by character and capacity a fit person and whether his appointment was for the welfare of the minor. His procedure was thus materially irregular. The procedure on Ajabrao's application is open to the same objection. Ajabrao had charged Shrawan with misappropriation, which is under section 39 (*a*) a ground for Shrawan's removal from the guardianship. As I have already said, Ajabrao's application was besides being one for his own appointment, in effect, also one for the removal of Shrawan, and the District Judge should have considered it in its latter aspect. It must be remembered, as pointed out in *Sayad Shahu* v. *Hapiza Begam* (2), that proceedings under the Guardians and Wards Act are not intended to be summary. I therefore, remand the case to be tried upon Ajabrao's application treated as one both for the removal of Shrawan under section 39 and for his own appointment. It will be necessary to consider the question of the appointment of Ajabrao only if it is decided to remove Shrawan. Any necessary amendment, formal or otherwise, of the application will be allowed by the District Judge. Costs in this Court will be paid as incurred.

Case remanded.

W. C. A. & N. H

(1) 1 C. W. N. 393.
(2) 17 B. 560; 9 Ind. Dec. (N. S.) 866.

HRIDAY KRISHNA PAL v. RAJANI KANTA PAL.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1922 OF 1920.

May 3, 1922.

Present:—Mr. Justice Ghose.

HRIDAY KRISHNA PAL AND OTHERS —PLAINTIFFS

versus

RAJANI KANTA PAL AND OTHERS DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XLI, r. 27 —Evidence, admission of, in appeal—Jurisdiction.

The power of a Court to admit evidence in appeal is restricted and can be exercised only under the provisions of r. 27 of O. XLI of the Civil Procedure Code. [p. 293, col. 2.]

Kessowji Issur v *G. I. P. Ry, Co.* 31 B. 381 at p. 390; 9 Bom. L. R. 671; 11 C. W. N 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M L. T. 435; 34 I. A. 115 (P. C.), *Gajadhar Prosad* v. *Lohia*, 35 Ind. Cas. 698; 24 C. L. J. 457, relied on.

If an Appellate Court allows fresh evidence to be taken on behalf of a party, it must also allow the other party an opportunity to produce such evidence as they think fit to rebut the additional evidence adduced. [p. 294, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Third Court, Tipperah, dated the 26th April 1920, reversing that of the Munsif, First Court at Chandpur, dated the 31st March 1919.

FACTS appear from the judgment.

Babu *Bepin Chunder Bose*, for the Appellant. —The learned Judge should not have admitted evidence after the arguments in the case had been finished on both sides. And the learned Judge has referred to this inadmissible evidence in his judgment. Reads O. XLI, r. 27 as regards the admission of evidence. I had no opportunity to attack the supplementary evidence adduced by the other side and this vitiates the learned Judge's judgment. Refers to *Kessowji Issur* v. *G. I P. Ry. Co.* (1) and *Gajadhar Prosad* v. *Lohia* (2).

Babu *Prokash Chunder Mozumdar*, for the Respondent.—The question is to whose *jote* this strip of land appertains. The First Court relied on the evidence of the plaintiffs. The plaintiffs have not been prejudiced in any way by the admission of this additional evidence which is nothing but a judgment of the Revenue Court. *Kessowji Issur* v. *G. I. P. Ry Co.* (1) is of a different nature. Reads O. XLI, r. 27, clause (*d*), Civil Procedure Code. Refers to *Hafiz Abdul Kurrim* v. *Sri Kissen Rai* (3) and *Gopal Singh* v. *Jhakri Rai* (4).

The objection raised by the other side is of a purely technical nature and should not be allowed at this stage.

Mr. *Bepin Chunder Bose* was not heard in reply.

JUDGMENT.—This appeal is preferred by the plaintiffs and it arises out of a suit for ejectment. The only objection taken to the judgment of the lower Appellate Court which reverses the judgment of the Trial Court is that the learned Subordinate Judge admitted evidence on behalf of the defendants after the arguments in the appeal had been heard and judgment reserved and based his decision upon that evidence. The objection taken is that the lower Appellate Court had no jurisdiction to admit the evidence complained of under O. XLI, r. 27, Code of Civil Procedure, as it did not come either under clause (*a*) or clause (*b*) of sub rule (1) of r. 27, and that the learned Judge did not record any reason for admitting it as provided by sub-rule (2) of that rule. The order of the learned Judge, dated the 2nd of April 1920, runs thus: "Arguments heard and judgment reserved. Let the document filed by the appellants be kept with the record". On the 26th of April the learned Judge delivered judgment decreeing the appeal preferred to him. It may be observed that there is actually no order, as I gather, by which the lower Appellate Court admitted their document in evidence. While, however, pronouncing judgment, the learned Judge relied upon the document, which, he says in his judgment, is marked Exhibit E. The power of the Court to admit evidence in appeal is restricted, and can be exercised only under the provisions of r. 27 of O. XLI, Code of Civil Procedure, as has been observed by their Lordships of the Privy Council in the case of *Kessowji Issur* v. *G. I. P. Ry Co.* (1). Their Lordships observed referring to section 568 of the Code of

(1) 31 B. 381 at p. 390; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 2 M. L T 435; 34 I. A. 115 (P. C.).
(2) 35 Ind. Cas. 698; 24 C. L. J. 457.
(3) 11 C. 139; 5 Ind. Dec. (N. S.) 851.
(4) 14 C. 37; 6 Ind. Dec. (N. S.) 25.

Civil Procedure of 1882: "The legitimate occasion for section 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in section 623." The appellants also rely upon the case of *Gajadhar Prosad* v. *Lohia* (2), the facts of which are almost the same as in the present case with regard to this question. It does not appear in this case, because nothing has been stated by the learned Subordinate Judge, as to why this evidence was taken in.

It is urged by the learned Vakil for the respondents that this document which purports to be a judgment of the Revenue Court was produced for the purpose of showing that the plaintiffs' evidence with regard to possession was untrue and that, it being a judgment, the plaintiffs could not possibly adduce any evidence in rebuttal of it and, therefore, the fact that this document was admitted and relied on by the Court of Appeal below could not have prejudiced the plaintiffs in any way and that the objection is untenable. It seems to me that where evidence has been admitted in contravention of the provisions of O. XLI, r. 27, Code of Civil Procedure, it is not for the Court of Appeal to see whether the evidence is incontrovertible or beyond doubt but it should only be seen whether it ought to have been taken at that stage or not. Reliance has also been placed on behalf of the respondents on the case of *Hafiz Abdul Kurim* v. *Sri Kishen Rai* (3) and on the case of *Gopal Singh* v. *Jhakri Rai* (4) in support of the proposition that the irregularities complained of on the part of the lower Appellate Court ought not to be considered sufficient for setting aside the judgment. I think, however, having regard to the rule and the procedure followed by the learned Subordinate Judge, that this appeal should be allowed and the case should go back to the lower Appellate Court for a re hearing of the appeal. If the Court thinks at the re-hearing that there is sufficient ground for taking additional evidence it will do so having regard to the provisions of O. XLI, r. 27, Civil Procedure Code, as explained in the cases already referred to. If the lower Appellate Court allows fresh evidence to be taken on behalf of the defendant, it must also allow the plaintiffs an opportunity to produce such evidence as they think fit to rebut the additional evidence adduced by the defendants. It is desirable, in the circumstances of the present case, that the appeal should be re-heard by some other Subordinate Judge than the Judge who heard it previously. Costs will abide the result.

B. N.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 141 OF 1918.

January 24, 1921.

Present:—Mr. Hallifax, A. J. C.

KOLHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mussammat CHOTTIBAI—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption Full operation postponed for two lives—Validity of adoption.

An adoption with a condition that the adopted son shall not get any interest in the property of his adoptive father, till after the death of the survivor of two living persons, is valid.

Appeal from the decree of the District Judge, Hoshangabad, dated the 19th December 1917, in Civil Appeal No. 13 of 1917.

Mr. *S. V. Deshmukh*, for the Appellant.

Messrs *M. Gupta* and *G. L. Galgil*, for the Respondents.

JUDGMENT.—It is hard to find anything to say in respect of this appeal, beyond saying that it must be dismissed. Indeed, the learned Judges of the lower Courts must have found some difficulty in discussing the absolutely futile pleas of the defendants as gravely and as seriously as they did. There is just one point which may be mentioned. It is embodied in the words of the first ground of appeal, but had to be brought to the notice of the learned Counsel for the appellants. He was arguing that any condition of postponement attached to an adoption would be invalid, but the cases, in which a man has made an adoption with a condition that the adopted son shall get no interest in his property during his lifetime and a widow had adopted a son to her deceased husband with reservation of her own life-interest in the property, are innumerable. I

have not, however, come across a case before in which the full operation of the adoption is postponed for two lives, both already in existence. If, however, it can be postponed for one life, there seems no reason why it could not equally be postponed till after the death of the survivor of two living persons. The appeal is dismissed and the appellants must pay all the costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2254 OF 1919.

April 3, 1922.

Present :—Justice Sir John Woodroffe, Kt., and Mr. Justice Ghose.

SARAT CHANDRA DE—DEFENDANT No. 1—APPELLANT

versus

MONORAMA DEBI—PLAINTIFF AND OTHERS *Pro forma* DEFENDANTS—RESPONDENTS.

Landlord and Tenant—Occupancy holding, non-transferable—Sale only of share, if entitles landlord to khas possession—Abandonment—Payment or offer of payment of rent by tenant, effect of.

A sale only of a share of a non-transferable occupancy holding does not entitle the landlord to *khas* possession unless it is shown that there has been an abandonment. [p. 296, col. 2.]

There can be no abandonment of a holding where there has been all along payment or offer of payment of rent by the tenant. [p. 296, cols. 2.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Mymensingh, dated the 10th of July 1919, modifying that of the Munsif, Iswarganj, dated the 12th July 1918.

FACTS appear from the judgment.

Babu *Tarak Chandra Chakarburtty* (with him Babu *Profulla Chandra Chakarburtty*), for the Appellant.—The defendant No. 1 is the appellant I am the purchaser from an occupancy *raiyat*. There was an usufructuary mortgage in 1912 in my favour. The landlord died in 1915. The lands adjoin the house of the landlord I was in possession to the knowledge of the landlord and rent was received by him from 1914-15. The sale in my favour took place on 6th August 1915. It has been found that I consoled the father of the plaintiff. Her father was looking after her. My purchase was consented to by him and he settled the *nazar* at Rs. 85. Upon his assurance the *kobala* was registered. The deed professes to transfer 15 annas of the holding to me. On 2nd June 1914 a Full Bench of this Court had decided that the landlord could not evict if a portion of the occupancy holding is sold and there is no abandonment. This point was entirely missed by the Courts below. I submit my purchase of a share of the holding can thus be explained. Then the landlord refused recognition. In February 1917 there was a partition between myself and my vendor who granted sub lease of his one-anna share on 20th March 1917. The present suit was brought on 11th May 1917. The lower Appellate Court says that these documents are spurious and sham transactions. Conceding that to be true, how does it affect my purchase in 1915. It has been held that there has been no abandonment. Rent for all these years have been paid and deposited in Court. First Court dismissed the suit on these grounds. The Appellate Court says that the sale was of the entire holding, I submit it is not open to the Court to say that in face of the case made out by the parties. Refers to *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (1), *Dayamoyi* v. *Ananda Mohan Roy* (2), *Purna Chandra Trivedi* v. *Chandra Moni Dasi* (3) and *Mohiuddin* v. *Bhagaban Chandra* (4). I am perfectly within my rights to avoid eviction by purchase of a portion of the occupancy holding. Refers to *Bullivant* v. *Attorney-General for Victoria* (5). In that case there were voluntary conveyances to evade payment of duties under the Statute. It was held that there was nothing illegal or improper in that. On the landlord's own showing the entire holding was not sold. Then as to abandonment, both Courts have held that there was no abandonment. I submit the decree is manifestly wrong. Refers to *Monohar Pal* v. *Ananta Moyee Dasya* (6). Then as regards my conduct, plaintiff's father

(1) 20 C. 593; 10 Ind. Dec. (N. s.) 399.

(2) 27 Ind. Cas. 61; 18 C. W. N. 971; 42 C. 172; 20 C. L. J. 52.

(3) 33 Ind. Cas. 49; 20 C. W. N. 556; 23 C. L. J. 304.

(4) 61 Ind. Cas. 443; 33 C. L. J. 285; 25 C. W. N. 29; 48 C. 605 F. B.

(5) (1901) App. Cas. 196; 70 L. J. K. B. 645; 84 L. T. 737; 50 W. R. 1; 17 T. L. R. 457.

(6) 20 Ind. Cas. 198; 17 C. W. N. 802 at p. 804.

was a co-executor to the Will of the plaintiff's husband. He consented to my purchase, he settled the *selami* and in fact everything was done to his knowledge. Refers to *Ahmad Yar Khan* v. *Secretary of State for India in Council* (7), *Municipal Corporation of Bombay* v. *Secretary of State* (8) I submit the plaintiff is bound by the conduct of the co-executor, her father.

Babu *Birendra Kumar De*, for the Respondent. The finding is that there has been no abandonment within the meaning of section 87 of the Bengal Tenancy Act. It has been found also that the money belonged to the purchaser but it was offered through the vendor. There is the finding which they cannot go behind, that the entire holding was sold. The mere mention of 15-annas in the document was a mere device. Plaintiff as landlord can show that it is a mere device.

[GHOSE, J.—But the device is supported by law.

Here the finding is conclusive that 16-annas was sold.

GHOSE, J.—Can you add to the terms of a document of sale?]

Refers to section 92 of the Indian Evidence Act. That does not affect the plaintiff at all. The purchaser is in possession of the entire holding and the original tenants have left living on the land and has left the village. Therefore, the landlord is admittedly entitled to *khas* possession according to the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (2). Therefore, the question of abandonment has no importance at all. Section 87 of the Bengal Tenancy Act is not exhaustive as to the methods of abandonment. Refers to *Matookdhari Shukul* v. *Jugdip Narain Singh* (9) as regards consent by plaintiff's father, the question could not arise if the sale be of 15 annas.

Babu *Tarak Chandra Chakraburtty* replied in brief.

JUDGMENT.—In this case there is both an appeal and a cross-objection. The First Court dismissed the suit and the Subordinate Judge decreed the suit in part, that is, as against the defendant who was described as principal defendant No. 1 and dismissed the suit as against the rest. Against this dismissal against the rest of the defendants the cross objection is directed. The question to be decided in this appeal is whether there was or was not a sale of the entire holding. If there was a sale of the entire holding then there is no question as to the landlord's right to *khas* possession. That is the decision which has been adopted by the Subordinate Judge.

It has been contended before us that we are bound by his finding on this question as being one of fact. We do not think in the circumstances of this case that it can be considered as a finding only of fact. The document which conveyed the property conveyed only 15 annas of it. In my opinion the Subordinate Judge was in error in holding that there had been a sale of the whole holding. There was in fact, as the document shows, a sale only of a share of the holding. That being so, there being a sale of a share of the holding the landlord was not entitled to *khas* possession unless it was shown that there had been an abandonment. As regards this the learned Subordinate Judge's finding is hardly consistent with some other part of his judgment. He found that there had been no abandonment of the holding. Nor can it be said that there has been an abandonment of the holding in the face of the fact that there has been all along payment or offer of payment of rent by the tenant. This disposes of the appeal.

As regards the cross-objection, it depends upon the decision we come to in the appeal and having regard to our decision in the appeal it must necessarily fail.

We, therefore, decree the appeal and dismiss the cross objection. The appeal will be decreed with costs. As no extra time was taken by the discussion of the cross-objection there will be no order as to costs in the cross-objection.

B. M.

Appeal dismissed.

(7) 28 C. 692; 28 I. A. 211; 5 C. W. N. 634; 3 Bom. L. R. 505; 8 Sar P. C. J 39 (P. C.).

(8) 29 B. 580; 7 Bom. L. R 27

(9) 28 Ind. Cas. 348; 19 C. W. N. 1819; 21 C. L. J. 261.

KISHEN CHAND v. BEHARI MAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1281 OF 1916.

June 4, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

KISHEN CHAND AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

BEHARI MAL AND OTHERS— DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Partial partition—Presumption—Onus of proof.

Where a partial partition of the property of a joint Hindu family is admitted, the presumption is that there was a complete partition embracing the whole of the family property: where, therefore, it is subsequently alleged that some property is still undivided, the proof of such allegation rests upon the person making it.

Narayan Babaji v *Nana Manohar*, 7 B. H. C. R. (A. C. J.) 153, *Bhola Devi* v. *Mohkam Chand*, 48 Ind. Cas. 784; 121 P. R. 1918, relied on.

Second appeal from a decree of the Additional District Judge, Amirtsar at Gurdaspur, dated the 12th January 1916, reversing that of the Subordinate Judge, Second Class, Amritsar, dated the 28th July 1914.

Messrs. *D. C. Ralli* and *Mehr Chand* and Mr. *N. C. Mehra* for Hon'ble Bakhshi *Sohan Lal*, K. B., for the Appellants.

Bakhshi *Tek Chand*, for Jiwan Lal, Respondent.

JUDGMENT.—This is a second appeal from the order of the Additional Judge, Amritsar, dismissing plaintiff's suit for possession, by partition, of one fourth of certain shops situated at Amritsar and also for a share in certain sums of money. The point on which the decision of the suit mainly depended was whether there had been a partition of the family property between the plaintiffs on the one hand and their uncle Jiwan Mal and their brothers Hazarimal and Mangal Das on the other. The plaintiffs in their plaint admitted that a part of the family property had already been divided but alleged that the property of which they now claimed a share had not been divided.

The First Court decreed the claim, holding that there had been no complete partition of the family property. The lower Appellate Court held that, as the plaintiffs had admitted a partial partition, the onus of proving that there was not a complete partition lay upon them and that they had not discharged it. It, therefore, set aside the order of the Trial Court and dismissed the suit. The plaintiffs have filed a second appeal in this Court and it is argued on their behalf by Mr. Ralli, Advocate, that the onus is really upon the defendants to show that the partition was a complete one. Mr. Ralli admits that he can show no direct authority in support of the proposition that when a partial partition of the property of a joint Hindu family is admitted, the onus is on the party alleging a complete partition to prove it. On the contrary there is ample authority against this proposition. In Mayne's Hindu Law, 8th Edition, at page 689 we find the following: "Where there has been a partition at all, the presumption is that it was a complete one and that it embraced the whole of the family property. Therefore, if property is afterwards found in the exclusive possession of one member of the family, and it is alleged that such property is still undivided and divisible the proof of such an allegation rests upon the party making it." Similarly in the Hindu Code by Gour at page 700 we find Art. 148 laying down that every partition is presumed to be complete both as to the person and the property. This view was taken so long ago as 1870 by the Bombay High Court in the case reported as *Narayan Babaji* v. *Nana Manohar* (1). The same view was taken in *Bhola Devi* v. *Mohkam Chand* (2). We, therefore, have no difficulty in agreeing with the learned District Judge that the *onus* lay upon the plaintiffs to prove that the partition was not a complete one. He says that the plaintiffs have produced no evidence whatever to prove this; and Mr. Ralli has been unable to refer us to any evidence on the record of the present case in support of it. He has referred to two suits brought by Jiwan Mal and Hazari Mal in 1911 which were mentioned by the Trial Court, but we do not think that these suits show in any way that the original partition was not a complete one. He has also referred to a copy of an entry in Jiwan Mal's *bahi* which is on the record of one of these cases which refers to a partition of certain debts and ornaments and states that the property at Amritsar is still joint. The document has not been proved by any evidence in the present case and we note that

(1) 7 B. H. C. R. (A. C. J.) 153.
(2) 48 Ind. Cas. 784; 121 P. R. 1918.

it is written in Persian characters by one Vir Bhan, and though Jiwan Mal signed in Hindi he stated that he did not know that any mention had been made of the property at Amritsar until afterwards and that this had been fraudulently entered by Vir Bhan. There is no proof that Jiwan Mal got this entry made, and plaintiffs in their replication said they knew nothing about this entry and did not rely upon it. The lower Appellate Court is perfectly correct in our opinion in stating that there is no evidence on the record to prove that the partition was not a complete one.

We accordingly dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1541 OF 1920.

March 15, 1922.

Present:—Mr. Justice Newbould.

BROJENDRA KISHORE ROY CHOWDHURY—PLAINTIFF—APPELLANT

versus

Sheikh SOMAR ALI—DEFENDANT—RESPONDENT.

Res judicata—*Rent-decree—Rate of rent—Presumption arising from entry in the Record of Rights, rebuttal of.*

A rent-decree may not be *res judicata* in the sense that it finally decided the rate of rent between the parties but it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. Hence the decision may be sufficient to support a finding that the presumption arising from an entry of a different rate of rent in the Record of Rights has been rebutted. [p. 299, col. 1.]

Appeal against a decree of the Subordinate Judge, Fourth Court, Mymensingh, dated the 12th March 1920, affirming that of the Munsif, Second Court at Netrokona, dated the 12th August 1919.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Ramani Mohan Chatterjee*), for the Appellant.—The only question involved in this case is about the rental of the tenancy. I submit that the decision of the learned Settlement Officer is not *res judicata*. Under section 11 of the Civil Procedure Code it cannot be held to operate as *res judicata*. There was, as a matter of fact, no decision. The Judge did not purport to pass a decree on decision of the point. It was a judgment on admission. The learned Judge in the Appellate Court is wrong in thinking that section 105 case considered only the excess. Reads section 105, Bengal Tenancy Act, and also sections 105 A 106, 107, Bengal Tenancy Act. The decision of the Settlement Officer in section 105 proceeding as to rent is final. The Court is in error when it treats this as presumptive evidence. The question cannot be re opened after the final decision by the Settlement Officer.

Babu *Profulla Chandra Chakrabarti*, for the Respondent.—Section 105 case was limited to excess of area only, the whole rental was not the subject-matter of the suit. My friend must bring forward the decision in section 105 case. I submit that the presumption arising from the entry in the Record of Rights has been amply rebutted.

Dr. *Sarat Chandra Basak* in reply—I rely on section 107, Bengal Tenancy Act, and not on section 11, Civil Procedure Code. When the Revenue Officer adopted in his judgment the entry in the Record of Rights that decision is final and conclusive between parties under section 107, Bengal Tenancy Act. And that rent cannot be varied by saying that the rent was so much in previous years. The previous judgment can have no operation in view of the decision in section 105 case.

JUDGMENT.—This appeal arises out of a rent suit and the only question in dispute is the amount of rent payable. The plaintiff relies on a decision in a case under section 105 of the Bengal Tenancy Act. The defendant relies on a decision in a suit for rent for the years previous to those for which rent is claimed in the present suit.

The appellant has taken back from the file of the lower Court the judgment delivered in section 105 case. Consequently I have before me only the statement by the lower Court of the purport of that judgment. From that it appears that in that case the only point which the Revenue

Officer had to consider was what additional rent was to be allowed for the excess area. If that was the only point decided it is of no help to the appellant that the rent of the original area was recorded at the conclusion of that case at the same amount as it had been recorded in the *khatian*. The lower Courts have held that the presumption arising from the entry in the *khatian* was rebutted by the decree in the previous rent-suit in which the rate of rent was held to be that admitted by the defendant. It is contended that the lower Appellate Court was wrong in holding that the decree operated as *res judicata*. It may not be *res judicata* in the sense that it finally decided the rate of rent between the parties. But it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. That decision is sufficient to support the finding that the presumption arising from the entry in the Record of Rights has been rebutted.

I accordingly dismiss the appeal with costs.

B. N.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1583 OF 1916.

June 28, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

NAND SINGH—DEFENDANT—APPELLANT

versus

Musammat DHAN KAUR, LEGAL REPRESENTATIVE OF GURBAKSH SINGH, DECEASED, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Widow, act of, prejudicing estate—Creation of occupancy rights—Reversioner, position of—Adverse possession against widow—Reversioner, whether affected.

An act of a widow prejudicing the estate of her deceased husband is not binding on the reversioners except for the life of the widow, and the reversioners are not bound to contest the widow's act during her lifetime. [p. 300, col. 2.]

The creation of occupancy rights by a widow, being a transfer of valuable rights, can be challenged by the reversioner [p. 300, col. 2.]

Although possession may be adverse against a widow, it is not adverse against a reversioner during her lifetime. [p. 300, col. 2.]

Second appeal from a decree of the District Judge, Ludhiana, dated the 4th April 1916, affirming that of the Subordinate Judge Second Class, Ludhiana, dated the 23rd October 1915.

Mr. *Kanwar Narain*, for Sardar *Sewa Ram Singh*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The brief facts of the case out of which the present second appeal arises are as follows: Budh Singh, the proprietor of the land in suit died a great many years ago, it is said before 1872, leaving two widows, *Musammat* Chand Kaur and *Musammat* Nand Kaur, the last of whom, *Musammat* Nand Kaur, died in 1912 Sawan Singh was the occupancy tenant of the land. He died on the 22nd May 1892. On the 14th October 1890 Sawan Singh executed a deed of adoption in which he recited that he had brought up Nand Singh and had treated him as his son and that Nand Singh should be heir after his death. After Sawan Singh's death mutation of his occupancy rights was sanctioned in favour of Nand Singh on the 20th March 1893. Sawan Singh's collaterals objected to the mutation and were referred to a civil suit. In 1907 they instituted a suit which was dismissed on the ground that the common ancestor of themselves and of Sawan Singh was not proved to have occupied the land. After the death of *Musammat* Nand Kaur the present plaintiffs, as reversioners of Budh Singh, sued for possession of the land. The Courts below have held (1) that Nand Singh was appointed an heir according to custom by Sawan Singh and that this customary adoption, according to Hindu Law, did not give him any right to succeed to Sawan Singh's occupancy rights; and (2) that the plaintiffs' suit having been brought within twelve years

of the death of the *Musammat* Nand Kaur, the widow of the last male proprietor, is within time.

The first point urged by Mr. Kanwar Narain in arguing the case on behalf of Nand Singh, appellant, is that the most important question in the case was whether the adoption of Nand Singh was a formal one according to Hindu Law or merely the customary appointment of an heir. He urges that the plaintiffs admitted the adoption and that, therefore, his client's Counsel in the Trial Court closed the evidence on the point. He says that the Trial Court presumed that only a customary adoption was alleged. We have examined the pleas of Nand Singh, and we find that there was no plea by him that his adoption was a formal one according to Hindu Law. The parties are Jats of Ludhiana District and, therefore, the *prima facie* presumption is that Nand Singh was merely appointed an heir according to custom. In a subsequent oral statement Nand Singh said that he did not know whether his adoption was a customary one or a formal one according to Hindu Law, but he admitted that in matters of inheritance he followed custom and not the Hindu Law. We think that, under all the circumstances of the case it was incumbent upon Nand Singh, if he relied upon a formal adoption, clearly to allege that such had taken place. We have no doubt that there was no intention whatever on the part of Nand Singh to allege a formal adoption, and we see no necessity for remanding the case in order that there may be any farther inquiry upon this point.

The second point is whether the plaintiffs' suit is barred by time. Mr. Kanwar Narain on behalf of the appellant has referred us to the definition of "landlord" in section 4 (6) and (7) of the Punjab Tenancy Act. We agree with him that there can be no doubt that *Musammat* Nand Kaur and *Musammat* Chand Kaur were landlords within the meaning of the Tenancy Act. He next went on to urge that the widows by not suing to oust Nand Singh allowed him to acquire the rights of an occupancy tenant. He urges that they had six years within which to sue Nand Singh for a declaration that he had not occupancy rights and that not having done so his rights cannot be called in question. He has not, however, referred to any authority in support of the proposition that this inaction on the part of the widows would bind the reversioners after their deaths. When Bidh Singh, the proprietor of the land, died, his estate vested in his widows on the usual life-tenure. Any act of their's prejudicing the estate would not be binding on the reversioners except for the lives of the widows. There is also clear authority for the proposition that the reversioners were not bound to contest the widows' acts during the latter's lifetime. They could wait until the estate fell into possession after the death of the last surviving widow and then bring a suit. In consequence of our finding that Nand Singh was not the formally adopted son of Sawan Singh, it is clear that upon the latter's death the occupancy rights determined. How then did Nand Singh acquire occupancy rights? He must have acquired them by a fresh act of the widows. They either allowed him to remain in possession as an occupancy tenant or they conferred occupancy rights upon him. It was held by a Division Bench of the Chief Court in the case reported as *Ishar* v. *Sundar* (1) that the creation of occupancy rights being a transfer of valuable rights, could be challenged by the heirs in accordance with the well recognized principles of Customary Law. If then it be considered that the widows created occupancy rights in favour of Nand Singh this act of theirs can be challenged by the heirs in accordance with custom. If it be held that Nand Singh's possession was adverse to the widows and that he acquired rights as against them, still it can not be held that this possession was adverse against the reversioners during the lifetime of the widows. See in this connection the Law of Limitation by Rustomji, 2nd Edition, page 450, where the authorities in support of this proposition will be found collected. The law allows the reversioner 12 years from the female heirs' death under Art. 141 of the Limitation Act and it is neither in her power nor in the power of any person claiming through or against her to abbreviate that period. Whether then it be held that the widows conferred occupancy rights upon Nand Singh or he acquired those rights as

(1) 48 Ind. Cas. 808; 125 P. R. 1918.

against them by adverse possession, the suit of the reversioners having been brought within 12 years of the death of the last surviving widow is within time. We accordingly dismiss the appeal with costs.

The First Court directed the parties to bear their own costs and this order was maintained by the lower Appellate Court. Bakhshi Tek Chand has filed cross-objections in regard to this on behalf of the plaintiffs. He, however, does not press them before us and, taking all the circumstances of the case into consideration, we see no reason to interfere with this part of the order. We accordingly reject the cross-objections.

W. C. A. & N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No 191 OF 1921.

April 24, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Ghose.

GANGARAM MAJHI AND OTHERS—APPELLANTS

versus

BAMAPADA MAHAPATRA—RESPONDENT.

Bengal Tenancy Amendment Act (II B. C. of 1918), s. 49E, sub-s. (2), 49F—Power of an aboriginal to effect a mortgage of his holding to a non-aboriginal, how restricted—Permission of Collector, if can enlarge that power.

The power of an aboriginal to effect a mortgage of his land is restricted by the provisions of section 49E sub-section (2) of the Bengal Tenancy Act as amended by Act II B. C. of 1918 under which such a tenant is empowered only to make a complete usufructuary mortgage of his land, and the permission of the Collector under section 49F of the Act cannot enlarge the power of the aboriginal to effect a mortgage of his holding in any other way than by a complete usufructuary mortgage.

Appeal against an order of the District Judge, Bankura, dated the 2nd of April 1921, reversing that of the Munsif, Khatra, dated the 20th of December 1920.

FACTS appear from the judgment.

Babu *Narendra Coomar Bose*, for the Appellants.—The restriction imposed by section 49E sub-section (2) of the Bengal Tenancy Amendment Act, II of 1918, is applicable only when the mortgage is by an aboriginal to another aboriginal. But when the aboriginal is unable to effect a mortgage to another aboriginal, then the Collector can permit him to execute a mortgage to a non-aboriginal. In the latter case the permission need not be limited to one kind of mortgage, namely, a complete usufructuary mortgage. The Collector can permit him to execute any kind of mortgage, and a simple mortgage executed by an aboriginal in pursuance of the permission of the Collector is a perfectly valid mortgage.

Babu *Bishindra Nath Sarkar*, for the Respondent.—The permission of the Collector as contemplated by section 49 F, sub-section (1) (*a*) of the Act, can enlarge the power of the aboriginal only with regard to his choice of the mortgage. Under section 49E (2) of the Act the aboriginal is empowered only to make a complete usufructuary mortgage of his holding. The permission of the Collector cannot remove this restriction with regard to the kind of mortgage that can be executed by an aboriginal.

Babu *Narendra Coomar Bose*, replied.

JUDGMENT.—In this case, the sole question is, whether the adjustment of a decree by way of a simple mortgage made by an aboriginal of his holding is valid having regard to the provisions of section 49 E, sub-section (2) of the Bengal Tenancy Act. It appears that the mortgage was made to a non-aboriginal with the consent of the Collector as provided by section 49F sub section (1) (*a*) of that Act. The learned District Judge has held that, under the provisions of section 49F, the Collector could only grant permission to an aboriginal to effect a transfer of his holding to a non-aboriginal if the aboriginal is unable to mortgage his land to another aboriginal as provided in section 49E, sub section (1) of the Act. The learned District Judge has, however, held that the power of an aboriginal to effect a mortgage of his land is restricted by the provisions of section 49E, sub-section (2) of the Act under which such a tenant is empowered only to make a complete usufructuary mortgage of his land and the permission of the Collector cannot enlarge the power of an aboriginal to effect a mort-

gage of his holding in any other way than by a complete usufructuary mortgage. We think the learned District Judge is right in his interpretation of the provisions of the sections of the Bengal Tenancy Act referred to above. The appeal, therefore, fails and must be dismissed with costs. We assess the hearing fee at one gold *mohur*

B. N.

Appeal dismissed.

LAHORE HIGH COURT.
CIVIL APPEAL No. 869 OF 1919.
May 31, 1920.
Present:—Mr. Justice Shadi Lal,
Chief Justice.

RATTAN SINGH AND OTHERS—PETITIONERS
versus
Chaudhri RAJ SINGH AND ANOTHER—RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 1 (4)—Will not governed by Succession Act or Hindu Wills Act—Succession Certificate, grant of, to executor—Jurisdiction—Sub-Judge, Second Class, invested with powers of District Court—Jurisdiction to entertain application for collection of debts exceeding Rs. 5,000.

Section 1 (4) of the Succession Certificate Act does not preclude the executor of a Will, to which neither the Succession Act nor the Hindu Wills Act applies, from obtaining a certificate under the Succession Certificate Act, authorising him to collect debts due to the deceased. The mere fact that the executor might have applied for Probate of the Will is not an adequate ground for refusing to entertain his application for a Succession Certificate [p. 304, col. 2; p. 305, col. 1.]

Where a Sub-Judge of the Second Class is invested with the functions of a District Court under the Succession Certificate Act, and no restriction is placed on the limits of his jurisdiction he is competent to entertain and adjudicate upon an application for a Succession Certificate involving debts the amount of which exceeds Rs. 5,000. [p. 305, col. 1.]

Petition, under section 44 of Act VI of 1918, for revision of an order of the District Judge, Delhi, dated the 4th August 1919, reversing that of the Subordinate Judge, Delhi, dated the 25th February 1919.

Lala *Durga Das*, for the Petitioners.

Lala *Moti Sagar*, R. S., for Raj Singh and Lala *Kishen Dayal*, for *Musammat* Ram Kaur, Respondent.

JUDGMENT.—The learned District Judge dissenting from the Subordinate Judge has found that the Will propounded by the respondent, Raj Singh, was duly executed by the deceased Nanu Singh, and that the latter had a disposing mind. Upon the strength of that Will the respondent is undoubtedly entitled to collect the debts due to the deceased, and the learned Judge has accordingly granted him a Succession Certificate in respect of these debts.

Mr. Durga Das for the petitioners contends that the Subordinate Judge had no jurisdiction to entertain the application for Succession Certificate, and bases his contention upon two grounds:

(1) That the respondent should have asked for a Probate of the Will, and could not make an application for a Succession Certificate; and (2) that as the debts exceeded Rs. 5,000 the Subordinate Judge, who was only a Subordinate Judge of the Second Class and could not entertain a suit the value of which exceeded Rs. 5,000, was not competent to adjudicate upon an application for a Succession Certificate in respect of debts exceeding in amount the limit of his pecuniary jurisdiction.

In connection with the first objection, my attention is invited to section 1 (4) of the Succession Certificate Act, VII of 1889, which enacts that a certificate shall not be granted with respect to any debt or security to which a right can be established by Probate or Letters of Administration under the Indian Succession Act, 1865, or by Probate of a Will to which Hindu Wills Act, 1870, applies, or by Letters of Administration with a copy of such a Will annexed. Now, it is admitted that neither the Indian Succession Act nor the Hindu Wills Act applies to the Will in question and I have not the least doubt that the words "Such a Will" in the concluding clause of the aforesaid sub-section refer to a Will to which either the Indian Succession Act or the Hindu Wills Act applies. If any authority on the subject were needed, I would cite the judgment of the Bombay High Court in *Dave Liladhar Kashiram* v. *Bai Parvati* (1) and the judgment of the Allahabad

(1) 18 B. 608; 9 Ind. Dec. (N. S.) 914.

High Court in *Jamna Kuar* v. *Daulat Rai* (2). It is, therefore, clear that section 1 (4) of the Succession Certificate Act did not preclude respondent from obtaining a certificate under the Act, and the mere fact that he might have applied for a Probate is not an adequate ground for refusing to entertain his application for a Succession Certificate, *vide Kalidas Fakirchand* v. *Baihamali* (3).

As regards the objection based upon the fact that the Subordinate Judge's pecuniary jurisdiction in respect of suits was limited to suits of the value of Rs. 5,000 or less, it is sufficient to say that section 26 of the Succession Certificate Act empowers the Local Government to invest any Court inferior in grade to a District Court with the functions of a District Court under the Act, and that where an inferior Court has been so invested, it has concurrent jurisdiction with the District Court in the exercise of all the powers conferred by the Act upon the District Court. Now, it is admitted that the Local Government has by a Notification in the Official Gazette invested the Subordinate Judge of the Second Class with the functions of a District Court under the Act, and there is nothing either in the Notification or in the Act which limits the jurisdiction of the Subordinate Judge to the hearing of applications involving debts the total amount of which does not exceed Rs. 5,000 Accordingly I am of opinion that the Subordinate Judge was entitled to entertain and adjudicate upon the application made by the respondent, and his proceedings cannot, therefore, be regarded as *coram non judice*.

The judgment of the learned District Judge shows that he has, upon a survey of all the facts and circumstances of the case, come to the conclusion that the Will was duly executed by the deceased; and there can be no doubt that the respondent being the sole executor is entitled to collect the debts. It was unnecessary for the Court to go into the question of the validity of the Will, because the proceedings under the Succession Certificate Act are of a summary nature, and the only thing which the Court was required to decide in summary manner was whether the respondent had a *prima facie* right to collect the debts, *vide* section 7 of the Succession Certificate Act. It is to be observed that the decision of the Court under the Act upon a question of right does not bar the trial of the same question in any suit or in any other proceeding between the same parties.

For the aforesaid reasons I am not prepared to hold that any valid ground for my interference on revision has been made out. Accordingly I dismiss the application with costs.

W. C. A.

Application dismissed.

(2) 2 A. L. J. 126.
(3) 16 B. 712; 8 Ind. Dec. (N. S.) 953.

CALCUTTA HIGH COURT.

CIVIL RULE No. 35 OF 1922.

February 17, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

JADU MONDAL AND OTHERS—DEFENDANTS—PETITIONERS

versus

JAGENDRANATH BANERJEE—PLAINTIFF—OPPOSITE PARTY.

Bond—Execution, denial of—Execution established—Court, if may infer passing of consideration.

Where a person denies execution of a bond and the Court finds that he did execute it, if the bond contains a recital that the money was paid to him, no error of law would be committed if from those facts the Court concluded that the consideration was paid. [p. 304, col. 1.]

Rule against an order of the Munsif, First Court, Krishnagor, exercising the powers of a Court of Small Cause, in Small Cause Court Suit No. 534-665 of 1921.

FACTS appear from the judgment.

Babu *Sarat Kumar Chatterjee*, for the Petitioners.—The defendant is the petitioner. The suit was brought in the Small Causes Court for recovery of money due on a bond. The defence was that no consideration passed. And also there was no evidence on the record to that effect either. The bond was not registered. The learned Judge has in spite of these facts decreed the suit. My submission is that the learned Judge has erred in decreeing the suit without having any evidence in support, on mere suspicion only.

Babu *Hari Charan Banerjee*, for the Opposite Party, was not called upon to reply.

JUDGMENT.—The petitioners were the defendants in a suit for money brought on a bond. The suit was decreed. This Rule was granted on the ground that there was no evidence whatever before the Court with regard to the passing of the consideration in respect of which the bond is alleged to have been given.

From the record of the substance of the evidence it is true that no witness is shown to have stated that the consideration of the bond was paid. But the issue having been tried under the Small Cause Court Procedure it does not follow that because no such statement was recorded no such statement was made. Further, the defendants denied execution of the bond at all. The lower Court has found that defence to be false and having found that the defendants executed the bond and as bond contains a recital that the money was paid, no error in law would be committed if from those facts the lower Court concluded, as it has done, that the consideration was paid.

We see no sufficient ground for disturbing the decision of the Small Cause Court Judge and accordingly discharge this Rule with costs. Hearing fee one gold *mohur*.

N. H. *Rule discharged.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No 26 OF 1920.

June 22, 1920.

Present:—Mr. Justice Broadway.

THE FIRM BHAWANI SAHAI-KANSHI RAM, FEROZEPORE, THROUGH *Lala* KANSHI RAM—DEFENDANT—APPELLANT

versus

THE FIRM HARBANS SINGH GOPAL DAS, SARGODHA, THROUGH GOPALDAS AND RAMDHAN—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, r. 1, O. XLIII, r. 1 (u)—Plaint, return of, for presentation to proper Court—Appeal—Remand by Appellate Court, whether competent—Remand, order of, if appealable.

An Appellate Court has inherent power to remand a case to the Trial Court on appeal from an order under O. VII, r. 1 returning a plaint for presentation to the proper Court. [p 305, col. 1.]

No appeal lies against such an order of remand. [p 305, col 1.]

Naubat Singh v. *Baldeo Singh*, 9 Ind. Cas. 666: 33 A. 479; 8 A. L. J. 12, *Chhubu Mian* v. *Har Charn Das*, 18 Ind. Cas. 529: 10 P. L. R. 1913; 119 P. R. 1912; 48 P. W. R. 1913, followed.

O. XLIII, r. 1 (*u*) has no application to such a case as that only contemplates an appeal from an order of remand passed under O XLI, r. 23 on appeal from a decree. [p. 305, col. 1.]

Miscellaneous second appeal from an order of the District Judge, Shahpur at Sargodha, dated the 13th August 1919, reversing that of the Munsif, First Class, Sargodha, dated the 5th June 1919.

Lala *Durga Das*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—A plaint was presented to a Munsif at Sargodha in the Shahpur District. The Munsif, acting under O. VII, r. 10, Civil Procedure Code, and holding that he had no jurisdiction to deal with the case, returned the plaint for presentation to a proper Court. The plaintiffs thereupon preferred an appeal to the District Judge, Shahpur, who held that the Munsif had jurisdiction and accepting the appeal, set aside the order of the learned Munsif declining jurisdiction and remanded the suit for decision on the merits at the same time, directing the stamp on appeal to be refunded. The defendants have come up to this Court in second appeal through Mr. Durga Das and the plaintiffs have been represented by Mr. Nanak Chand.

Mr. Nanak Chand has raised a preliminary objection to the effect that no second

appeal lies to this Court. His contention briefly is that, inasmuch as the plaint was returned under O. VII, r. 10, Civil Procedure Code, O. XLIII, r. 1 (*a*) allowed an appeal against that order and that the order of the Appellate Court on the appeal was rendered final by section 104 (2). In support of his contention he referred me to *Naubat Singh* v. *Baldeo Singh* (1) and *Ohhubu Mian* v. *Har Charn Das* (2), both of which cases are on all fours, as near as may be, with the present one and both support the learned Counsel. On the other hand, Mr. Durga Das contended that he was appealing not against the order passed by the learned District Judge on the appeal under O. XLIII, r. 1 (*a*) but under O. XLIII, r. 1 (*u*), Civil Procedure Code, and that the lower Appellate Court had no power to remand the case. After giving due weight to his contentions I am unable to accede to them. Indeed, this very point was taken in the Allahabad case referred to above, and it was there held that clause (*u*) of r. 1, O. XLIII, only contemplated an appeal from an order of remand under r. 23 of O. XLI. In this view I agree. R. 23 of O. XLI deals with an appeal from a decree passed in a suit which has been disposed of upon a preliminary point. In the present case the appeal to the learned District Judge was not from a decree but from an order and, therefore, the Court could not have acted under r. 23 of O. XLI. Mr. Durga Das contended, therefore, that all that the District Judge could do was to accept the appeal and set aside the order but that he could not remand the case. Here again I am unable to agree. According to section 107, Civil Procedure Code, an Appellate Court has power to remand a case subject to such conditions and limitations as may be prescribed. This power of remand has not been restricted by any provision of the Code that has been brought to my notice. In any event, the Court has an inherent power to see that its orders legally passed are carried out. Admittedly the learned District Judge had the power to set aside the order of the learned Munsif and it follows that it had power to enforce the natural result, *viz.*, that the case should be proceeded with. Following *Naubat Singh* v. *Baldeo Singh* (1) and *Ohhubu Mian* v. *Har Charn Das* (2) I hold that the order of the learned District Judge was final and that no appeal lies. Further, I am not prepared to treat this as a revision.

Accordingly, I dismiss this appeal but in the circumstances leave the parties to bear their own costs in this Court.

N. H.

Appeal dismissed.

(1) 9 Ind Cas. 666; 33 A. 479; 8 A. L. J. 12.
(2) 18 Ind. Cas. 525; 101 P. L. R. 1913; 119 P. R. 1912; 48 P. W. R. 1913.

CALCUTTA HIGH COURT.

CIVIL RULE No. 639 OF 1921.

February 13, 1922.

Present :—Mr. Justice Newbould.

FAZIL MEAH—PETITIONER

versus

PROSANNA KUMAR ROY DECREE-HOLDER, IDRIS MEAH AND OTHERS—JUDGMENT—DEBTOR—OPPOSITE PARTIES.

Execution sale—Knocking down of property and acceptance of deposit by Nazir, *whether make sale final—Discretion of Court to accept or reject bid—Civil Procedure Code (Act V of* 1908*), Sch. I, App. E Form* 29.

An execution sale is not concluded when a property is knocked down to a bidder and the necessary deposit of 25 per cent made by him and accepted by the Nazir. Having regard to the provisions of the third condition of sale set out in Form No 29 Appendix E, of the First Schedule to the Civil Procedure Code, the Court has a discretion in the matter of accepting or rejecting the bid and the Court's order directing a re-sale of a property after it has been knocked down and the deposit accepted by the Nazir, is not without jurisdiction [p. 306, cols. 1 & 2]

Rakhal Chandra Dutt v. *Sitanath Roy*, Civil Revision Case No. 241 of 1921, followed.

Rule against an order of the Munsif, Third Court, Sadharam, in Execution Case No. 123 of 1921.

FACTS appear from the judgment.

Babu *Santosh Kumar Bose*, for the Petitioner.—The question is whether after a sale having been made on proper bids, a subsequent bid can be entertaind and a re-sale be held. On appeal the District Judge has held that no appeal lay to him in this matter. The judgment-debtor has applied for setting aside sale on the ground of inadequacy of price. That matter is still pending. That application is against the last sale. I submit all these proceedings would be *ultra*

vires. Refers to O. XXI, rr. 65, 69, 84, Civil Procedure Code. I made a deposit of the money and when I came to deposit the balance I learnt that another sale took place behind my back. I submit the Court cannot do that. The acceptance by the Nazir of my bid is final.

Babu *Jitendra Kumar Sen Gupta*, for the Opposite Party.—The Court has a *quasi*-revisional jurisdiction to accept or reject a bid. It is not true that the acceptance of a bid by the Nazir is final. Refers to Form 29, Appendix E, Schedule I, Civil Procedure Code; *Rajendra Prasad Jha* v. *Upendra Nath Jha* (1). Here the bid was accepted by the Nazir. I am not the decree-holder. I am the mortgagor in possession. Refers to a decision of Cuming, J., in *Rakhal Chandra Dutt* v. *Sitanath Roy*, Civil Revision No 241 of 1921, decided on 23rd November 1921, *Kenaram* v. *Kailash Chandra* (2). I submit if the Court thinks that the bid is inadequate he may not accept it. He has a jurisdiction to do so.

Babu *Santosh Kumar Bose*, in reply.—The fact that my bid was accepted by the Court is borne out by the acceptance of the deposit and the issue of *chalan*.

JUDGMENT.—The petitioner in this case made a bid for Rs. 450 for a certain property which was being sold by the Court in execution of a decree. The actual sale was held by the Nazir who accepted this bid and the petitioner at once made the necessary deposit of 25 per cent. However, soon after the property had been knocked down the opposite party No. 10, Emadadulla, applied to the Munsif for a re sale of the property offering a bid of Rs. 700. On this the Munsif ordered a re sale of the property which was knocked down to Emdadulla for this sum. For the petitioner it is said that the knocking down of the property by the Nazir and the acceptance of the deposit made the sale final and the Munsif had no jurisdiction to put the property up again. A similar point came up for decision in the case of *Rakhal Chandra Dutt* v. *Sitanath Roy*, Civil Revision Case No. 241 of 1921. It was there decided that a sale was not concluded when a property was knocked down and the deposit made. Having regard to the provisions of the third condition of sale set out in Form No. 29, Appendix E, of the First Schedule of the Civil Procedure Code, I think the Court had discretion in the matter, and the order directing a re-sale of the property was not made without jurisdiction. Taking this view of the matter this Rule must be discharged with costs. Hearing fee one gold *mohur*.

B. N.

Rule discharged.

(1) 27 Ind. Cas. 805; 21 C. L. J. 174; 19 C. W. N. 633.

(2) 19 Ind. Cas. 904; 18 C. L. J. 53.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1070 OF 1916.

April 20, 1920.

Present:—Mr. Justice Chevis, Acting Chief Justice, and Mr. Justice Martineau.

PARMA NAND—PLAINTIFF—APPELLANT

versus

RAM PARKASH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 10 (2)—Security for respondent's costs—Failure to furnish security within time allowed, effect of—Appellant's whereabouts unknown, whether sufficient reason for extending time.

Where an appellant fails to furnish security for the costs of the respondent within the time allowed, his appeal is liable to be dismissed [p. 307, col. 1]

The fact that the delay in furnishing security is due to the whereabouts of the appellant being unknown, is not a sufficient reason for not following O. XLI, r. 10 (2), of the Civil Procedure Code. [p. 307, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Jhelum, dated the 8th February 1916.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.

MARTINEAU, J.—On the 10th December last an order was passed by this Court requiring the appellant to furnish security for the costs of the appeal and of the Trial Court within one month. The order was communicated to the appellant's Counsel, Mr. Sheo Narain,

who was in fact present when it was passed, but no security was furnished till the 9th February, when the security bond of one Khan Malik was filed in the Subordinate Judge's Court.

It is contended on behalf of the respondents that as the security was not furnished in the time fixed by this Court the appeal should be rejected. We think that this contention must prevail and it is unnecessary to consider the further objection raised on behalf of the respondents as to the surety not being a man of means.

Mr. Sheo Narain says that the reason why the security could not be furnished within the period of one month fixed by this Court was that the whereabouts of his client were not known, as his client is a *fakir* and was wandering about. We cannot accept this as a sufficient reason for not following O. XLI, r. 10 (2), Civil Procedure Code, which is imperative and lays down that where the security is not furnished within such time as the Court orders the Court shall reject the appeal.

We accordingly reject the appeal, but we leave the parties to bear their own costs

CHEVIS, ACTG C. J.—I think it is the duty of every litigant to keep in touch with his case, and not to go wandering around the country at large without giving any address where a communication from the Court or from his Counsel can readily find him.

W. C. A.

Appeal rejected.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 226 OF 1919.

January 31, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

GOVIND DASS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM CHARAN LONIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family property—Legal necessity—Improvident transaction Presumption—Jurisdiction—Relief for possession not claimed in plaint—Appellate Court, if can decree formal possession.

Where a father, as manager of a joint Hindu family, enters into an agreement to sell the family immoveable property in his hands, the mere facts that he repents of the agreement and that his sons apply to contest the suit brought with the object of enforcing the agreement, raise a presumption that the agreement is an improvident one. [p. 311, col. 1.]

The mere existence of an antecedent secured debt cannot of itself justify the father in alienating practically the whole of the immoveable property belonging to himself and his sons if the debt can be discharged by alienating only a part of the property. [p. 311, col. 1.]

An alienation of joint family property effected by the concerted action of the adult members of the family, raises a presumption in favour of the alienation having been made for real family necessity. [p. 311, col. 2.]

Where the father enters into an improvident transaction to rid himself of his immediate embarrasments without due regard to the necessities of the case and the interests of the minor members of the undivided family, the vendee must be held to have taken the risk involved therein [p. 314, col. 1.]

Per *Piggott, J.*—In a suit to avoid alienation in which no relief for possession is asked, a formal decree directing the plaintiff to be restored to possession, whether conditional or otherwise, cannot and ought not to be passed. [p. 313, col. 1.]

Per *Walsh, J.*—When an Appellate Court is seized of the whole matter, it should not hesitate to pass such orders as are necessary to terminate the controversy and to do justice between the parties. Consequently in a suit by sons to avoid alienation made by the father, although no relief as to possession may be claimed, it is not incompetent for the High Court on appeal to decree possession to them. [p. 314, col. 1.]

First appeal from the decision of the Second Additional Subordinate Judge, Jaunpur, dated the 19th of March 1919.

Dr. *S. M. Sulaiman* and Mr. *Abu Ali*, for the Appellants.

Dr. *Surendra Nath Sen*, Messrs. *Haribans Sahai* and *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—In this case, Govind Das and five others, being 6 out of the 7 sons of Gopal Das, sued to avoid an alienation of joint family property made by their father, Gopal Das. The defendants were the vendees under a sale-deed of the 1st of November 1917 together with Gopal Das himself and another son of his by name Debi Das who had refused to join in the suit. Three of the plaintiffs were minors on the date of the institution of the suit. The plain issue in the case

was, of course, the question of legal necessity for the sales but it arisas in a peculiar form and complicated by the result of a previous litigation. The sale deed above referred to was not voluntarily executed by Gopal Das. It was imposed upon him by a decree of Court in a suit for specific performance of an agreement dated 3rd September, 1912. The position, therefore, is that Gopal Das, as the father and manager of a joint undivided Hindu family, entered into an agreement to sell joint family property in his hands (it may be noted further that the agreement covered the whole, or practically the whole, of the immoveable property belonging to the family) and repented of this agreement, but was compelled to execute the deed of transfer by decree of Court. This decree was obtained in a suit which came up to this Court as First Appeal No. 177 of 1917, decided on the 6th of March 1919. The suit as brought was a peculiar one. The plaintiffs not merely claimed specific performance of the agreement of September the 3rd 1912, but they joined with this claim one for consequential relief by delivery of actual possesston over the property in respect of which a conveyance was to be executed by decree of Court. There has been some argument before us as to whether such a suit would be maintainable at all, but I do not propose to discuss this question as it has no real bearing on the result of the present appeal. The point which requires to be noticed is the consequences which followed from the frame of that suit, especially in the execution department. The Trial Court very properly, in my opinion, held that, whether a suit so framed were maintainable or not, it certainly could not be effectively tried without making the sons of Gopal Das parties as defendants. The then plaintiffs were offered an opportunity of impleading the sons of Gopal Das and deliberately declined to avail themselves of the same. It has been pointed out that the reason for their action probably was that the suit, regarded purely as one for specific performance, would have been barred by limitation as against the sons of Gopal Das before the Court's order, which virtually directed them to be impleaded, could be complied with. However, the Court eventually determined to proceed with the trial of the suit as against Gopal Das alone. This procedure was virtually sanctioned and endorsed by a Bench of this Court before which the matter came in appeal but an examination of the record shows beyond doubt that this was only done upon the understanding that the suit was limited to the question whether Gopal Das should or should not be compelled to execute a formal conveyance in accordance with the agreement of September the 3rd 1912. No doubt, issues had been framed by the Trial Court covering the whole matter in controversy, but, from the moment that the plaintiffs declined to implead the sons of Gopal Das, the only questions which remained for determination were whether Gopal Das had, in fact, entered into the alleged agreement and whether he should, in that suit, be compelled to execute a formal conveyance in accordance with the agreement without prejudice to any right which his sons might have of challenging either the conveyance or agreement out of which it arose. The view taken by the Trial Court is sufficiently expressed in the decree actually framed, which was a mere declaration that the plaintiffs were entitled to specific performance of the contract to sell. The appeal preferred against this decree was filed in this Court on the 14th of May 1917. In the meantime, however, the plaintiffs had gone to the Trial Court with an application for amendment of the decree. This application, unfortunately, came before the successor of the Subordinate Judge who had delivered the judgment in the suit and signed the decree as originally framed. His successor was apparently impressed with the fact that the decree, as framed, did not carry out the operative portion of the judgment, according to which the suit (as brought) was decreed. He accordingly amended the decree under an order of the 12th of May 1917 by the addition of words which allowed the plaintiff's claim for delivery of possession over the property specified at the foot of the plaint. The appeal to this Court was filed in apparent ignorance of this amendment two days after the amendment had been made,

It was, in fact, filed upon a copy of the decree as unamended and was dealt with by this Court upon that basis. The learned Judges who decided the appeal were clearly of opinion that they were determining nothing which could, in any way, affect or prejudice the rights of the sons of Gopal Das. They came to the conclusion that, under the circumstances, the decree which they had before them, that is to say, the decree directing specific performance of the contract of the 3rd September 1912, had rightly been passed as against Gopal Das. They expressly reserved the right of the sons of Gopal Das to challenge the effect of this alienation upon their interests. The latter had already done so by means of the present suit, instituted on the 6th of September, 1915. The fact that one of the sons declined to join in the suit is of no legal importance. So far as we can gather from the record, the truth seems to be that Gopal Das had, while the dispute between him and his transferees was pending, granted a lease of a substantial portion of the property covered by the agreement of the 3rd of September 1912 on favourable terms to his son, Debi Das. The transferees have virtually bought off Debi Das by agreeing not to contest this lease.

The plaint, in the present suit, was amended after the decree of the Trial Court in the suit for specific performance had been passed, but, in the meantime, and, thereafter, proceedings in execution of that decree continued. A formal sale-deed was executed under orders of the Court on the 1st of November 1917. One of the points in issue had been the price for which the property was to be conveyed. This was fixed by the Trial Court at Rs. 22,503-10-10 and this finding was affirmed on appeal. The decree did not, however, direct that the whole of this money should be paid over to Gopal Das. On the contrary, there was a direction that the vendees, upon execution of the conveyance, were permitted to retain in their own hands so much money as might suffice to pay off a mortgage on the property in suit, dated the 10th of July, 1909, executed by Gopal Das and those of his sons who had, on that date, attained majority, in favour of one Manik Chand. The vendees waited until the 4th of September 1919 when they deposited in Court the amount of money sufficient to pay off this mortgage. We have been informed in argument that they were subsequently compelled to increase the amount of their deposit, that the total sum deposited by them amounted eventually to more than Rs 23,700 and that they have actually paid off Manik Chand. In saying this, we are, to some extent, travelling beyond the record before us, but what we do know is that the vendees did proceed to take out execution of their decree as amended and obtained from the Execution Court, on the 24th of January 1918 formal delivery of possession over all the property covered by the decree. It seems to me very much open to question whether, under the circumstances, the sons of Gopal Das would not have been well advised in treating that delivery of possession as one which could not affect their rights in any way. As a matter of fact, they submitted to the process of the Court and accepted the position that they had been actually ejected, along with their father, on the 24th of January 1918. They elected to come before the Execution Court with a petition purporting to be under O. XXI, r. 100 of the Civil Procedure Code. That is to say, they represented themselves as persons other than the judgment-debtor who had been dispossessed of immoveable property by the holder of a decree for the possession of such property and they asked the Court to restore them to possession at least to the extent of the shares in the property in question which would have fallen to them on a partition between themselves and their father. This application had a very curious history. It was pending in the Execution Court when one of the decree-holders, by name Sital, died. The Court thereupon held that there existed no machinery under the Code of Civil Procedure by which the legal representatives of Sital could be brought upon the record, that the application under O. XXI, r. 100, could not be further proceeded with and it was accordingly rejected. We have before us, connected with the

present appeal, an application in revision against that order of the Execution Court. I have gone into this matter in such detail because I think one of the points before us for consideration is whether the decree in the present suit can, or ought to be, framed in such a manner as to rectify the error which the Execution Court undoubtedly committed when it rejected the application under O. XXI, r. 100, on the grounds on which it did so reject it. It is obvious, moreover, that in any decree, which we may now pass on this appeal, we must take account of the fact that the vendees under the sale-deed of November the 1st 1917, had rightly or wrongly, (and as I think wrongly) been placed in actual possession of the disputed property under their decree as amended.

In the light of the facts already stated, it is now necessary to come back to the one essential question in issue in this appeal, namely, whether there was legal necessity either for the sale-deed of November the 1st 1917, or for the agreement of September the 3rd, 1912, so as to make either or both of these transactions binding upon the sons of Gopal Das.

Before, however, I can consider this question in its simplicity, it seems necessary to refer to one other point about which there has been considerable controversy. The agreement of September the 3rd 1912 was of a peculiar nature in that it did not provide for the sale of the property concerned at a fixed and ascertained price, but at a price to be ascertained thereafter with reference to the profits of the property concerned. I have already stated that this price was eventually fixed at Rs. 22,508-10-10. The appellants before us have contended that one of the questions left open to them in the present suit was to claim a fresh finding upon this matter of price and there has been a good deal of argument before us on the point. When the question was dealt with by the Bench of this Court in First Appeal No. 177 of 1917, the learned Judge held that the price must be fixed with reference to the profits as they stood on the date of the agreement for sale. They brushed aside, on this ground, the contention of the sons of Gopal Das that there had been a substantial increase in the value of the property since the date of the contract. On a review of the evidence adduced in the present suit, I do not think it can be said that the plaintiffs, the sons of Gopal Das, have made out any case against the finding arrived at in the former suit which fixed the price payable under the agreement of September the 3rd 1912 calculated upon the profits as they then stood, at the sum already mentioned. A more difficult question is whether there has, in fact, been substantial increase in the profits since that date, and whether any account can be taken of this increase in the present suit. The Court below has come to the conclusion that the increase, apparent upon an inspection of the village papers, is purely fictitious, created by means of dishonest machinations on the part of Gopal Das, or of his son, Gobind Das, for the purpose of the present litigation. The question really turns on the value to be attached to the evidence given by the Patwari Bahadur Lal. This remarkable witness had made a deposition in one sense on the 8th of December 1916 in the former litigation, and he made a deposition in a very different sense in the present suit on the 17th of February 1919. The learned Subordinate Judge says that the man is a shameless liar and that no reliance can be placed either upon his evidence or upon the papers prepared by him. I entirely agree that Bahadur Lal is an untrustworthy witness, but it does not follow that he was speaking the truth in 1919 and swearing falsely in 1916. Where he has chosen to contradict himself, I am disposed to believe the evidence of his own papers against himself. According to those papers, the rent roll of the principal village in suit had arisen between 1318 (or 1320) Fasli from Rs. 1,324 to Rs. 1,646 in 1323 Fasli. On the whole and after arguments making due allowance for the arguments to the contrary set forth in the judgment under appeal, I think there had been a real increase in the annual income of the property in suit between the date of the agreement for sale and that of the conveyance executed on the 1st of November 1917. The precise extent of that increase is difficult to estimate and I do not think a precise estimate is necessary for the determination of this appeal. The price fixed according to the agreement of September the 3rd 1912 works out at a

little over 22 years' purchase on the net annual profits. I should be prepared to hold on the evidence that the increase in the annual profits after the date of the agreement amounted to approximately that shown in the Patwari's papers, that is to say, to about Rs. 322 annually. This would mean an increase of something over Rs. 7,000 in the sale price, according to the terms of the agreement.

This consideration, however, does not seem to me to affect the result of the present appeal, except in so far as it has a bearing on the question of the binding effect upon the sons of Gopal Das, of a sale-deed executed by their father under compulsion in pursuance of an improvident agreement of which he had himself repented. The mere facts that he himself repented of it, and that his sons begged to be allowed to contest the suit brought with the object of enforcing it, serve in my opinion, to raise a considerable presumption that the agreement was an improvident one. The main object of the transaction was to pay off a mortgage-deed in favour of Manik Chand, a document the terms of which I shall have to consider further. For the present, it is sufficient to say that a sum of something less than Rs. 14, 00 would have been sufficient to pay off Manik Chand in the month of September 1912 and that the existence of the antecedent debt cannot of itself be regarded as justifying Gopal Das, the father and manager of joint undivided Hindu family, in parting with practically the whole of the immoveable property belonging to himself and his sons for a sum of Rs. 22,500 and odd. In the Court below, a great deal was said about other purposes for which the family may possibly have required money in the month of September 1912. One suggestion is that, according to the evidence of the plaintiff, Govind Das himself, the family was living beyond its means or, at any rate, was spending more than the income derivable from its immoveable property, so that presumably, money was required to meet the mere ordinary expenses of the family. I do not think this point is at all made out but, even if it were, an obvious rejoinder would be that, under the circumstances, the first duty of the family, and of the father as manager of the family, would be to see whether the difficulty could not be met by some curtailment of expenditure. It was suggested further that Gopal Das required money for the purposes of a joint family business. If he did, he certainly never got any. In the events which have occurred, the consideration which has actually passed to Gopal Das and his family has been the extinguishing of the mortgage in favour of Manik Chand, assuming, of course, that this mortgage has been extinguished, and that the transactions which have taken place have not merely operated to transfer the mortgagee right from Manik Chand to the defendants respondents. The only other payments made to Gopal Das have been a sum of Rs. 500 paid as earnest money and a small payment of Rs. 189-12-6 eventually made by the vendees in the course of their proceedings in execution of their decree. With regard to these small sums, there seems to me literally no evidence that the money was taken by Gopal Das for any purpose which would be binding on his sons, or that his sons have benefited by the money.

The question of legal necessity, therefore, resolves itself into a consideration of the terms of the mortgage in favour of Manik Chand, the consideration for that alienation of joint family property and the benefit derived by the sons, on the assumption that this mortgage will be finally extinguished as a result of the transactions culminating in and including the final decree to be passed in the present suit. Here the respondents are, up to a certain point, in a strong position. The mortgage in favour of Manik Chand was executed on the 10th of July 1919 not only by Gopal Das himself but by four of his sons, the plaintiffs, Govind Das, Bhagwan Das and Kishun Das and the defendant Debi Das. We have, therefore, an alienation of joint family property effected by the concerted action of all those members of the joint family who had attained majority at the time. There is a very considerable presumption in favour of such an alienation having been made for real family necessity. The terms of the document itself specially when read in connection with the evidence given by the plaintiff, Govind Das, in the present suit, tend strongly in the same direction. I think we are bound to hold that, as regards the principal money at any rate, amounting to Rs. 10,500 due to or obtained from Manik Chand under this

mortgage, there was legal necessity sufficient to make the transaction binding, not only upon the executants, but upon those sons of Gopal Das who were minors at that time and have not yet attained majority. The only question which can be seriously argued is whether there was legal necessity for raising money at the rate of interest specified in the deed. That rate was $8\frac{1}{4}$ per cent. per annum, compoundable with six monthly rests; but there was a penalty clause under which the rate could be increased to 9 per cent. per annum, similarly compoundable in the event of default in the regular payment of interest. Manik Chand's security was excellent, for there can be no doubt that, at the time of the mortgage, the value of the property involved was at least double the sum secured by the mortgage. As regards the stipulated rates of interest, therefore, the transaction looks, upon the face of it, an improvident one. I very much doubt whether the penalty clause by which the rate of interest could be raised to 9 per cent. would, in any event, be enforced by the Courts. The concurrence of the adult sons of Gopal Das in the transaction is, no doubt, an important consideration, but, as regards this particular question of the rate of interest, it is a good deal discounted by the fact that their ages in the year 1909 varied from 25 to (*sic*) years. The transaction must, in the main, have been arranged by Gopal Das, and the concurrence of these youngmen being obtained in order to strengthen the position of the mortgagee. We have to consider the rights of the minor plaintiffs, and, looking at the matter from their point of view, it seems to me that it is clearly open to the Court to consider this question, whether, admitting that there was legal necessity for raising a loan of Rs. 10,500, it was really necessary for Gopal Das and his adult sons to have borrowed the money on such onerous terms as to interest. If this were a suit by which Manik Chand was seeking to enforce the terms of the mortgage as against Gopal Das and all his sons, I am confident that it would be the duty of the Court to re consider this question of interest. The proper finding in such a suit would, in my opinion, be that the minor sons were bound to the extent of the principal of the loan and the rate of interest of $8\frac{1}{4}$ per cent. per annum, which is not a particularly unreasonable rate under the circumstances if it be treated as simple interest. I am clearly of opinion that the minor sons shall not be bound by the penalty clause in the deed, and I do not think that they ought to be bound by the clause providing that the interest, even at its original rate, should be compoundable with six monthly rests. I do not see why the issue in the present suit should be dealt with on any different basis than would have been the case if this were a suit by Manik Chand to enforce his mortgage. My finding, therefore, is that legal necessity for the alienation in suit is proved to the extent of the principal sum of Rs. 10,500 with simple interest at the rate of $8\frac{1}{4}$ per cent. per annum.

The next question is how long should this interest continue to run and, in my opinion, this admits of a very clear and positive answer. On the 1st of November 1917 when the respondents obtained the formal conveyance of the property in suit under the orders of the Court, they became liable then and there to pay off Manik Chand. They had no right in equity to continue to allow Manik Chand's mortgage to run and to pile up compound interest, or any interest at all, against the property in suit. I hold, therefore, that this interest at $8\frac{1}{4}$ per cent. per annum, should run from the date of Manik Chand's mortgage, the 10th of July 1901, to the 1st of November 1917 and no further.

There remains only the question of the form of decree to be drawn up to give effect to these findings. If the respondents had never obtained possession of the mortgaged property, the position would be simple. A declaration would require to be drawn up to the effect that the plaintiffs are bound by the alienation sought to be impugned in this suit to the extent of a consideration of Rs. 10,500 *plus* interest at an ascertained rate and for the period specified. The question is complicated by the fact that the respondents are in possession of the mortgaged property and, by the further question whether this possession can be interferred with, either by any decree passed in the present suit, or by any orders passed on the petition of revision which is also before us. I am satisfied that, on the frame of the present suit, in which no relief for possession has ever been asked, a formal

decree directing the plaintiffs to be restored to possession, whether conditional or otherwise, cannot and ought not to be passed. I am also of opinion that we ought not, under the circumstances, to interfere in revision with the proceedings taken by the Execution Court. What the equities of the case really demand is that the respondents, the vendee under the sale-deed of November the 1st 1919, should continue to enjoy the possession which they have obtained (no matter how), until they have been paid off the sum now ascertained to be equitably due to them from the plaintiffs, either out of the usufruct of the property, or by payment of the ascertained sum into Court, or by combination of the two methods. They are, undoubtedly, liable to account to the plaintiffs for the annual profits of the property in suit from the date on which they obtained possession in execution of their decree which date appears, from the record of the execution case, to be the 20th of January 1918 and, as there is no interest running in their favour, after the 1st of November 1917, the whole of the net profits enjoyed by them must be applied in reduction of the debt found to be equitably due in favour of the plaintiffs, I think it is clearly impossible for us, on the materials on the record, to ascertain what profits the respondents have been enjoying from the month of January 1918 onwards, still less what profits they may enjoy hereafter before the plaintiffs can make good the balance of the sum equitably due from them. It is even possible that the plaintiffs may elect to allow the respondents to continue in possession until the whole of the ascertained liability is paid out of the usufruct. The object in view would, in my opinion, be effected by granting the plaintiffs a declaratory decree in the following terms:—That the plaintiffs are not bound by the agreement entered into by Gopal Das on the 3rd of September 1912 or by the sale-deed of November, the 1st 1917, executed in pursuance of that agreement under the orders of the Court or by any of the proceedings in Suit No. 85 of 1915 in the Court of the Subordinate Judge of Jaunpur between Sital and Ram Charan plaintiffs and Gopal Das defendant, terminating in the decree of this Court in First Appeal No. 177 of 1917, except in so far that the plaintiffs are liable to make good to the respondent Ram Charan and the legal representatives of the deceased respondents Sital, a sum of Rs. 10,500 with simple interest at 8¼ per cent. per annum calculated from the 10th of July 1909 to the 1st of November 1917 but no further. That the said Ram Charan and the legal representatives of Sital are liable to account to the plaintiffs for the net profits of the property in suit from the 24th of January, 1918, or such other date as they obtained possession over that property in execution of the decree passed in Suit No. 85 of 1916, and that the plaintiffs appellants are entitled to recover possession of the said property on any date on which the sum declared to be due from them has been satisfied either out of the usufruct of the property, or by deposit in Court for the benefit of the above-mentioned respondents of the entire balance due to them after deducting the profits enjoyed by them up to the date. I think the plaintiffs should be regarded as having succeeded in this suit roughly to the extent of the difference between the sum of Rs. 22,500 for which specific performance of the contract of sale was ordered, and the sum of about Rs. 17,500 which will be due from them on account of principal and interest on Manik Chand's mortgage under the terms of the decree proposed. For purposes of calculating costs, it is not necessary to work out these figures with greater accuracy; the plaintiffs may be regarded as having succeeded in the proportion of Rs. 5,000 (success) to Rs. 17,500 (failure), and the parties should be directed to pay and receive costs in both Courts in proportion to failure and success, costs in this Court to include fees on the higher scale. I would, therefore, setting aside the decree of the Court below, grant the plaintiffs a decree for a declaration in the terms set forth above with the above order as to costs.

WALSH, J.—I agree. To the extent to which legal necessity can be established for the original mortgage of 1909, which was indeed disputed in so far as the principal is concerned, and for the debt arising therefrom, the plaintiffs who are entitled to have this agreement for sale set aside, ought to do equity by discharging the debt. I regard it as unfortunate that this Court, when the matter was open for decision in the suit

for specific performance, did not insist upon the sons being made parties, instead of affirming a barren decree which it seemed to recognize would be worthless, and thereby postponing the real controversy to a later date with the inevitable result of producing the present litigation in which the suit has only just been instituted, with all the complications which have necessarily ensued from the lapse of time and supervening events. As regards the rate and the compound nature of the interest, it is clear that, having regard to the nature of the security, no legal necessity existed for these. The father did what many men in difficulties do, namely, entered into an improvident transaction to rid himself of his immediate embarrassment, without due regard to the necessities of the case and the interests of the minor members of the family, and the purchaser must be held, on principle, to have taken such risk as was involved in the transaction into which he entered. I adhere to the view expressed in *Padam Singh* v. *Bam Rup* (1) to which decision I was a party, as to the effect of an improvident rate of interest in such a case. I do not see why when an Appellate Court is seised of the whole matter, as in this case, it should hold itself prevented from making such orders as are necessary to terminate the controversy and to do justice between the parties, and why it is not competent to us now to decree that possession to the sons of which they have wrongfully been deprived, subject to their doing equity by discharging the antecedent debt which alone could support the transaction It seems to me that much of the delay, complication and superabundance of litigation in India is due to the timidity of the Courts in not making final orders which will have the effect of putting an end to the questions between the parties when they are seised of the whole matter, but I do not dissent from the order proposed.

Order accordingly.

R. R.

(1) 36 Ind. Cas. 217; 14 A. L. J. 772.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 229-B OF 1921.

July 20, 1922.

Present:—Mr. Predeaux, A. J. C.

TRIMBAK—DEFENDANT No. 2—APPELLANT

versus

GANESH AND OTHER—PLAINTIFFS NOS. 1 TO 5 AND DEFENDANT No. 1—RESPONDENTS.

Evidence Act (I of 1872), ss. 11, 13, 32 (2)—Documents containing recitals as to boundaries, admissibility of—Persons making them alive and testifying to them—Documents, admissibility of, whether affected.

Documents not *inter partes* containing recitals as to boundaries and throwing light on the question of the ownership of the property in suit, are not admissible under section 11 or section 13 of the Evidence Act, but are admissible under section 32 (2) of that Act. The mere fact that the persons concerned in the transactions are alive and actually testify to them, would not render such documents inadmissible. [p. 315, col 2.]

Appeal from the decree of the Additional District Judge, Akola, dated the 18th April 1921, in Civil Appeal No. 239 of 1920.

Mr. *K. K. Gandhe*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—This suit relates to a house situated at Risod. The first plaintiff and the first defendant are real brothers and it is the plaintiffs' contention that the house is their ancestral property. The father died in 1906 and the brothers then separated, fields being divided but the house remaining joint. The plaintiffs now sue for partition and possession of their half share in the house.

The case proceeded *ex parte* against the first defendant, but the second defendant contested the suit, claiming the house as his own, defendant No. 1 being his tenant. The Trial Court found in defendant No. 2's favour and dismissed the suit. On appeal the suit has been decreed.

Only the first and second grounds in the memorandum of appeal to this Court have been argued. There is no force in the first ground. The document referred to therein is Exhibit A-4, and evidence was taken on this Exhibit in the Trial Court. I do not think, therefore, that there is anything in this objection.

The second ground of the memorandum relates to Exhibit A-4 and Exhibit P-I, the first being a mortgage and the second a

sale-deed executed by and in favour of persons who are not parties to this suit. The house in suit is shown as a boundary in these documents and as belonging to the father of the first plaintiff and of the defendant No. 1. It is contended that, recitals of boundaries of lands in documents between third parties are not admissible in evidence. The decisions on this point are somewhat conflicting. It was held in *Dwarka Nath* v. *Mukundu Lal Chowdhury* (1) that documents, though not *inter partes*, containing recitals that a particular site belonged to a particular person were admissible in evidence, though such entries may not be conclusive or binding evidence and may be very weak evidence, or even of no weight at all. They were held admissible either under section 11 (*b*) or section 13 of the Evidence Act. A different view is, however, taken in another decision of the same High Court, namely, in *Abdullah* v. *Kunja Beh ri Lal* (2) which distinctly holds that such documents are not relevant either under section 11 or section 13 of the Evidence Act. In *Abdullah* v. *Kunja Behari Lal* (2) by the same Court reported at page 253 of 16 Calcutta Weekly Notes it is decided that recitals of boundaries in deeds of sales and mortgages executed by owners of adjoining plots of land and describing the disputed land as the tenanted land of the defendants or their predecessors were relevant under section 32 (3) of the Evidence Act, though not under section 32 (2) or 11, or 13 of that Act. In *Daddapaneni Narayanappa, In re* (3) a Single Judge held that a recital in a document dealing with neighbouring land that the land in question belonged to the plaintiff was not legal evidence. Nor was it admissible under section 32 (2) of the Evidence Act. And two Judges of the same High Court differed in *Soripalli Venkatarayagopala Rau* v. *Fota Narasayya* (4). In *Abdul Ali* v. *Syed Rejan Ali* (5) it was held that such recitals were inadmissible in evidence against a party who was a stranger to them and that the ruling as to the admissibility of the documents in *Dwarka Nath* v. *Mukundu Lal Chowdhury* (1) was *obiter*. In a recent case of *Soroi Kumar Achari* v. *Umed Ali Howladar* (6) it is decided that recitals of boundaries of other lands in documents between third parties are not admissible in evidence. Against this view it was held in *Natwar* v. *Alkhu* (7) that such document is admissible in evidence under section 32 (*b*) of the Evidence Act, and the same view was adopted in *Imrit Chamar* v. *Sridhar Panday* (8) in *Ningawa* v. *Bharmappa* (9) and in *Haji Bibi* v. *Aga Khan* (10). The weight of authority, therefore, seems to be that such documents containing recitals as to boundaries are not admissible under section 11 or section 13 of the Evidence Act, but are admissible under section 32, clause (2), of that Act. It is, however, contended that the two documents objected to in the present case cannot fall within the provisions of section 32 (2), because the persons connected with the two transactions are still alive and have in fact been examined as witnesses. This is so, but it stands to reason that, if the documents containing such recitals would be relevant evidence, if those persons were dead, or could not be found, or had become incapable of giving evidence, or their attendance could not be procured without an amount of delay or expense which, under the circumstances of the case, appears unreasonable, they are relevant if testified to by persons concerned in the transactions. They have, therefore, been rightly admitted in the present case.

It is clear that, as the documents have been rightly admitted in evidence, the finding of the lower Appellate Court based on these documents and oral testimony cannot be challenged in this Court, for there is nothing to vitiate the finding that the house was the joint property of the two brothers and that the plaintiffs are, therefore, entitled to the decree they seek.

(1) 5 C. L. J. 55.
(2) 12 Ind. Cas. 149; 14 C. L. J. 467; 16 C. W. N. 252.
(3) 8 Ind. Cas. 268; (1910) M. W. N. 668; 9 M. L. T. 91.
(4) 26 Ind. Cas. 747; (1914) M. W. N. 779.
(5) 21 Ind. Cas. 618; 19 C. W. N. 468.
(6) 63 Ind. Cas. 954; 35 C. L. J. 19; 25 C. W. N. 1022.
(7) 18 Ind. Cas. 752; 11 A. L. J. 139.
(8) 13 Ind. Cas. 120; 17 C. W. N. 108; 15 C. L. J. 7.
(9) 23 B. 63; 12 Ind. Dec. (N. S.) 22.
(10) 2 Ind. Cas. 874; 11 Bom. L. R. 493 at p. 462.

The result is, that this appeal fails and is dismissed with costs. The appellant will pay the respondents' costs.

W. C. A. & N. H.

Appeal dismissed.

PATNA HIGH COURT.

IN THE MATTER OF COURT FEE IN SECOND CIVIL APPEAL NO. ... OF 1922.

August 1, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

Babu RAM SEKHAR PRASAD SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEONANDAN DUBEY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 5, 7 (iv) (c)—Taxing Officer, decision of, final—Value of suit—Plaintiff to fix value—Arbitrary or incorrect value—Suit under s. 7 (iv), valuation of—"Confirmation of possession", meaning of.

The Taxing Officer of a High Court has jurisdiction to fix the amount of the Court-fee payable on a memorandum of appeal to that Court, and if he decides that the value put by the appellant upon the relief is incorrect, he has the power to correct it, and the High Court has no jurisdiction to interfere with his decision, even though he has done something which the law does not allow him to do. [p. 317, cols. 1 & 2.]

Balkaran Rai v. *Gobind Nath Tewari*, 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831, *Koer Karan Singh* v. *Gopal Rai*, 4 Ind. Cas. 123; 32 A. 69; 6 A. L. J. 972, *Lagan Burt Kuer* v. *Khakhan Singh*, 43 Ind. Cas. 962; 3 P. L. J. 92 and *Chanderbati Kuer* v. *Gorey Lal Singh*, 52 Ind. Cas. 508; 4 P. L. J. 700, relied on.

Section 7, clause (iv) (c) of the Court Fees Act requires that the plaintiff shall truly state the value of his relief, but it is not open to him to give an arbitrary and incorrect valuation. [p. 319, col. 1.]

Jageshra v. *Durga Prashad Singh*, 24 Ind. Cas. 679; 12 A. L. J. 844; 36 A. 500, *Ummatul Batul* v. *Musammat Nanji Koer*, 11 C. W. N. 705; 6 C. L. J. 427, *Krishna Das Laha* v. *Hari Charan Bannerjee*, 10 Ind. Cas. 865; 14 C. L. J. 47; 15 C. W. N. 823, *Raj Krishna Dey* v. *Bepin Behary Dey*, 17 Ind. Cas. 162; 16 C. L. J. 184; 17 C. W. N. 591; 40 C. 245, *Brij Krishna Das* v. *Murli Rai*, 55 Ind. Cas. 316; 4 P. L. J. 708, relied on.

In the absence of rules framed under the Suits Valuation Act for the value of an interest in land which is the subject-matter of a suit under section 7, clause *iv* of the Court Fees Act, the value of the suit is the value of the subject-matter of the relief, that is to say, the money value of the loss which the plaintiff apprehends [p. 319, col. 2]

The words "confirmation of possession" mean and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession, and is, therefore, consequential relief within the meaning of section 7 (iv) (c) of the Court Fees Act. [p. 317, col. 2: p. 318, col. 1.]

Bohuroonissa Bibi v *Kureemoonissa Khatoon*, 19 W. R. 18, *Jhumak Kamti* v *Debu Lal Singh*, 6 Ind. Cas. 898: 22 C. L. J. 415, *Dina Nath Das* v. *Rama Nath Das*, 34 Ind. Cas. 702: 23 C. L. J. 561, relied on.

Parathayi v. *Sankumani*, 15 M. 294; 5 Ind. Dec. (N. S.) 556, *Samiya Mavali* v. *Minammal*, 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744, *Vachhani Keshabhai* v. *Vachhani Nanbha Bavaji*, 1 Ind. Cas. 108; 33 B. 307; 11 Bom. L. R. 30: 5 M. L. T. 230; *Dayaram Jagjivan* v. *Gordhandas Dayaram*, 31 B. 73; 8 Bom. L. R. 885, *Sunderabai* v. *Collector of Belgaum*, 52 Ind. Cas. 897; 43 B. 376; (1919) M. W. N. 254; 23 C. W. N. 753; 21 Bom. L. R. 1143; 46 I. A. 15 (P. C.), *Barru* v. *Lachhman*, 22 Ind. Cas. 503; 228 P. W. R. 1913; 111 P. R. 1913; 23 P. L. R. 1914, *Hari Sanker Dutt* v. *Kali Kumar Patra*, 32 C. 734; 9 C. W. N. 690, considered.

Court-fee matter in an appeal from the decision of the Subordinate Judge, Shahabad.

Mr *A. K. Roy*, for the Appellants.

JUDGMENT.

MULLICK, J.—The plaintiffs allege that they held under the proprietor, defendants Nos. 4 to 18, a holding of 11 *bighas*, 3 *kathas*, which, by private partition, has been split up into three sets of parcels, Survey Plots Nos. 253 and 72 being allotted to defendant Nos. 4 to 14, Survey Plots Nos. 253 1136 and 263 to defendants Nos. 15 to 17, and plot No. 177 to defendant No. 18. The rent of plot No. 253 is shown in the Record of Rights as Rs. 4 2-0, whereas the plaintiffs state that it is Rs. 1-13-6, and plot No. 72 is shown as *kabil-lagan*, whereas the plaintiffs state that it is part and parcel of plot No. 253.

The plaintiffs also allege that the defendants have conspired together and got the name of defendant No. 1 entered as a *raiyat* of the entire 11 *bighas* 3 *kathas*, although he has no interest in the same. The plaintiffs accordingly pray for a declaration that

the Record of Rights is wrong. In regard to possession, they state that the defendants are resisting their possession and they, therefore, ask for confirmation of possession.

In the Court of the Munsif the land was valued at Rs. 100 evidently for the purpose of jurisdiction and a fee of Rs. 10 was paid upon the plaint upon the footing that the suit was for a declaration only. The Munsif dismissed the suit and the same amount of Court-fee was paid by the plaintiffs in their appeal to the Subordinate Judge.

The Subordinate Judge having decreed the suit, the defendants have preferred the present second appeal and have paid the same Court fee as the plaintiffs did in the Courts below.

The Stamp Reporter, however, found that the market-value of the land affected was Rs. 1,239-10-6 and that an *ad valorem* fee was payable thereon, and, as the appellants had paid Rs. 10, he claimed a deficit of Rs. 80. There being a difference of opinion between the Stamp Reporter and the appellants, the case was referred to the Taxing Officer who has affirmed the view of the Stamp Reporter and called upon the appellants to pay the deficit. As the appellants have refused to do so, the case has been sent up to this Bench in order that final orders may be passed on the appeal.

Now, the first question to be decided is, whether the Taxing Officer's decision as to the amount of the Court fee due on the memorandum of appeal is final. Section 5 of the Court Fees Act would seem to conclude the matter, but the learned Vakil for the appellants before us contends that, as the case comes under section 7 (*iv*) (*c*) of the Act, the appellants are entitled to value the relief at their own figure, that in declining to accept their valuation the Taxing Officer has exceeded his jurisdiction, and that his decision can, therefore, be revised by the Court.

Now, it seems to me that the wording of section 5 is so explicit and general that it leaves the Court no option. The Taxing Officer has jurisdiction to fix the amount of fee payable, and if he decides that the valuation put by the appellants upon the relief was incorrect he has the power to correct it. Even if he has done anything which the law does not allow him to do, the Court Fees Act gives the High Court no jurisdiction to interfere with his decision as to the amount of the fee.

This view is also completely covered by authority. In *Balkaran Rai* v. *Gobind Nath Tewari* (1) it was held that a decision under section 5 of the Court Fees Act is not open to appeal, revision or review and is final for all purposes and that no means have been provided or suggested by the Legislature for questioning it. In *Koer Karan Singh* v. *Gopal Rai* (2) it was held that the decision of a Taxing Officer as to the category within which a suit falls for the purpose of ascertaining the proper amount of Court-fees payable on a memorandum of appeal, as also his decision as to the amount of fee, is final and binding upon the Court under section 5 of the Court Fees Act and that the Court cannot go behind the order of the Taxing Officer to examine the method which he adopted to arrive at his decision. This Court also has uniformly adopted this view of section 5 and, I think, it is too late for the appellants to attack the Taxing Officer's decision on the ground that he has illegally assumed jurisdiction. See *Lagan Burt Kuer* v. *Khakhan Singh* (3) and *Chanderbati Kuer* v. *Gorey Lal Singh* (4).

Then it is contended that the Taxing Officer has jurisdiction only to deal with fees payable under Chapter II and that as the fee now demanded is one payable under Schedule I of the Act, it is not a fee in respect of which his decision is final. The reply to this is, that Schedule I is merely supplementary to section 7; it is a table provided for ready reckoning and indicates how the *ad valorem* fee prescribed by section 7 is to be calculated.

But, apart from this preliminary point, I think it is quite clear that the Taxing Officer's procedure was perfectly correct and that his decision must be affirmed.

The plaintiffs pray for a declaration and for confirmation of possession. It may be contended that the prayer for confirmation of possession is nothing more than a prayer that the fact of, and his right to, possession may be declared but the words "confirmation

(1) 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831 (F. B.).
(2) 4 Ind. Cas. 123; 32 A. 59; 6 A. L. J. 972.
(3) 43 Ind. Cas. 962; 3 P. L. J. 92.
(4) 52 Ind. Cas. 508; 4 P. L. J. 700.

of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession; and it is for this reason that for over half a century confirmation of possession has been held to be consequential relief within the meaning of section 7 (*iv*) (*c*) of the Court Fees Act. See *Bohuroonissa Bibi* v. *Kureemoonissa Khatoon* (5), *Jhuman Kamti* v. *Debu Lal Singh* (6), *Dina Nath Das* v. *Rama Nath Das* (7).

I have been unable to discover how and when this form of pleading originated but, at the present time, I think, it is indisputable that, though it may be often unnecessary to ask for it, a prayer for confirmation of possession is added as an useful precaution against failure to prove possession up to the date of the suit. In the present case the plaintiff states in paragraph 13 of his plaint that, owing to the resistance of the defendants, he is compelled to bring a regular suit. This is, therefore, in essence a suit for possession which is a form of consequential relief.

That being so, how is the consequential relief to be valued in this case? Are the plaintiffs entitled to put their own valuation or is the Court or, in a High Court, the Taxing Officer competent to correct such valuation?

The learned Vakil for the appellants relies upon various decisions in the High Courts of Bombay and and Madras and of the Chief Court of the Punjab which, though affirming the principle that the plaintiffs' valuation must be accepted, do not seem really to cover the case now before us. I proceed to refer to these briefly.

(1) *Parathayi* v. *Sankumani* (8). In this case the plaintiff sought to set aside a deed of sale of which the consideration was Rs. 60,500. He paid a Court-fee of Rs. 10 only as on a declaratory suit but the Court held that he must pay *ad valorem* fee on the value of his interest on the document.

(2) *Samiya Mavali* v. *Minammal* (9). In this case the plaintiff sued to set aside a sale-deed and valued his relief at Rs. 800. The Trial Court assessed the value at Rs. 2,000, the amount mentioned in the sale-deed. The High Court on second appeal held that the plaintiffs' valuation should be accepted. The report does not show whether in the opinion of the Court that was the proper valuation of the relief.

(3) *Vachhani Keshabhai* v. *Vachhani Nanbhu Ravaji* (10). The plaintiffs prayed for a declaration of title to certain lands, recovery of a sum of Rs. 637 being their share of the income for the years 1956-1960 *Sambat* and for an injunction. They valued the first relief at Rs. 130, the second at Rs. 637 8- and the third at Rs. 25. The High Court held that both for Court-fees and jurisdiction the plaintiffs' valuation must be accepted and that notwithstanding the defendants' objection that the property was worth Rs. 5,000 the suit was triable by a Second Class Subordinate Judge whose jurisdiction was confined to suits less than Rs. 5,000 in value.

Their Lordships, however, were of opinion that the valuation would be determinable by the Court if a claim for possession were made and on this ground they distinguished the previous ruling of their own Court in *Dayaram Jagjivan* v. *Gordhandas Dayaram* (11).

(4) *Sunderbai* v. *Collector of Belgaum* (12). This was a suit for a declaration and an injunction. Their Lordships of the Privy Council cited with approval the observation of the Bombay High Court that jurisdiction should be determined by the plaintiff's valuation.

(5) *Barru* v. *Lachhman* (13). In this case the plaintiffs sought a declaration and an injunction and valued the relief at Rs. 130 for purposes of Court fee and at Rs. 1,100 for purposes of jurisdiction though the value of the land was Rs. 73,192. A Full Bench of the Punjab Chief Court held that as the case fell within section 7 (*iv*) (*c*) of the Court Fees Act the valuation was proper.

(5) 19 W. R. 18.
(6) 16 Ind Cas. 898; 22 C. L. J. 415.
(7) 34 Ind. Cas 702; 23 C. L. J. 561.
(8) 15 M. 294; 5 Ind. Dec. (N. S.) 556.
(9) 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744.
(10) 1 Ind Cas. 108; 33 B. 807; 11 Bom. L. R. 80; 5 M. L. T 210.
(11) 31 B. 73; 8 Bom. L. R. 895.
(12) 52 Ind Cas. 497; 43 B 376; (1919) M. W. N. 254; 24 C. W. N. 753; 21 Bom. L. R. 1143; 46 I. A. 15 (P. C.)
(13) 22 Ind. Cas. 503; 228 P. W. R. 1913; 111 P. R. 1913; 23 P. L. R. 1914.

(6) *Hai Sanker Dutt* v. *Kali Kumar Patra* (14). In this case the plaintiff sought a declaration of title to some jungle land, damages for the cutting of some trees and an injunction. He valued the declaration together with the injunction at Rs. 130, and the damages at Rs. 79. The High Court of Calcutta held that though the value of the whole jungle was Rs. 1,200, it was neither the duty nor within the power of the Court to ascertain the value of the property for purposes of jurisdiction.

It will be observed that none of the cases relate to possession. They would all seem to relate to claims in which the Court had no option but to accept the plaintiffs' valuation. No case has been shown to us where there was a claim for possession and where the plaintiff was allowed to put a valuation upon it which the Court knew to be false.

On the other hand, it was observed by Richards, C. J., in *Jageshra* v. *Durga Prashad Singh* (15), that section 7, clause (*iv*) (*c*) requires that the plaintiff shall truly state the value of his relief; to the same effect is *Umatul Batul* v. *Musammat Nanji Koer* (16), *Krishna Das Laha* v. *Hari Oh ran Banerjee* (17) and *Raj Krishna Dey* v. *Bepin Behary Dey* (18) and in the High Court at Patna the authorities are unanimous that it is not open to the plaintiff to give an arbitrary and incorrect valuation—see *Sri Krishna Das* v. *Murli Rai* (19), *Shama Pershad Sahi* v. *Sheopersan Singh* (20).

In this state of the authorities I think the Taxing Officer was clearly right in following the practice prevailing in this Court.

Apart from authority, it is also quite clear that the interpretation put by the appellants on section 7 (*iv*) (*c*) cannot be accepted; for if pushed to its logical conclusion it would lead to manifest absurdities. It is admitted that a suit for declaration of title and recovery of possession is a suit for declaration with consequential relief. If the section is to be literally construed, then, while a plaintiff suing simply for possession would, under section 7 (*c*) have to pay *ad valorem* fees on the value of the property, he would, by joining a prayer for declaration, pay an *ad valorem* fee on whatever smaller value he chose to put upon the consequential relief. Again, when a plaintiff had valued his prayer for consequential relief at a certain figure in his plaint and had failed in the Trial Court, it would be open to him in appeal to value the consequential relief at any lower figure he might choose. These inconsistencies and anomalies would not occur if the section were held to mean that the valuation for the purposes of Court-fee is to be made in the first instance by the party concerned but is finally determinable by the Court.

The next question is, what is the proper value of the consequential relief in this case. No rules have been made under sections 3 and 4 of the Suits Valuation Act in this Province for the valuation of an interest in land which is the subject-matter of a suit under section 7, clause (*iv*) of the Court Fees Act. Sections 3 and 4 of the former Act provide for the valuation of land for the purposes of jurisdiction and under section 8 the value as determinable for the computation of Court fees is to be the same as the value for the purposes of jurisdiction. No rules having been framed, we must look to the value of the subject matter of the relief, that is to say, the money value of the loss which the plaintiffs apprehend; and in this case we must follow the practice of this Court and assess the value of the relief at the value of the 11 *bighas* 3 *kathas*, in respect of which possession is claimed. The Taxing Officer finds that in 1910 the plaintiffs purchased the entire holding of 11 *bighas* 18 *kathas* at a Civil Court auction sale for Rs. 1,323 10 6 and that the proportionate value of the 11 *bighas* 3 *kathas* is Rs. 1,239-10-6. The *ad valorem* fee payable upon this sum is Rs. 90 and there is, therefore, a deficit of Rs. 80 in the present case. It may be that the value of the property at the time of the suit was less, though this

(14) 32 C. 734: 9 C. W. N. 690.
(15) 24 Ind. Cas. 679: 12 A. L. J. 844; 36 A. 500.
(16) 11 C. W. N. 705; 6 C. L. J. 427.
(17) 10 Ind. Cas. 865; 14 C. L. J. 47; 15 C. W. N. 823.
(18) 17 Ind Cas. 162; 16 C. L. J. 194; 17 C. W. N. 591; 40 C. 245.
(19) 56 Ind Cas. 316: 4 P. L. J. 703.
(20) 41 Ind. Cas. 95; 5 P. L. J. 394; 2 P. L. W. 173.

is not probable, than its value 8 years earlier, but the appellants had an opportunity of proving its real value before the Taxing Officer, and as no proof was given we are not in a position to say that the Taxing Officer's decision is incorrect. I think, therefore, that his decision must be affirmed.

The learned Vakil for the appellants desires two days' time to pay the deficit Court-fee. If the amount is not paid by the 3rd instant the appeal will be dismissed without further reference to a Bench.

MILLER, O. J.—I agree.

W. C. A. & N. H.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 165-B OF 1921.

June 23, 1922.

Present:—Mr. Prideaux, A. J. C.

SAKHARAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DEOBA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 144—Proof of title by plaintiff—Burden on defendant to prove possession for over 12 years before suit—Constructive possession—Title—Constructive possession always follows title.

In cases falling under Art 144 of Schedule I to the Limitation Act, it is not incumbent on the plaintiff to establish possession within 12 years of suit. He has to prove title and it then rests on the defendant to prove that he and those under whom he claims have been in possession for over twelve years before suit [p. 322, col. 1.]

Appeal from a decree of the Additional District Judge, Akola, dated the 16th February 1921, in Civil Appeal No. 60 of 1920.

Mr. *D. T. Mangalmurti*, for the Appellants.

Mr. *V. Bose*, for the Respondent.

JUDGMENT.—This judgment disposes of Second Appeal No. 164 B of 1921, Deoba, plaintiff, and Ashruji, defendant, Second Appeal No. 165-B of 1921, Deoba, plaintiff, and Sakharam and Ashruji, defendants, and Second Appeal No. 166-B of 1921, Deoba plaintiff, and Sakharam, defendant. These three suits have been tried together and one judgment has governed their disposal in the Courts below. They were heard together in this Court and, therefore, this judgment disposes of all the three.

The property in suit is the various Pot Hissas of Survey No. 41 of Kankarwadi. The plaintiff sued for joint possession of his eight annas share in these Pot Hissas. His story is that the field originally belonged to one Girmaji, the grandfather of the plaintiff. Girmaji had two sons, Punjaji and Raghoji, and the plaintiff is the son of Raghoji. He owns a joint half share in the field, the other half belonging to his uncle Punjaji. The defendants refused to give him possession of his shares and hence the suit.

The defence was, that the field was bought from Punjaji on 22nd February 1906 by Ashruji and Raoji, father of Sakharam. As Punjaji's sons disputed the sale, Raoji and Ashruji paid Rs. 550 to the sons of Punjaji and obtained another sale deed on 19th June 1909. This sale deed is said to have been lost. It was further pleaded that Punjaji was in possession as ostensible owner, and that the defendants were *bona fide* purchasers for valuable consideration without notice of the plaintiff's title. Adverse possession was pleaded and it was contended that the suits for joint possession were not maintainable, and that plaintiff should have brought a suit for partition and separate possession of his alleged half share.

The plaintiff, in return, stated that the defendants were in possession for 4 or 5 years and that he knew nothing of the transfer. The case was tried on the following issues common to the three suits:—

(1) Whether it is obligatory on the plaintiff to bring a suit for partition? Is the suit for joint possession not maintainable?

(2) Whether the field Survey No. 41 was the ancestral property of the plaintiff and Punjaji and whether the plaintiff has got half share in the field? or

(3) Whether the field was the self-acquired property of Punjaji?

(4) Whether Punjaji and his sons sold the field in suit to Raoji and defendants? Had they right to sell the entire field?

(5) Was plaintiff in possession of the field at any time within 12 years next before this suit? or

(6) Is plaintiff's claim barred by defendants' adverse possession for over 12 years?

(7) Whether Punjaji was the ostensible owner of the field and are the defendants protected by section 41 of the Transfer of Property Act?

(8) To what relief are the parties entitled?

In Suits Nos. 350 and 351, that is, Second Appeals Nos. 164B and 165B, there was an additional issue. Whether it was necessary for the plaintiff to claim relief in this case in Civil Suit No. 349 of 1919 filed in this Court? Is this suit barred under O. II, r. 2, Civil Procedure Code?

The First Court's findings may be summarised as follows:—

The plaintiff's suits for joint possession are maintainable. It was established that the field originally belonged to Girmaji, the grandfather of plaintiff, and plaintiff is the son of Girmaji's son, Raghoji. It has not been shown that the field was the self-acquired property of Punjaji. Deoba had a half share in the field as his share as son of Punjaji's brother, Raghoji. The first sale by Punjaji was by *razinama* and *kabuliyat* in 1906. One Badulal had obtained a foreclosure decree in respect of this field on a mortgage executed by Punjaji. The actual possession remained with defendants as lessees of Badulal. The sons of Punjaji then sued Badulal for redemption obtaining a decree and redeeming the mortgage. It was after this that Raoji and Ashruji took a fresh sale-deed from Punjaji's sons on 19th June 1909. That has been lost and a copy of it is on record. Punjaji and his sons were owners of half and had no right to sell the other half share belonging to plaintiff. The plaintiff has admittedly never been in possession, but Punjaji's possession would not be adverse to plaintiff unless he actually ousted plaintiff or denied his title openly, and adverse possession would commence from the date of such denial or ouster. In the present case the sale to defendants of the whole field was given by Punjaji on 22nd February 1906 when the defendants entered into possession. Punja by selling the field on that date, openly denied the plaintiff's title to the field claiming the entire field himself, and as the present suit was filed on 11th December 1919, that is, more than 13 years after the field has been sold, under Art. 144 of the Limitation Schedule, 1908, plaintiff's claim was time barred. Dealing with Issue No. 7 the Judge finds that the defendants took no reasonable care to ascertain whether Punjaji had a right to make the transfer and, therefore, the case was not governed by section 41 of the Transfer of Property Act. It was held that the three suits were rightly brought, but the suits were dismissed on the ground that they were barred by limitation.

On appeal it was found that there was interruption of the defendant's adverse possession when they were dispossessed on 26th June 1907 when the mortgagees took possession of the field in pursuance of their decree, and the mortgagees were in possession till 13th May 1909 and as the suits were brought within 12 years from this date they were within time. The Judge held that the defendants were not entitled to tack to their possession the possession of their vendors from 13th May 1909 or the possession of the mortgagee Laduram Badulal from 23th April 1907 to 13th May 1909 and also their own prior possession from 22nd February 1906 to 26th April 1907. The defendants' possession for the period of the lease was not adverse possession. The three appeals were allowed.

It is here argued that the adverse possession of Punjaji's branch against Deoba and Raoji commenced on 18th September 1902, that is, from the date of the mortgage in favour of Laduram if not from 22nd February 1906 when Punjaji sold and gave possession to the present appellants. The point pressed here is, that Art. 142 applies. It is admitted by appellants that plaintiff came of age in 1907. It is also clear that plaintiff never held actual possession. So it is difficult to see how Art. 142 of the Limitation Schedule can possibly apply. Art. 144 applies, and the defendants will have to prove 12 years' adverse possession. The mortgage in Laduram's favour was executed when the plaintiff was a minor. By consenting to act as Laduram's lessees and then re-buying from Punjaji and his sons it seems to me that appellants admitted they were no owners by the *razinama-kabuliyat* transfer

of 1906. I do not see how they can possibly tack on Punjeji's possession, as a joint owner he was holding for both himself and the plaintiff, nor yet the time they were in possession as lessees. Constructive possession always follows the true title and until Punjeji and his sons sold after appellants had been in possession as lessees adverse possession did not commence. In cases under Art. 144 it is not incumbent on the plaintiff to establish possession within 12 years of suit. He has to prove title and it then rests on the defendants to show that he and those under whom he claims have been in possession for over 12 years before suit. Even if time be taken from 1906 when the *razinama* and *kabuliyat* transaction took place as, owing to plaintiff's minority time would not commence to run until 1907, it is by no means certain that the suits are not within time, but I agree with the lower Appellate Court generally in its reasons for holding that the suits are within the limitation allowed. This disposes of the three appeals which are dismissed with costs. The appellants will pay the respondent's costs.

G. R. D. *Appeals dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2209 OF 1919.

January 25, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Cuming.

SASHI KUMAR SORKHEL AND OTHERS —DEFENDANTS—APPELLANTS

versus

CHANDRA KUMAR SAMADDAR CHOWDHURI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Decree, fictitious, if requires to be set aside - Hindu Law - Joint family—Acquisition during jointness—Presumption—Burden of proof—Hindu widow, suit against—Husband's estate, representation of.

A decree which is fictitious does not require to be set aside [p. 324, col.]

Where one finds people living as joint and properties are acquired during this time the presumption is that they are acquired for the benefit of the joint family as a whole. The burden of adducing evidence to rebut the presumption is on the side who denies the jointness. [p. 324, col. 2.]

Where a *bona fide* suit is brought against a Hindu widow in respect of a genuine debt incurred by her husband, the widow, for the purposes of the suit, represents the husband's estate and the estate would be bound by the decision thereof. [p. 323, col 1.]

But where the suit is a fictitious one, the decree would not bind the estate or the reversioners. [p. 323, col. 2.]

Appeal against a decree of the Additional District Judge, Bakarganj, dated the 16th June 1919, modifying a decree of the Subordinate Judge Second Court of that district, dated the 30th April 1917.

Babu *Mahendra Nath Roy* (with him Babu *Manmotha Nath Roy*), for the Appellants.

Babu *Brojolal Chakrabarty* (with him Babu *Suresh Chandra Talukdar*), for the Respondents.

JUDGMENT.—This is an appeal by five defendants—defendents Nos. 1, 3, 12, 13 and 18. The suit in respect of which the appeal arises is a suit by which the plaintiffs claim, as reversionary heirs of one Purna, a 4-annas share in 13 properties jointly with the defendants Nos. 1 to 11 who are said to be the owners of the other 12-annas share. The First Court decreed the suit with regard to all the 13 properties. The lower Appellate Court upheld the decision as regards properties Nos. 1 to 9 and reversed the decision of the First Court so far as regards properties Nos. 10 to 13. The appeal concerns properties Nos. 1 to 9; but the plaintiffs have filed a cross-objection with regard to properties Nos. 10 to 13.

Now, it will be convenient before dealing with the points raised in the appeal to refer to the genealogical table which will be found at page 29 of the paper book before us. One Krishna Chandra Sarkhel had 4 sons—Bhairab, Rajkallabh, Shib Chandra and Banga Chandra. Bhairab had a daughter and son Purna. Purna married Umatara. He died leaving only his widow Umatara him surviving and no other heirs. On the widow's death the descendants of Bhairab's daughter, who are the plaintiffs, became heirs to Bhairab's estate. Rajballabh had a son Kali Mohan; it is not necessary to refer to the other members of Rajballabh's family, nor is it necessary to refer to Shib Chandra's family. On the 16th April 1861 sometime after Bhairab's death a suit

was commenced by one Prasanna on a bond said to have been executed by Purna. The parties to the suit were Purna's widow Umatara, Banga Chandra and Kali Mohan. Now, I think, there can be no doubt that if the debt was a genuine debt and the suit a *bona fide* one, Umatara, for the purposes of the suit, represented Purna's estate and Purna's estate would be bound by the decision thereof. The suit was decreed on the 11th May 1861 and in October 1869 there was a sale in execution of the decree—the properties sold being the shares of the judgment-debtors in properties Nos. 1 to 9 which are claimed in this appeal. The properties were bought or purported to be bought by one Chandra. After an interval of many years, namely, on the 2nd February 1910, Umatara commenced a suit for a possession of a 4 annas share in properties Nos. 1 to 9. Other properties, I understand, were included in the suit but we are not concerned with these. Her allegation was that she had been dispossessed and she alleged (*inter alia*) that the execution sale did not pass any property inasmuch as the bond was forged. The suit was brought in the Munsif's Court and was valued at Rs. 1,100. The Munsif dismissed the suit on the 26th April 1911 and the learned Vakil for the respondent has shown us a copy of judgment in the suit. It appears that so far as the merits were concerned, the findings were in favour of Umatara, but that she failed to obtain a decree because she did not ask to set aside the sale in execution. It seems, therefore, that although she succeeded on the merits she failed for technical reasons. On the 6th October 1915 Umatara died and the suit in respect of which this appeal arises was commenced on the 8th March 1916 in the Subordinate Judge's Court. The suit was valued at Rs 2,100. It was brought, as already stated, by the reversioners who became the owners of Purna's estate after the death of Umatara. The suit relates to the 9 properties said to have been sold in 1861 and to 4 other properties which are the subject-matter of the cross-objection. Now, as I have already stated, as regards properties Nos. 1 to 9, both the lower Courts held that Umatara did not represent the estate and that accordingly the reversioners were not affected by the previous litigation.

In the appeal before us 4 points have been urged. First, it is said that the decree of 1861 bound the estate as represented by Umatara as the decree was not fraudulent; secondly, it is said that the plaint in the present suit contains no prayer to set aside the execution sale and that the suit would not lie unless the execution sale is set aside; thirdly, it is said that the suit is barred by limitation; and lastly, it is said that the suit of 1910 operates as *res judicata*.

Now, the findings of the lower Appellate Court with regard to the bond and the suit of 1861 are on their face somewhat conflicting. At page 33 of the paper-book the learned Judge states that there is nothing to show whether the debt, on which the *ex parte* decree was obtained, was real or unreal and that it cannot be said that the decree was obtained by fraud. But at page 34 he states as follows: "All these facts show indication by conduct that the auction-sale was a sham transaction to keep the property in the family." And again, "If the debt were a real one such suspicious conduct inconsistent with *bona fides* were not probable. Under all these circumstances I believe and find that the debt was not a real debt, that the auction-purchaser was not a *bona fide* one and that possession continued with the Sarkhel family and not with the auction-purchaser or his heirs. I also find that the sale did not affect the interest of Umatara and much less of the reversioners." It has been argued on behalf of the appellants that as the bond was not found to be a forgery the estate of Purna was bound by reason of Umatara's presence as a party. I think, if there was a clear and unambiguous finding to this effect, then this contention must prevail. But I think, that reading the judgment as a whole the two findings amount to this that there was no debt, that the bond was a fictitious document and the suit accordingly a mere fiction with the result that the execution sale, founded on a fiction, is really of no value and not binding on any one. This being so, it cannot be said that the decree of 1861 was a decree that would bind Purna's estate or Purna's reversioners.

So far as the second ground is concerned, it seems to us to be concluded by the decision to which reference has been made, namely, the decision in *Surendra Nath Ghose* v. *Kali Gopal*,

Mozoomdar (1), where it is clearly laid down that a decree which is fictitious does not require to be set aside; the statement being "a collusive and fraudulent proceeding in a Court is not a judicial proceeding and is to be treated as availing nothing to the party who sets it up." So much then for the second point urged before us.

So far as the 3rd point is concerned, this is based on the suit of 1910 and I think this presents a certain amount of difficulty. The point apparently was abandoned in the First Court, for the learned Munsif states that the Pleader for the defendant did not press the point of *res judicata* in the course of his argument, but it was apparently argued in the lower Appellate Court. Now I have already stated the nature of that suit, the findings of the Court and the ground of the decision and, on the whole, I think, that both the Courts were right in holding that, under the circumstances, the suit of 1910 was a personal suit by Umatara, not on behalf of the estate, and that it does not operate as *res judicata*. It is also noticeable that this is not a case in which Umatara is suing, after her husband's death, for possession of an estate of which she had never been in possession. Clearly on the evidence she was in possession from her husband's death from sometime before 1861 until the year 1903. So she is not suing to recover her husband's share but to recover present possession in her own right which she enjoyed for many years and from which she had been dispossessed. This disposes of all the questions raised in the appeal before us. The result is that, in our opinion, the decision of the lower Court is correct so far as regards the properties Nos. 1 to 9 and we must uphold the claim of the plaintiffs for possession of those properties.

We now come to the cross objection of the respondents. This refers to plots Nos. 10 to 13. Now these plots did not form a part of the original estate of Krishna Chandra Sarkhel nor had they been acquired during Purna's lifetime. It appears that sometime between Purna's death and the year 1903 these plots were acquired by the joint family of which Umatara was one. The Munsif who gave these four plots to the plaintiffs states in his judgment which will be found at page 26 of the paper-book: "These properties were acquired when the parties lived in commensality. The presumption, therefore, is that they were acquired by the joint fund." It seems to us that that is a correct statement of the law; where one finds people living as joint and properties are acquired during this time, the presumption is that they were acquired for the benefit of the joint family as a whole. Consequently, Umatara as a member of the joint family was presumably, until the presumption is rebutted, entitled to an interest in these properties. The lower Appellate Court has reversed the decision of the First Court as regards these plots on an error of law in that he has thrown the burden on the plaintiffs of showing the fund from which the acquisition was made and in not throwing on the side who denied the jointness the burden of adducing evidence to rebut the presumption that the properties were acquired for the joint family as a whole. This, in our opinion, vitiates the finding of the District Judge as regards Plots Nos. 10 to 13. But it is said that he has found that Umatara was never in possession of these properties and that in the suit of 1910 she did not claim any share in them. But, as I have already stated, that suit was brought to enforce a personal claim and that does not debar the plaintiffs as reversionary heirs of Purna from now asserting their claim to a share of those properties. The cross objection, therefore, we think, must succeed and we declare that the plaintiffs are entitled to a 4 annas share in the properties Nos 10 to 13.

The result, therefore, is that the decree of the Court below in so far as it relates to these 4 properties must be set aside and that of the First Court restored. In other respects the decree of the Court below will stand. The respondents will be entitled to their costs of the appeal and to the Court fees paid on the memo. of cross-objection.

CUMING, J.—I agree.

B. N. *Decree set aside.*

(1) 42 Ind. Cas, 431; 22 C. W. N, 367; 26 C. L. J. 383; 45 C, 920.

GOVIND v. RADHABAI KALAR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 8-B OF 1921.

July 20, 1922.

Present :—Mr. Kotwal, A. J. C., and Mr. Prideaux, A. J. C.

GOVIND—PLAINTIFF—APPELLANT

versus

RADHABAI KALAR—DEFENDANT—RESPONDENT.

Hindu Law—Jaiswar Kalar—School, by which, governed—Situation of property—Residence—Determination of domicile and personal law.

A person belonging to the Jaiswar sub-division of the Kalar caste and living in a village in the Central Provinces is *prima facie* governed by the Benares School of Hindu law [p. 326, col. 2.]

The place where a person's property is situated is not a decisive factor in the determination of his domicile [p. 326, col. 2.]

A Hindu residing in a particular province is subject to the particular doctrines of Hindu Law recognised in that province. [p 326, col. 2.]

Balwant Rao v. *Baji Rao*, 57 Ind. Cas. 545; 16 N. L. R. 187; 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 47 I. A. 213; 25 C. W. N. 243; 48 C. 30 (P. C.), followed.

Appeal from the decree of the Additional District Judge, Amraoti, dated the 20th October 1920, in Civil Suit No. 39 of 1919.

Mr. *V. R. Pandit*, R.B., *W. R. Puranik* and *O. B. Parakh*, for the Appellant.

Messrs. *M. Gupta*, *J. K. R. Oama*, R.B., and *K. V. Brahma*, R.B., for the Respondent.

JUDGMENT.—The following genealogical tree shows the relationship of the parties :—

SHEORAMSA = Radhabai (defendant)
died 2nd November 1918

Nathu = widow Jamna died 12th February 1918.	Tukaram = Bhagirathibai
	adopted son Govinda, minor, (plaintiff.)

The plaintiff's case was as follows. Sheoramsa and his two sons who predeceased him formed a joint Hindu family. Tukaram before his death instructed Bhagirathibai that she should adopt a son to him Out of respect for Tukaram's wishes Sheoramsa before his death directed Radhabai, not to adopt a son herself but to get Bhagirathibai to adopt one to Tukaram. Radhabai acting on this direction consented to the plaintiff's adoption by Bhagirathibai which took place on the 20th March 1919. On these facts the plaintiff sued Radhabai for a declaration that he was by virtue of the adoption grandson and heir of Sheoramsa, and for possession of Sheoramsa's property. In proof of the consent by Radhabai the plaintiff relied on a statement in writing called a *kaifiyat* dated the 11th December 1918 signed by Radhabai. In this statement mention is made of Sheoramsa's directions referred to above.

Radhabai denied that Tukaram and Sheoramsa had instructed Bhagirathibai and herself respectively as alleged and that she consented to the adoption. She alleged that the *kaifiyat* was taken from her under misrepresentation but that even if she is deemed to have consented to the adoption by that statement, her consent was withdrawn before the adoption took place. She further pleaded that Sheoramsa and the members of his family as well as his forefathers were residents of the Central Provinces and the parties were, therefore, governed by the Benares School of Hindu Law. Other minor pleas taken by the parties will be apparent from the issues which were as follows :—

"1. Did Bhagirathi adopt plaintiff ?

2. Was the adoption made on the instructions of Tukaram and Sheoramsa ?

3. (*a*) Was it made with the consent of defendant ?

(*b*) Was the consent withdrawn ?

4. What was the age of Tukaram when he died and what was the age of Bhagirathi at the time ?

5. Was the thumb impression on

(*a*) the document styled *kaifiyat* secured by the *patwari* by misrepresentation as alleged by the defendant ?

(*b*) Is the *kaifiyat* inadmissible in evidence for want of stamps and registration ?

6. By what School of Hindu Law are the parties governed ?

7. (*a*) What property not admitted by defendant to be in her possession, but claimed on the ground that it is in her possession is with her ?

(*b*) What is the value of the property in possession of defendant and claimed by plaintiff ?

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(c) What debts due by Sheoramsa were re paid by defendant?

8. What were the mesne profits of the field in the year 1919-20?

9. What relief can plaintiff claim?"

The Lower Court found :—

On Issue No. 1,

that the adoption was proved ;

On Issue No. 2,

that Tukaram did not authorise Bhagirathibai to adopt a son and that Sheoramsa did not instruct Radhabai to see that Bhagirathibai adopted a son ;

On Issue No. 3,

that Radhabai did not consent to the adoption ;

On Issue No. 4,

that Bhagirathibai was born on the 14th June 1903 and that Tukaram being older than her by about a year was under 15 years when he died in April 1917 ;

On Issue No. 5,

(a) that even if Radhabai executed the *kaifiyat* she did not do so with knowledge of its contents and

(b) that it was not inadmissible in evidence to prove her consent or Sheorama's instructions ;

On Issue No. 6,

that the parties were governed by the Benares School of Hindu Law, as Sheoramsa's family had migrated from the United Provinces and resided in that part of the village Salbardi which is situated in the Central Provinces. No findings were given on Issues Nos. 7 and 8 as they were deemed unnecessary.

The plaintiff's suit being dismissed he has filed the present appeal.

In this memorandum of appeal the plaintiff challenged the findings on Issues Nos. 2, 3, 5 (*a*) and 6, and further complained that the lower Court had failed to examine the parties fully and properly and to elicit all the facts necessary to decide the sixth issue.

We take up first the question as to the School of Hindu Law which governs the parties. Sheoramsa was a Jaiswar Kalar : *vide* P. W. No. 8. The Jaiswar sub-division of the Kalar caste is said to have come from Oudh : *vide* Russell on Tribes and Castes of the Central Provinces, 1916, Volume III, page 306. Presumably, therefore, Sheoramsa was governed by the Benares School. Assuming, however, that Sheoramsa's family had not migrated to the place of their present residence, we have it from P. W. No. 8 that since the time of his forefathers Sheoramsa's family has been living in the Central Provinces. P.W No. 16 also states that Sheoramsa lived in Salbardi in the Central Provinces. *Prima facie*, therefore, he was governed by the Benares School which prevails in the Central Provinces. Salbardi is a village situated partly in the Central Provinces and partly in Berar. It is argued for the appellant that most of the property of Sheoramsa is situated in Berar and it should, therefore, have been presumed that his domicile was in Berar. Admittedly, Sheoramsa's residential house is situated in that part of Salbardi which is in the Central Provinces, and in view of the fact and the evidence of the witnesses referred to above the fact that his fields are situated in Berar is insufficient to lead us to hold that he was domiciled in Berar. The place where a person's property is situated is not, in our opinion, a decisive factor in the determination of his domicile. We do not think that the plaintiff's complaint about the lower Court's failure to examine the parties properly on this point is justified. In *Balwant Rao* v. *Baji Rao* (1) it was held that a Hindu residing in a particular Province of India is held to be subject to the particular doctrines of Hindu Law recognized in that Province. Having regard to this rule the defendant's plea was quite sufficient. The plaintiff's reply to that plea was that "Sheoramsa and his son resided in both the Salbardis, one of which is in the Central Provinces and the other in Berar. It is not admitted that they were governed by the Benares School of Hindu Law." If the plaintiff had any further statement to make it was open to him to have done so. We are not even now told what other facts exist which could have been elicited in examination by the Court.

The parties being governed by the Benares School, the next question that arises is : did Tukaram give authority to Bhagirathibai

(1) 57 Ind. Cas. 545; 16 N. L. R. 187; 39 M. L. J. 166; (1920) M. W. N. 453; 22 Bom. L. R. 1070; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 47 I. A. 213; 25 C. W N. 243; 48 C. 30 (P. C.).

to adopt. Before this question is dealt with it will be convenient to deal with the question of Tukaram's age when he died. This question was tried as a preliminary issue and was dealt with by the lower Court at some length. No attempt has been made in this Court to challenge that finding and we agree with the lower Court that Tukaram was about 15 years old when he died. Exhibits D2, D3, D5 and D6, vernacular school registers, the evidence of Radhabai (D. W. No. 2) and the statement of Bhagirathibai admitted to have been made by her before the Naib-Tahsildar sufficiently prove that Tukaram was about 15 years old when he died. Exhibit D7 shows that Bhagirathibai was herself 1 $\frac{1}{3}$ years old on the 23rd March 1905. P. W. No. 1 who is financing this case states that Tukaram was 5 or 6 months older than Bhagirathibai. Bhagirathibai herself states that he was two years older. This also points to Tukaram being about 15 years old at the time of his death,

Bhagirathibai as P. W. No. 9 states that a day before his death Tukaram expressed a wish that she should adopt a son. The fact that he was only about 15 years old then makes us doubtful about his having done so. It is, as the lower Court remarks, improbable that a boy of that age should think of spiritual matters and of continuing his line of descent and instructing his child wife to make an adoption. Bhagirathibai says that Jhapraji was present when Tukaram instructed her to adopt a son. Jhapraji as P. W. No. 10 states that Bhagirathibai herself was at Yelikeli with her father when Tukaram died and that he himself does not know if Tukaram said anything before his death with regard to the adoption. P. W. No. 11 also states that Bhagirathibai was not in the house when Tukaram died. We agree with the conclusion of the lower Court that Tukaram did not give authority to Bhagirathibai to adopt a son.

As regards the alleged desire of Sheoramsa that Radhabai should make Bhagirathibai adopt a son, we have the evidence of P. Ws. Nos. 8 to 12. According to Bhagirathibai, P. W. No. 9, Sheoramsa died on a Saturday. On the preceding Thursday in the afternoon he told Radhabai to get Bhagirathibai to adopt a son and made Hanumant (P. W. No. 12) write what would appear to be a Will directing Bhagirathibai to adopt a son and giving instructions as to the disposal of his property. She states that this document was attested by Nagosa (P. W No. 8), Jhapraji (P. W. No. 10) and three other persons. Nagosa states nothing about this. Jhapraji says that Hanumant was not present when Sheoramsa told Radhabai about the adoption, that Hanumant was asked on Friday to reduce the matter to writing and that neither did Sheoramsa sign the document nor did anybody attest it after it was written. Jairam (P. W. No. 11) states that it was on a Friday that Sheoramsa told Radhabai and Bhagirathibai that Bhagirathibai should adopt a son. The witness then volunteers that Sheoramsa got a letter written by Hanumant to the effect that Bhagirathibai should adopt a son and perpetuate his name. Nothing more was, according to this witness, written in the letter and it was neither signed nor attested. This witness is hostile to Radhabai and apparently was hostile to Sheoramsa also. P. W. No. 12, Hanumant, states that one day before his death Sheoramsa told Radhabai that she should make Bhagirathibai adopt a son. He says that he wrote a document which contained instructions to Radhabai as above and directions about the disposal of his property. The witness states that Sheoramsa signed the document but nobody attested it. The document is not produced in evidence and though P. W. No. 12 says that it was given to Radhabai it does not appear to have been called for by the plaintiff.

A circumstance in support of the story about the instructions given by Sheoramsa to which some of the witnesses refer is the bringing of a boy for approval by Radhabai. Nagosa (P. W No. 8) states that he brought a boy about 15 days after Sheoramsa's death, that the Gurubaba of the family took him to Radhabai but that she disapproved of him, Hanumant (P. W. No. 12) states that Nagosa brought the boy a month or a month and a half after Sheoramsa's death but that he was not approved by the Jamnagir Bowa. Jhapraji (P. W. No. 10) states that Nagosa took the boy during Sheoramsa's lifetime for his approval but that Sheoramsa did not like him. We are not at all impressed by this evidence.

We do not understand why Sheoramsa did not authorise Radhabai to adopt a son herself or why he gave preference to the widow

of Tukaram who was a younger son over that of Nathu who was the elder one. The plaintiff's suggestion is that Sheoramsa advised an adoption by the widow of Tukaram because Tukaram had expressly desired it. If, however, as we have held, Tukaram did not express any such desire, the foundation for Sheoramsa's instructions goes.

In further support of the story about Sheoramsa's instructions, reliance is placed upon a *kaifiyat* dated the 11th December 1918 of which Exhibit P-29 is a copy. It is as follows:—

"*Kaifiyat* (statement) executed by Radhabai widow of Sheoramsa Kalar of Salbardi, *Taluq* Morsi, District Amraoti, to the following effect:—

My husband Sheoramsa is dead. Even if I am his true nearest heir he told me at the time of his death that I should get the whole property (moveable and immoveable) recorded in the name of the daughter-in-law, Bhagirathibai, and that I should make her adopt a boy with a view to continue his line. All this happened in the presence of the *Panchas* and so I have entered my husband's whole property in the name of my daughter-in-law Bhagirathibai. It may be recorded in her name. I have executed this *kaifiyat* of my free will and consent, in full possession of my senses and without taking any intoxication and hearing any one's advice.

Dated 11th December 1918. By the pen of Namdeo Yeshwantrao Kukde.

Left thumb mark of Radhabai, widow of Sheoramsa."

The lower Court has dealt with this matter in paragraph 16 of its judgment. Namdeo (P. W. No. 17) has written the document and Babu Khan (P W. No. 18) has attested it. Neither of them is able to say why Radhabai executed it. Namdeo states that he had gone to Salbardi for marketing and that he was called from the market by Radhabi and that he wrote the *kaifiyat* as instructed by her. Babu Khan who is a resident of Salbardi states that the document was written on a market day and that Saturday is the only market day in that village. Now the 11th December 1918, the date on the *kaifiyat* was a Wednesday. There is, therefore, cause to suspect the genuineness of this *kaifiyat*. Radhabai denies that she gave any document purporting to permit mutation in Bhagirathibai's name. She states that the *Patwari* took her thumb impression on a blank paper saying that he would have the fields mutated in her name and that if she gave her thumb impression she could have mutation made without having to go to Court. She denies that she knew Namdeo, the writer. The *Patwari*, as shown by the lower Court, is a very unsatisfactory and unreliable witness. We can see no reason why the document was written as it is, except to serve as evidence of an admission by Radhabai of the alleged instructions by Sheoramsa. We agree with the lower Court that even if the thumb-impression on the document is Radhabai's its contents were not written by her authority or with her knowledge.

We also agree with the lower Court in holding that the consent of Radhabai to the adoption is not proved. The circumstances under which the ceremony of adoption actually took place indicate that Radhabai was not a consenting party to it. The fact that the doors of the family house were closed against Bhagirathibai's party, that the ceremony had to be performed in a lane, that it was considered necessary to have a photographer in readiness to have a photograph of the party taken, that Radhabai does not appear in the photograph, that Radhabai had applied for mutation in her own name and that she would have nothing to do with Bhagirathibai or the adopted boy after the adoption, all negative her consent.

To sum up, we find, agreeing with the lower Court, that the parties are governed by the Benares School of Hindu Law, that Tukaram did not authorise Bhagirathibai to adopt, that Sheoramsa did not instruct Radhabai to get Bhagirathibai to adopt and that Radhabai did not consent to the adoption. On these findings the plaintiff's claim must fail. The appeal is, therefore, dismissed with costs.

G. S. P. *Appeal dismissed.*

ABDUL RAHIM v. JONABALI SIKDAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1492 OF 1920.

February 16, 1922.

Present:—Mr. Justice Newbould.

ABDUL RAHIM KAZI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

JONABALI SIKDAR AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDENTS *pro forma*—RESPONDENTS.

Evidence, admissibility of - Recitals of boundaries in documents between third parties, if admissible—Evidence Act (I of 1872), ss. 11, 13, 32 (3).

Recitals of boundaries in documents between third parties where they throw light on the question of the ownership of the property in suit are not admissible in evidence under section 11 or 13 of the Evidence Act. But they may be admissible under clause (3) of section 32 of the Act when they are the statements made by persons of the character described in the opening sentence of that section, that is to say, persons who are dead or who cannot be found or for other reasons there stated cannot be examined as witnesses [p. 330, col 1.]

Soroj Kumar Acharji v. *Umed Ali Howladar*, 63 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J. 19, *Abdullah* v. *Kunja Behari Lal*, 12 Ind Cas. 149; 16 C. W. N. 252; 14 C. L. J. 467, *Imrit Chamar* v. *Sridhar Panday*, 13 Ind. Cas. 120; 15 C. L. J. 7; 17 C. W. N. 108, relied on.

Appeal against a decree of the Subordinate Judge, First Court, Faridpur, dated the 6th of March 1920, modifying that of the Munsif, Third Court at Madaripur, dated the 28th of June 1920.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Anita Ranjan Ghosh*), for the Appellants.—The lower Appellate Court has referred to certain documents which are not admissible in evidence. Even if admissible there is nothing to show that the name in which the boundary plots stood was the predecessor-in-interest of the plaintiff. When the title deed fails the suit should have been dismissed unless adverse possession for 12 years was shown and proved. One cannot prove his title by reference to statements in other people's documents.

Refers to *Abdul Ali* v. *Syed Rejan Ali* (1), *Soroj Kumar Acharji* v. *Umed Ali Howladar* (2), *Abdullah* v. *Kunja Behari Lal* (3).

Statements in the conveyances of others as to boundaries are not evidence against me and they cannot create a title in the plaintiff. The document was objected to and the learned Judge relied a good deal on this document. The final Record of Rights is in my client's favour. They ought to have rebutted the presumption raised by that.

Refers to *Soroj Kumar Acharji* v. *Umed Ali Howladar* (2).

Mr. *A. K. Fuzl-ul-Haq* (with him Moulvi Syed *Mohd. Sadulla*), for the Respondents.—The plaintiff claimed as a successor in-interest of one Hadi. Not only *kasmi* right, but right by adverse possession is claimed. The finding is that the plaintiffs are in uninterrupted possession till the date of the suit. Findings as to tank and Adi, who is the same as Hadi, are in my favour. These documents may not be admissible as regards my title but certainly so as regards my possession. The ruling cited refers to question of title and not of possession. Documents are admissible under section 13 of the Evidence Act. I would rely on section 11 of the Evidence Act.

Section 32 read with section 13 (*a*) of the Evidence Act will make the documents admissible as the statements are from persons who are dead now. I rely on the finding on the question of possession.

Babu *Jogesh Chandra Roy* briefly replied.

JUDGMENT.—The plaintiffs respondents brought the suit out of which this appeal arises for recovery of possession of three plots of land on declaration of their title thereto. As regards two of the plots Nos. 1115 and 211, both Courts have held that the plaintiffs' case failed, and though a cross-objection in respect of this finding was taken on behalf of the respondents it has not been pressed at the hearing of this appeal.

We are now only concerned with plot No. 1116 in respect of which the Munsif dismissed the plaintiffs' suit but the lower Appellate Court gave the plaintiffs a decree for a 14-annas share. As regards this plot the only question that really arises in this appeal is as to the admissibility of certain documents on which the lower Appellate Court has based this finding in favour of the plaintiffs. In proving their title to this plot the plaintiff relied on Exhibit 3 a document which had been rejected by both Courts and further on five documents, Exhibits 1, 4, 5, 6 and 7, which contain recitals that the land in dispute

(1) 21 Ind. Cas. 618; 19 C. W. N. 468.
(2) 63 Ind. Cas. 954; 25 C. W. N. 1022; 35 C. L. J. 19.
(3) 12 Ind. Cas. 149; 16 C. W. N. 252; 14 C. L. J. 467.

was the property of one Adi Sikdar. The lower Appellate Court, differing from the first Court, has held that it has been proved that this Adi Sikdar was the predecessor-in-interest of the plaintiffs. These documents are documents of transfer of different properties adjoining the land in dispute and in the boundaries given in these documents Adi Sikdar's tank is mentioned As regards the admissibility of these documents, for the appellants, reliance is placed on the case of *Soroj Kumar Acharji* v. *Umed Ali Howladar* (2). There it was held that the question whether recitals in the boundaries of other lands in documents between the third parties, such as there are in the present case, are admissible in evidence under section 11 or section 13 of the Evidence Act is not free from doubt. But having regerd to the recent decisions on the point it was held in that case that such documents were not admissible in evidence. That ruling certainly supports the contention raised on behalf of the appellants as regards admissibility under section 11 or 13 of the Evidence Act. On behalf of the respondents reliance is placed on the cases of *Abdullah* v. *Kunja Behari Lal* (3) and *Imrit Chamar* v. *Sridhar Panday* (4). In the former of these cases it was held that similar documents describing boundaries were not relevant under section 11 or section 13 of the Evidence Act, but they might be admissible under clause (3) of section 32 when they were the statements made by persons of the character described in the opening sentence of that section; that is to say, persons who are dead or who cannot be found or for other reasons there stated cannot be examined as witnesses. It is not shown in this case that the persons who appear in these documents to have made these statements come under the category described in that section. It is conceded on behalf of the appellants that there is some evidence apart from these documents to support the plaintiffs' case and that the case should go back for re hearing after excluding from consideration the inadmissible documents. When the case is heard the plaintiffs may be able to show that the facts are such as to make these statements admissible under section 32, clause (3) and if they are able to do so on the evidence on the record this documentary evidence may be considered by the lower Appellate Court. But should they not be able to do so they must be excluded from consideration.

I accordingly decree this appeal and dismiss the cross-objection taken by the respondent. The appeal will be re-heard by the lower Appellate Court only on the point of the right of the plaintiffs to a decree in respect of plot No. 1116, the tank, and it will be decided on the evidence already on the record.

Costs will abide the result.

I make no order as to costs in the cross-objections.

E. N.

Appeal allowed;
Cross-objection dismissed.

(4) 18 Ind. Cas. 120; 15 C. L. J. 7; 17 C. W. N. 108.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION Suit No. 54 OF 1921.

June 10, 1921.

Present :—Mr. Justice Pratt.

VITHALDAS BHAGVANDAS—PLAINTIFF

versus

NAGUBAI M. JOSHI—DEFENDANT.

Bombay Rent (War Restrictions) Act (II of 1918), s. 9—Fraction of premises leased required by landlord—Tenant, eviction of.

A *bona fide* requirement of a landlord of a small fraction of the premises leased does not amount to a reasonable requirement of the whole of the premises within the meaning of section 9 of the Bombay Rent War Restrictions Act so as to entitle him to evict the tenant from them. [p. 331, col. 1.]

Mr. *F. S. Talyarkhan*, for the Plaintiff.

Mr. *Coltman*, for the Defendant.

JUDGMENT.—The plaintiff, who is the owner of a building on Sandhurst Road, seeks to evict the defendant, a lady Doctor, who is in occupation of the ground floor as residence and first floor as a hospital and also of one motor garage in an out-house appertaining to the building.

The plaintiff himself lives on the New Charney Road, and has two motor cars and

two carriages without horses. He says he does not require any part of the property in the occupation of the defendant, except the motor garage. He wants this motor garage for the accommodation of one of his cars. His cars are at present accommodated, one in a hired garage close to his residence, and the other, in a vacant shop on the ground floor of his sister's house. The carriages are, one, at his sister's bungalow on Malabar Hill, and the other, in one of the other garages in the same out-house.

The car, which is in the hired garage close by, is conveniently situated, and he is content to leave that car there. The car he wants to accommodate in the garage, which he seeks to acquire possession of, is the car which is in his sister's shop. He says the car is only temporarily accommodated there, but surely it is not likely that his sister would turn that car out of the shop. The only extra convenience he gets by removing the car from the sister's house to the garage in suit, is a gain of four or five minutes in time. The shop in his sister's house is ten minutes from his own residence, and the garage in suit is four or five minutes distant.

Again, I see no reason why the plaintiff should not remove the carriage which is in one of the same garages in the same out-house and accommodate his car there. The carriages are not in use and he ought to be able to find godown-accommodation for that carriage somewhere else.

On these facts, I am not satisfied of the *bona fides* of the plaintiff's requirement.

But even assuming that the plaintiff's requirement is *bona fide* it is not reasonable. Plaintiff must sue to eviet the defendant from the whole of her premises in occupation as his tenant, and I must, therefore, deal with the suit on that footing. It comes to this, therefore, that a *bona fide* requirement of a small fraction of the premises leased does not, in my opinion, amount to a reasonable requirement of the whole of the premises. For these reasons, therefore, I find on the issue framed, in the negative, and dismiss the plaintiff's suit with costs.

W. C. A. *Suit dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 708 OF 1921.

February 17, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

KHOSAL MAHAMMAD—PLAINTIFF—PETITIONER

versus

AMIRUDDIN MAHAMMAD PRAMANIK—DEFENDANT OPPOSITE PARTY.

Bond—Alteration, effect of—Suit on altered bond if maintainable—Proof of actual loan by independent evidence.

The plaintiff brought a suit on a bond for Rs. 35. The defendant denied payment of consideration and also pleaded that the bond which he admittedly had executed was a bond for Rs. 25 only and had been altered so as to show the amount advanced to be Rs. 35 The Trial Court dismissed the suit on the finding that the bond was altered, although the consideration money of Rs. 25 had been paid The plaintiff moved the High Court under section 25 of the Provincial Small Cause Courts Act:

Held, that although the plaintiff could not recover his claim on the bond sued upon, he was entitled to recover the amount of Rs. 25 which he had been found to have advanced to the defendant, inasmuch as he was entitled to succeed on proof of the loan by independent evidence. [p. 332, col. 1.]

Rule against an order of the Munsif, First Court, Jalpaiguri, exercising the powers of a Court of Small Causes.

FACTS appear from the judgment.

Babu *Atul Chandra Gupta*, for the Petitioner.

—The plaintiff is the petitioner. This Rule was granted against an order dismissing the suit on the ground of unauthorised alterations in the bond. I sued for Rs. 35 with interest The defendant denied receipt of consideration. The Judge held that there was a consideration for Rs. 25, but has dismissed my case on the ground of unauthorised alteration of Rs. 25 to Rs. 35. He has relied on *Gour Chandra Das* v. *Prasanna Kumar Chandra* (1) which I submit is quite distinguishable. The case in *Achyutananda Bhattacharya* v. *Ram Nath Bhattacharya* (2) is also distinguishable. There the point was raised by the subsequent purchaser from the mortgagor. I would rely on *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (3), *Moti Lal Saha* v. *Monmohan Goswami* (4). I submit a decree for Rs. 25 should have been passed.

(1) 33 C. 812: 10 C. W. N. 788; 3 C. L. J. 363.
(2) 21 Ind. Cas. 79; 18 C. L. J. 854.
(3) 28 C. 851; 2 Ind. Dec. (N. S.) 565.
(4) 5 C. W. N. 56.

LALSING v. PARSHRAM.

No one appeared for the Opposite Party to show cause.

JUDGMENT.—This Rule is unopposed. The petitioner brought a suit against the defendant on a bond for Rs. 35. The defendant denied payment of consideration and also pleaded that the bond which he admittedly executed was a bond for Rs. 25 only and had been altered so as to show the amount advanced to be Rs. 35. The lower Court has found that the consideration money of Rs. 25 was paid and the bond was altered. On these findings he has applied the principle of the leading case of *Master* v. *Miller* (5) to be found at page 803 of Smith's Leading Cases, 12th Edition, Volume 1, and dismissed the suit, That the plaintiff petitioner cannot recover his claim on the bond is not disputed but what is contended is that he can sue on the original debt of Rs. 25. This contention is supported by the authority of the case of *Moti Lal Saha* v. *Monmohan Gossami* (4), in which it was held that even if the promissory note sued upon were a forgery the plaintiff would succeed on proof of the loan by independent evidence. Following this decision we hold the plaintiff is entitled to recover the amount of Rs. 25 which he has been found to have advanced to the defendant.

We, accordingly, make the Rule absolute and set aside the decree of the Small Cause Court Judge. The plaintiff will get a decree for the sum of Rs. 25 only against the defendant. The parties will bear their costs in all the Courts.

B. N.

Rule made absolute.

(5) (1791) 1 Sm. L. C. (11th Ed.) 787 at p. 803; 2 R. R. 399; 4 T. R. 320; 100 E. R. 1042.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 86-B OF 1921.

April 28, 1922.

Present :—Mr. Prideaux, A. J. C.

LALSING—DEFENDANT—APPELLANT

versus

PARASHRAM—PLAINTIFF—RESPONDENT.

Ostensible owner—Alienation—Suit by real owner to recover property—Notice of title—Burden of proof—Question of fact, decision on—Decision, when not final.

In order to allow the real owner of property to recover from an alienee the property taken from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the title or the existence of circumstances which ought to have put the purchaser on an enquiry which if prosecuted would have led to a discovery of the real title. [p. 333, col. 1.]

Ordinarily, a decision on a question of fact is final, but when it is shown that that decision was reached without assessing the evidence on the record at its proper value and that, while appraising that evidence, various important factors were not considered, the decision cannot be accepted as final. [p. 333, col. 1.]

Appeal against a decree of the Additional District Judge, Akola, dated the 20th December 1920, in Civil Appeal No. 219 of 1920.

Mr. *A. V. Khare*, for the Appellant.

Mr. *M.* B. *Niyogi*, for the Respondent.

JUDGMENT.—This case was last before this Court as Second Appeal No. 8-B of 1918 when it was remanded for taking of some fresh evidence and for a fresh decision on the merits. The principal question at issue, namely, whether the house in suit is the property of the plaintiff, Parasram, or of his brother, Rajaram, is one of fact and the decision on a question of fact would, in most cases, be final but there are circumstances in the present case which lead me to believe that the evidence on record has not been assessed at its true value and various important factors to be taken into consideration while appraising that evidence have not been considered. It is, of course, true that the sale-deed of 1883 proves itself, but because Parasram was the owner of the house in that year it by no means follows that he was still owner when he brought the present suit. Some reliance has been placed on the rent note but that document was executed by Arjun during the pendency of the defendant's suit against Rajaram, and the evidence of the writer of the document, Yeshwant (P. W. No. 1), states that Parasram and Rajaram were both absent when he wrote the rent note. The evidence does not show that the present plaintiff, Parasram, was in fact a party to that rent-note. The second witness for the plaintiff states that he does not know who is the owner of the house; therefore, it seems that the plaintiff got a decree merely on

his original sale deed and the Courts below have not given proper weight to the fact that the local authorities in their collection of taxes have shown Rajaram as the owner of the house and collected the taxes from him. P. W. No. 2 himself admits that Rajaram was living in the house until the last five or six years. It is significant that the plaint in this case is signed for Parasram by the son of Rajaram who also appears in the case as the plaintiff's agent. A matter worthy of consideration is the question whether if Parasram had been in truth the owner of the house, he would not have had his name entered as owner in the Municipal register and paid taxes of the house himself. It is here argued that the lower Courts do not seem to have given the consideration it deserves to the question whether Parasram is the owner of the house in suit and has allowed Rajaram to pose as the ostensible owner of it, for it is a rule of law that in order to allow the real owner of property to recover from an alienee the property taken from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the title or the existence of circumstances which ought to have put the purchaser on an inquiry which if prosecuted would have led to a discovery of the real title. This question must be considered and the lower Appellate Court must ascertain and record its opinion on the question whether Parasram has, as a fact, had anything to do with the property for many years past or whether he has allowed Rajaram to live in the house and to treat it as his own leading people to believe that Rajaram was in truth the real owner. I have said enough to show that all aspects of the case have not been duly considered by the lower Appellate Court. I am not, therefore, prepared to receive its findings on the main question of fact as final. I set aside the decree and remand the case for a decision *de novo* in the lower Appellate Court. Costs will abide the result.

W. C. A. & G. R. D.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

REST APPEAL No. 47 OF 1921.

December 8, 1921.

Present:—Mr. Lyle, A. J. C.

SITA RAM—PLAINTIFF—APPELLANT

versus

SARJU PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 105—Agreement between co-sharers to take profits in turn, whether lease—Registration not necessary.

An agreement between the co-sharers of an estate whereby each is in turn to take the profits for a certain number of years, is not a lease within the meaning of section 105 of the Transfer of Property Act but is an arrangement as to the method of distribution of profits and does not require to be embodied in a registered instrument to render it valid.

Appeal against a decree of the First Additional District Judge, Lucknow, dated 21st June 1921 confirming that of the Honorary Assistant Collector of the First Class, Lucknow, dated 31st January 1921.

Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen*, for Respondent No. 1.

JUDGMENT.—This second appeal arises out of a suit for profits. The plaintiff's father and the first two defendants each purchased a 5-annas share and the third defendant purchased the remaining 1-anna share in the village in July 1900. Both the Courts below have held that there was an agreement among the parties by which the defendant No. 3 was to realize his share of profits from certain tenants and the other two defendants and the plaintiff were each to realize the rent from all the other tenants of the village and take all the profits for a period of six years in turn. They held that this agreement was acted upon and that in accordance with this agreement the plaintiff had taken the profits for the whole 15-annas from 1309 to 1314 Fasli, that the defendant No. 2 had taken the profits from 1315 to 1320 Fasli, and that the defendant No. 1 had taken and was entitled to the profits from 1321 to 1326 Fasli. In accordance with this finding the plaintiff's claim being for the profits for 1325 and 1326 Fasli was dismissed.

The only point urged in second appeal is that, assuming that there was such an agreement, it was not valid in law or binding on

the plaintiff-appellant, that it amounted to a lease for a period of more than one year and that, therefore, it could only be made by a registered instrument under section 107 of the Transfer of Property Act. It seems to me to be quite clear that the agreement in question does not amount to a lease as defined in section 105 of that Act. One of the essentials of a lease is that there should be a consideration to be rendered periodically or on specified occasions to the lessor, and that essential is entirely absent in this agreement. The agreement is nothing but an arrangement between co-sharers as to the method of distribution of profits. Instead of dividing the profits each year it was agreed that each party should take the profits for six years in turn. The agreement was a perfectly valid agreement and did not require to be embodied in a registered instrument. I may also note that the plaintiff has in pursuance of this agreement enjoyed the profits for six years and he cannot now be allowed to go behind it.

The appeal fails and is dismissed with costs.

N. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1482 OF 1922.

February 15, 1922.

Present :—Mr. Justice Newbould.

Srimati MANMOHINI DEBI—PLAINTIFF—APPELLANT

versus

RAM KISHORE TARKARATNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27, O. XLVII, r. 1—Admission of evidence at appellate stage—Insufficient ground—Proper remedy.

The fact that the plaintiff in a case was unaware of certain important documents during the hearing of the case is no sufficient ground for their admission in evidence at the appellate stage under O. XLI, r. 27, Civil Procedure Code. The plaintiff's proper remedy is by an application for a review under O. XLVII, r. 1. [p. 335, col. 1.]

Garden Reach Spinning and Manufacturing Co. v. Secretary of State for India, 23 Ind. Cas. 865; 42 C. 67; 19 C. W. N. 401, *Kessowji Issur v. Great Indian Peninsula Railway Co.*, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 P. C.), followed

Appeal against a decree of the Additional District Judge, Tipperah, dated the 21st of February 1920, affirming that of the Munsif, Second Court at Brahmanbaria, dated the 19th of September 1918.

FACTS appear from the judgment.

Babu *Kali Kinkar Chakravartti*, for Babu *Upendra Kumar Roy*, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration of plaintiff's Niskar title to one third share of the lands and for partition. The First Court dismissed the suit. On appeal that decision has been affirmed. My main contention is that the learned Judge ought to have admitted certain documents in evidence. Our case was that the plaintiff was unaware of their existence and so could not produce them before the First Court. The learned Judge has held that this evidence could only be admitted under O. XLI, r. 27, and that no substantial cause has been shown as to why they should be admitted and has relied on the case of *Garden Reach Spinning and Manufacturing Co. v. Secretary of State for India* (1). But even according to that decision the Judge ought to have found that there was *lacuna* in the evidence. Those documents would have proved my main contentions and disproved those of the defendants. The other findings are rather against me. But the learned Judge was wrong in holding that the plaintiff's whole case depends on showing that she was in possession of plot No. 8. I submit the Judge ought to have considered the case with regard to the other plots.

Babu *Dwarkanath Chakerbutty*, Senior Government Pleader (with him Babus *Gobinda Chandra Dey Roy*, *Surendra Nath Guha* and *Monomohan Banerjee*), for the Respondents, was not called upon to reply.

JUDGMENT.—This is an appeal against a decree dismissing a suit for declaration of the plaintiff's Niskar title to one-third share of the lands of the plaint and for partition. The dismissal by the Court of first instance was affirmed on appeal by the lower Appellate Court.

(1) 28 Ind. Cas. 865; 42 C. 675; 19 C. W. N. 4 1.

The main point urged in this appeal is that the lower Appellate Court was wrong in refusing to receive certain documents in evidence under O. XLI, r. 27, Code of Civil Procedure. The plaintiff-appellant's case was that she was unaware of the more important of these documents during the hearing of the case in the First Court. The lower Appellate Court has held that that is no sufficient ground for admission of the evidence under O. XLI, r. 27, Code of Civil Procedure, and the plaintiff's proper remedy is by an application for a review under O. XLVII, r. 1. In support of this view he cites the case of *Garden Reach Spinning and Manufacturing Co.* v. *Secretary of State for India* (1). He has wrongly referred to it as a Privy Council decision whereas it is a decision of a Bench of this Court. But it is nonetheless binding on the learned Additional District Judge and is also binding on me sitting singly. Though it is not itself a decision of the Judicial Committee it is based on their decision in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (2). These decisions fully support the view of the learned Additional District Judge. I hold that he was right in refusing to admit this evidence at the hearing of the appeal.

The only other point urged is that the Court of Appeal below is in error in thinking that the whole case of the plaintiff depended upon her possession of plot No. 6 and this has vitiated its judgment. From what I have seen of the judgments of the two lower Courts I am unable to hold that the learned Judge is wrong in holding that the plaintiff's case must fail if she fails to prove her possession of plot No. 6. The judgment which is one of affirmance has dealt sufficiently with other points in the case and has given good grounds for supporting the finding of the First Court on the facts. On these findings the plaintiff's suit necessarily fails.

I accordingly dismiss the appeal with costs to each set of respondents.

B. N.

Appeal dismissed.

(2) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 676 OF 1920.

January 9, 1922.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyaje.

JAYANT BAPSHA SAVANT—DEFENDANT—APPELLANT

versus

ABDUL RAHIMAN MAHOMED IBRAHIM—RESPONDENT.

Khoti Khasgi *lands, purchaser of*—Faida, *liability to pay.*

A purchaser of Khoti Khasgi lands from one of the co-sharers Khots, is liable to pay Faida, unless he is able to show that by virtue of some custom or agreement amongst the Khots the Faida is not payable. [p 33t, col. 1.]

Second appeal from the decision of the Assistant Judge, Thana, in Appeals Nos. 97 and 107 of 1920, confirming a decree passed by the Subordinate Judge at Mahad, in Civil Suit No. 272 of 1918.

Mr. *N. V. Gokhale*, for the Appellant.

Mr. *V. B. Virkar*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff alleged that he was a co-sharer Khot of the suit village of Bhandivili, that he managed the suit village in the years 1914-15, 1915-16, 1916-17 and 1917-18; that a Khoti Khata stood in the defendant's name; and that the defendant did not pay Dhara and Faida for those lands. The defendant *inter alia* contended that for some lands in suit he was liable to pay only Dhara and local cess; and the main issue in the suit was whether for those lands he was liable to pay the Faida.

In the Trial Court the learned Judge points out that a Khot in respect of his Khasgi lands is a tenant to himself so far as his liability to the body of Khots in concerned. With regard of Khasgi lands, I understand, the position is that the holder is still liable to pay Faida to the general body of the Khots, and that this payment of Faida for various Khasgi lands held by various co-sharers in the ordinary course would be adjusted when the division of profits is made among the joint body of the Khots.

The defendant, as a purchaser of Khoti Khasgi lands from one of the co-sharer Khots, would be liable to pay Faida, unless he was able to show that by virtue of some custom or agreement amongst the Khots

the Faida was not payable. That was a matter to be proved by evidence, and as the learned Judge points out no evidence whatever was adduced. The fact that the defendant produced four sale-deeds, under which the defendant bought Khoti Khasgi lands, which were alleged to be immune from the payment of Faide, would not be relevant, unless it could be shown that the general body of Khots had agreed to those terms. The plaintiff's claim was, therefore, decreed in the Trial Court, and this decision was confirmed in appeal.

The learned Appellate Judge relied upon the decision in *Raghunathrao* v. *Vasdev* (1) that a Khoti sharer, if he sold his Khoti Khasgi lands, lost his rights thereto as against the general body of the Khots, and if after the sale he remained in possession of such lands, he was a tenant-at-will and could be ejected; and the head-note also says that if a Khoti sharer parts with his Khoti Khasgi lands, then those lands, in the hands of an outside purchaser, become Khoti Nisbat, that is to say, the purchaser not being a member of the body of Khots cannot hold any lands as "Khoti Khasgi", as that expression refers only to lands in the occupation of a Khot and cultivated by him or by his hired labourers. It is clear, therefore, that these lands in the possession of the purchaser are liable to pay Faida under the arrangement which was made in Exhibit 29, whereby it was arranged that the tenants of Khoti Nisbat lands were to pay Rs. 1 assessment and annas 8 Faida. Therefore, the decision of the Court below is correct and the appeal must be dismissed with costs.

COYAJEE, J.—I concur. The defendant's plea, so far as it appears on the evidence, seems to be that he is not liable to pay Faida in respect of the Khoti Khasgi lands now in his possession. This plea was disallowed by both the lower Courts, and, in my opinion, for sufficient reasons. The lands in question are not Dhara lands. They are Khoti Khasgi lands which are thus explained by Mr. Justice Ranade in *Secretary of State for India* v. *Narayan Namshet Kamerkar* (2):

"Khoti Khasgi lands have been thus defined in Mr. Justice Candy's book on Khoti Tenure. 'All land in a Khoti village, which is not Dhara, must be Khoti. The Khoti lands which are cultivated by the Khot himself, or by means of hired labourers are called Khoti Khasgi, and the rest is Khoti Nisbat, which may be sub-let to permanent tenants or to recant cultivators.'"

Now, all Khoti lands are liable to pay Faida, that is, the Khot's profits. It constitutes his remuneration for the trouble and risk of collecting the revenue of the village, and managing the village. Khoti Khasgi lands are not exempt from such imposition. When the Khoti Vatan is held by one single individual, he is, so to say, his own tenant as regards the Khoti Khasgi lands in his private occupation. The position as regards the payment of this Faida becomes clearer when such Khoti Vatan is held by a body of sharers. In that case each sharer holding Khoti Khasgi lands becomes a tenant of the co-parcenery and pays Faida to the whole body of Khots including himself, and when a Khoti village is taken under attachment by Government, the Khot is liable to be assessed for Khoti Faida in respect of lands in his private occupation. *Ramchandra Narsinha Mahajan* v. *Collector of Ratnagiri* (3) and *Ramchandra Daji Joshi* v. *Visaji Bapuji Kanhere* (4).

It was no doubt open to the defendant in this case to prove that this particular Khoti land had been the subject of a special agreement between his vendor Khot and his co-sharers. The burden of proving it lay on him. No such agreement, however, has been either alleged or proved in this case. The learned Trial Judge pointed this out when he said "defendant has not adduced any evidence to show that he is not liable to pay Faida to plaintiff in virtue of any custom or agreement."

In these circumstances, in my opinion, the decree of the lower Court is right.

W. C. A. *Decree affirmed.*

(1) 23 B. 769; 1 Bom. L. R. 436; 12 Ind. Dec. (N. S.) 514.

(2) 1 Bom. L. R. 19 at p. 26; 23 B. 518; 12 Ind. Dec. (N. S.) 345.

(3) 7 B. H. C. R. (A. C. J.) 41.

(4) (1880) P. J. 297.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 173 OF 1920 AND 111 OF 1921 AND CIVIL REVISION NO 155 OF 1921.

May 3, 1922.

Present :—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.

GOUR CHANDRA RAY—JUDGMENT-DEBTOR—APPELLANT IN M. A. NO. 173 RESPONDENT IN M. A. NO. 111 OPPOSITE PARTY IN C. R. NO. 155

versus

JANARDAN PRASHAD THAKUR AND OTHERS—DECREE-HOLDERS—RESPONDENTS IN M A. NO 173, APPELLANTS IN M. A. NO. 111—PETITIONERS IN C. R NO. 155.

*Execution of decree—Application for issue of notice—Step-in-aid of execution—Objection as to limitation not taken—Objection, if can be taken in subsequent proceedings—*Res judicata—*Order dismissing execution petition for default, if appealable*

An application praying for issue of notice upon the judgment-debtor is an application in aid of execution. [p. 38, col 1]

Where after due notice upon the judgment-debtor the Court decides that the execution is in order and that it should proceed, it is not open to the judgment-debtor in subsequent execution proceedings to challenge that order and set up a plea that the previous execution proceedings were barred by limitation. [p. 38, col]

No appeal lies from an order dismissing an application for execution on account of the decree-holder's failure to prosecute it [p. 38, col. 2]

Appeal from an order of the Subordinate Judge, Purneah, dated the 19th July 1920.

IN M. A No. 173.

Messrs. *S. N. Palit* and *S. M. Mullick*, for the Appellant and Messrs. *K. Sahay*, *Siveshar Dayal* and *B. K. Prasad*, for Mr. *D. N. Sinha*, for the Respondents.

IN M A. No. 111 AND C. R. No. 155 OF 1921.

Messrs. *K. Sahay*, *Siveshar Dayal* and *B. K. Prasad* for Mr. *D. N. Sinha*, for the Appellants and Messrs. *S. N. Palit* and *S. M. Mullick*, for the Respondents.

JUDGMENT.

JAWALA PARSAD, J.—This appeal arises out of an order of the Subordinate Judge, dated the 19th July 1920, rejecting the petition of the judgment-debtor appellant with respect to the execution of the decree obtained by the respondent. The only question involved in this appeal is whether the execution of the decree is barred by limitation.

The decree was obtained on the 19th of April 1909 and was put into execution several time. The present execution was levied on the 11th of November 1919. This was within three years from the previous execution which was filed on the 10th of April 1917 and disposed of on the 13th of September 1917. Before this execution the decree-holder had levied execution of the decree on the 19th December 1913. That execution was dismissed on the 27th April 1914. The contention of the judgment-debtor is that the execution levied on the 10th April 1917 was barred by limitation and consequently the decree-holder lost all right to execute the decree on the 11th of November 1919. The determination of this question rests entirely upon the construction of an application made by the decree-holder on the 25th April 1914. It is conceded that if that application be in aid of execution, the execution of the decree holder which commenced on the 10th April 1917 was well within time. On the 6th of April 1914 the Court directed "Notice to issue under O. XXI, r 66, upon the judgment-debtors fixing 25th May 1914." The decree holders had put in process-fee and notices for the parties. The return of notice was received, but the notice was not served, at least upon some of the judgment-debtors, and consequently the decree holder filed the application of the 25th April 1914 praying that an order may be passed for issue of another notice for service upon the judgment-debtors in the suit and one week's time may be allowed for filing *talbana* and notice. The learned Vakil on behalf of the judgment-debtors contends that this was an application simply for time to file the *talbana*, and was not an application praying for issue of notices upon the judgment-debtors. The plain meaning of the application is that it was for both the purposes. The notice upon some of the judgment-debtors had been returned unserved. It was, therefore necessary for the decree holder to apply for the issue of fresh notice upon those judgment debtors. This interpretation is borne out by the order of the Court which runs in the following words:—"Decree-holders filed a petition for issuing fresh notice and prayed for time

to file notice and process-fees. Put up on 27th April 1914 for orders." There is ample authority for the proposition that an application for the issue of notice upon judgment debtors is an application in aid of execution There can, therefore, be no manner of doubt that the application of the 25th of April 1914 was an application-in-aid of execution. Therefore, the application of the judgment-debtor for execution of the decree filed on the 10th of April 1917 was within three years from the application of the 25th April 1914 filed by the decree holder in aid of execution. In this view the present execution of the judgment-debtor is not at all barred by limitation. Supposing, however, that the application of the 25th April 1914 was not in aid of execution, the judgment-debtors did not object to the execution of the decree in 1917 in respect of notice having been served upon them. In the execution of 1917 (No. 234 of 1917) the Court directed notice to issue under O. XXI, r. 22, of the Code of Civil Procedure, fixing the 3rd May 1917. That notice was served upon the judgment-debtors on the 23rd April 1917. The decree-holder has examined the Court peon and the identifier to prove service of that notice. The learned Subordinate Judge has accepted that evidence. He has also considered the objection of the judgment-debtors as to why the evidence of service of the notice should not be believed. The same objection was urged before us, but on examination of the evidence in the case we are satisfied that the objections are unsubstantial and that the Court below was right in accepting the evidence of service of the notice upon the judgment-debtors.

Accepting, therefore, that the judgment-debtors had received notice of the execution, it was open to them to object to the execution of the decree upon the ground that it was already barred by limitation. This they did not do, and on the 3rd of May 1917 the Court accepted the affidavit filed on behalf of the decree-holder in proof of service of the notice and directed a writ of attachment to issue fixing the 22nd of May 1917. The Court accepted the evidence on the record that the writ of attachment was also served and directed on the 12th of June 1917 notice to issue for the sale proclamation under O. XXI, r. 66. Therefore, not only the notices were served upon the judgment-debtor under O. XXI, r. 22, but also the writ of attachment was served upon the spot. The Court, therefore, decided after due notice upon the judgment-debtors that the execution was in order that it should proceed. That order is binding upon the judgment-debtors. It is an order deciding as between the parties that the execution was not barred by limitation. Such an order has been held to operate as *res judicata*, and whether right or wrong, the order cannot be challenged in subsequent execution proceedings. The result is that it is not open to the judgment debtors now to challenge the execution of the decree filed in 1919 that the decree was barred long before the present execution.

The result is that we accept the view taken by the Court below and dismiss the appeal with costs.

The decree-holders' trouble does not cease with the disposal of this appeal, for we find that after the objection of the judgment-debtors was disposed of on the 19th of July 1920 and the execution was directed to proceed, the execution was dismissed as being infructuous on the 6th of May 1921. The decree-holder has, therefore, come to this Court aggrieved by the order of the Subordinate Judge, dated the 6th May 1921, passed by the Subordinate Judge both in appeal and in revision. The order of the Subordinate Judge is in the following words: "Decree-holder takes no step, though the case was fixed for yesterday when I was busy with sessions. The execution case is accordingly dismissed as infructuous." The order in question is not appealable. This kind of order is not included in the list of orders in O. XLIII, r. 1, and no order unless included in that list is appealable The order in question was passed in execution of the decree on account of the default of the decree-holder to take certain steps. The order was passed in execution proceedings by virtue of section 141 of the Code of Civil Procedure, in other words, the order is similar to what is passed in suits on account of default of plaintiffs. Here, the decree-holder failed to take necessary steps for the prosecution of his application in execution and it was accordingly dismissed for default. Whether this order is an order in the suit

or in the execution it is not at all appeal able. Mr. Kulwant Sahay concedes that the preliminary objection of the respondents that the appeal is incompatent must prevail. The appeal is, therefore, dismissed.

Knowing of this difficulty Mr. Kulwant Sahay has also preferred an application in revision. The question then is whether the order of the 6th of May was without any jurisdiction or jurisdiction was exercised illegally or with material irregularity or whether the Subordinate Judge failed to exercise the jurisdiction vested in him by law. On the 28th of April 1921 the decree-holders filed process-fee and notice. The Court directed notice to issue under O. XXI, r. 67, fixing the 9th of May 192 for its return. In the meantime, notices were returned unserved, and on the 4th of May the Court passed the following order:—"Notices returned unserved. Judgment-debtor No. - refused to take notice as there is mistake in his name in the notice. The notices of other judgment-debtors not served, there was no different *goshwara*. Decree-holder to take necessary step by to-morrow." On the 6th of May the Court passed the order with which we are concerned. "Decree-holder takes no step-though the case was fixed for yesterday when I was busy with sessions. The execution case is accordingly dismissed as infructuous."

Now, the date fixed for the return of notice was the 9th of May 1921 and that obviously was done in the presence of the decree-holder, for upon his filing process fee that order was passed. The orders of the 4th and the 6th of May do not appear to have been passed with the notice and knowledge of the decree-holder. The order sheet does not show that any intimation was given to the decree holder or his Pleader. On the other hand, column 4 of the order-sheet does not contain signature of the decree holder's Pleader. The order of the 4th of May directed the decree-holder to take necessary steps by the next day. Such an important order requiring a party to do something must necessarily have been signed by the Pleader of that party. The rules of the Hight Court on the subject are explicit and column 4 is expressly designed for that purpose. The decision of this Court in the case of *Ram Sukul Pathak* v. *Maharaja Kesho Prasad Singh* (1) has concluded the matter. On behalf of the decree holder an affidavit has been filed stating that they had no knowledge or information of the orders of the 4th and the 6th of May. There is no counter-affidavit filed on behalf of the judgment-debtors and the record of the Court, namely, the order-sheet in question supports the statement of the decree-holder. Therefore, it must be held that the orders of the 4th and the 6th of May were passed behind the back of the decree holder and the case was taken up without notice having been given to the decree-holder. Such an order is without jurisdiction. No order can be passed to the prejudice of a party without having given him an opportunity to be heard. The order in question was also irregular, inasmuch as the return of notice was fixed to be taken up on the 9th of May. It was taken up and disposed of long before the said date. Considering all the circumstances we have no hesitation in holding that the order of the 6th of May 1921 must come within the purview of the revisional power of this Court and is one which, the justice of the case demands, must be set aside.

We, therefore, set aside the said order and direct execution to proceed in continuation of the order of the 28th of April 1921, allowing an opportunity to the decree-holder to have notice under O. XXI, r. 66 served upon the party and to take such legal steps as he may be entitled to in prosecution of the execution of his decree. In the circumstances of the case we make no order as to costs both in the decree-holders's Appeal No. 111 and Civil Revision No. 155, and direct that each party should bear its own costs.

It is necessary that in this case notice of every order must be given to the parties and their signatures or those of their Pleaders must be obtained on the orders, inasmuch as the decree is an old one of 1909 and is about to be barred altogether by 12 years limitation. If the parties or their Pleaders refuse to sign, the Court must make a notice to that effect.

BUCKNILL, J.—I agree.

R. M.

Appeal dismissed.

(1) 43 Ind. Cas. 925; 3 P. L. J. 219; 4 P. L. W. 75; (1918) Pat 17 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 518 OF 1921.

July 27, 1922.

Present:—Mr. Hallifax, A. J. C.

KESHEORAO AND OTHERS—APPELLANTS—DECREE-HOLDERS—PLAINTIFFS

versus

GOVINDRAO—DEFENDANT—JUDGMENT-DEBTOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 28 (2) 34—"Provable debt," meaning of—Obligation incurred subsequent to adjudication, effect of

D. was adjudicated an insolvent in 1914. His father died in 9 / leaving him separate property. In 191[illegible] *P* sued *D* and his mother on a bond executed by his father in 1915 and obtained a decree in execution of which he attached certain property which *D* had inherited from his father It was objected that the debt was one provable in the Insolvency Court, and that, consequently, the proceedings in execution in the ordinary Court were barred under section 28 (2) of the Provincial Insolvency Act:

Held, that according to the definition in section 34 of the Provincial Insolvency Act, a "provable debt" was one to which an insolvent became subject by reason of an obligation incurred before the date of his adjudication as an insolvent; that as the obligation in the present case was not incurred until after that date, the debt was not a "provable debt," and that, therefore, the bar of section 28 (2) of the Act did not apply to it.

Appeal against an order of the District Judge, Bhandara, dated the 27th July 192 , in Civil Appeal No. 32 of 1921.

Mr. *M. R. Indurkar*, for the Appellants.

Mr. *S. C. Dutt Choudhry*, for the Respondents.

JUDGMENT.—The learned Pleader for the appellant abandoned the second of his two grounds of appeal, which is based on the mistaken idea that the decree he is seeking to execute was passed before the respondent was declared an insolvent; it was actually passed nearly five years later. The facts then are these. The respondent was adjudicated an insolvent in 1914 and has not yet been discharged. His father, Baliram Bokhare, died in 1917 leaving him separate property which I am informed is more than sufficient to pay all his debts. In the following year the original appellant, who has died since the appeal was filed, sued him and his mother on a bond executed by his father on 14th October 1915, and on 4th January 1919 obtained a decree declaring them both liable for the payment of Rs. 1,320 3 0, but only as the legal representatives of the deceased Baliram. In execution of this decree the appellant attached certain property which the respondent had inherited from his father. The respondent objected that the debt was one provable in the Insolvency Court under section 34 of Act V of 1920 (Provincial Insolvency) and, therefore, the proceedings in execution in an ordinary Court were barred by section 28 (2) of the Act. This contention has found favour in the two lower Courts and the application for execution has been dismissed on the ground that it does not lie.

(2) Now it is clear that the respondent did not become subject to this debt till after his insolvency. To be a "provable debt", according to the definition in section 34 of the Act, it must, therefore, be a debt to which he has become subject by reason of an obligation incurred before the date of his adjudication as an insolvent. I am inclined to think the words "obligation incurred" in the section refer to an obligation incurred by the insolvent himself, but that does not affect the decision of the present case as the obligation was not incurred even by the original debtor, his father, till 1915. The debt is not, therefore, a "provable debt," as defined in section 34 of the Act, and the bar of section 28 (2) does not apply to it.

(3) The dismissal of the application for execution must, however, stand, though for a different reason. The application was for the attachment of immoveable property and under sub sections (2) and (4 of section 28 the insolvent owns none at all. The decree holder appears to be entitled to execute his decree, but there is no property on which to execut it, nor can he proceed against the person of the judgment-debtor. His learned Pleader, however, states that he asks for nothing but a decision that the debt is not provable in insolvency in which case he can keep the decree alive by means of the present application for execution and such further applications as may be necessary and eventually execute it after the

discharge of the insolvent. I find that the debt is not provable in insolvency but that the application for execution must still stand dismissed as the property which the decree-holder sought to attach is not liable to attachment. The appeal is accordingly dismissed, but under the circumstances it is ordered that the respondent shall pay all the costs in all three Courts. The Pleader's fee in this Court will be Rs. 15.

W. C. A. *Appeal dismissed.*

[CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 75 OF 1920.

August 31, 1920.

Present:—Sir Asutosh Mookerjee, Kt., Acting Chief Justice, and Justice Sir Earnest Fletcher, Kt.

RASH BEHARI GHOSE—APPELLANT

versus

[THE OFFICIAL ASSIGNEE OF CALCUTTA—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 36, scope of—Matters involving difficult questions of title.

Section 36 of the Presidency Towns Insolvency Act, 1909, like section 28 of the Indian Insolvent Act, 1848, which it replaced, is discretionary. [p. 343, col. 2.]

The Court should not deal with a matter under section 36 of the Presidency Towns Insolvency Act, if it involves difficult questions of title but should leave the parties to litigate such matter in a regular suit. [p. 344, col. 2.]

Barlow v. *Cochrane*, 2 B. L. R. (O. C. J.) 56; 1 Ind. Dec. (N. S.) 933, *Robinson, In the matter of*, 2 Ind. Jur. (N. S.) 273, *Miller* v. *Thomas Barlow*, 14 M. I. A. 209; 8 P. C. 733; 2 Sar. P. C. J. 727; 8 Moo. P. C. (N. S.) 127; 20 E. R. 765; 17 E. R. 280, *Dwarkanath Mitter* v *A. B. Miller*, 4 B. L. R. O. C. J. 85; 15 W. R. O. C. J. 18n, *Ajoodhia Pershad* v *A. B. Miller*, 7 B. L. R. 74; 1 W. R. O. C. J. 18, *Umbica Nundun Biswes, In the matter of*, 3 C. 414; 1 C. L. R. 61; 1 Ind. Dec. (N. S.) 862, *Kursondas Ramjee, In re*, 4 Bom. L. R. 154; 26 B. 765, *Seehase, In re*, 45 Ind. Cas. 106; 22 C. W. N. 335 and *Official Assignee of Madras* v. *Vadavalli Ammal*, 38 Ind. Cas. 524; 9 M. L. T. 311; 4 L. W. 42; 5 M. 810, referred to.

Garbett v. *Veale*, (1845) D. & M. 458 at p. 480; 5 Q. B. 408; 13 L. J. Q. B. 93; 8 Jur. 335; 114 E. R. 1505, dissented from.

Kalagurda Suryanarayana v. *Yarlagadda Naidoo*, 6 C. W. N. 814, *Rowlandson* v. *Champion*, 17 M. 81; 6 Ind. Dec. (N. S.) 14, *Official Assignee of Madras* v. *Mehta & Sons*, 49 Ind. Cas. 943; 42 M. 510; 36 M. L. J. 190; 25 M. L. T. 263; (1919) M. W. N. 294, *Hirth, In re, Trustee, Ex parte*, (1899) 1 Q. B. 612; 68 L. J. Q. B. 287; 80 L. T. 63; 47 W. R. 244; 6 Manson 10; 15 T. L. R. 153, *Slobodinsky, In re, Moore, Ex parte*, (1903) 2 K. B. 517; 72 L. J. K. B. 884; 89 L. T. 190; 52 W. R. 156; 10 Manson 341; 19 T. L. R. 616, not followed.

Quære:—Whether a suit is maintainable for the determination of the question of title after the matter has been decided under section 6 of the Presidency Towns Insolvency Act? [p. 344, col. 2.]

Hajee Abdul Lateef Sahib v. *Official Assignee of Madras*, 44 Ind. Cas. 847; 42 M. 117, referred to.

Appeal against an order of Mr. Justice Rankin, dated the 8th June 1920.

Mr. *L. F. Pugh*, for the Appellant.

Mr. *A. Avetoom*, for the Respondent.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This appeal is directed against an order made by Mr. Justice Rankin under section 36 (5) of the Presidency Towns Insolvency Act, 1909. The subject-matter of the order is War Bonds to the value of Rs. 20,00 deposited by Jacob and Co., with the Registrar of this Court on its original side as security for the due performance of a decree obtained against them by the appellant Rash Behari Ghose, or of such decree as may ultimately be made in the litigation between them. The events which have led up to the order may be briefly narrated.

On the 3rd July 1913 Nitai Charan Ghose, father of the appellant, was adjudicated an insolvent on his own petition. On the 11th January 1916, the insolvent came up for his discharge and the order of the Court was that his discharge be suspended for 18 months, that is, till the 11th July 1917. This order was completed and filed on the 18th July 1917. Now it transpires that Nitai Charan Ghose was employed as Manager in the firm of W. A. Lee and Co., who were the first Managing Agents of the Nalbona Coal Co. Ltd. Nitai Charan Ghose had assisted in the formation of the Company, and it was arranged amongst the promoters that as remuneration he would receive three fourths of the shares which might be allotted to one Mayamal Dasi and also two-thirds of such shares as might be allotted to Kaladanoyi Dasi, who were vendors of lands to be transferred to the Company

when formed. The shares, however, were issued neither in the names of these two ladies nor in the name of Nitai Charan Ghose. They were in fact issued in the name of Rash Behari Ghose and have always stood in his name in the books of the Company. On or about the 15th May 1917 Rash Behari Ghose dealt with these shares as his own property and sold them to Jacob and Co., for Rs. 15,920. On the 20th November 1917 Rash Behari Ghose instituted a suit against Jacob and Co., for recovery of the value of the shares which he alleged had been delivered to them pursuant to the agreement for sale. Jacob and Co., admitted possession of the shares, but denied that they had obtained them from Rash Behari Ghose, they set up in fact an entirely different story as to how they had acquired title to the disputed shares. The suit was heard by Mr. Justice Ghose and on the 27th August 1919 a decree was made in favour of Rash Behari Ghose against Jacob and Co. This decree was confirmed on appeal on or about the 20th April 1920 We have been informed that Jacob and Co., have carried the matter further and have preferred an appeal to His Majesty in Council. During the pendency of this litigation Jacob and Co., deposited with the Registrar War Bonds of the face value of Rs. 20,000 for the performance of such decree as might ultimately become binding on them. On the 8th June 1920 the Official Assignee commenced the present proceedings with an application (which had been drawn up apparantly on the 3rd May) in which he alleged that the War Bond, in so far as they covered the price of the shares, appertained to the estate of the insolvent. He accordingly prayed that the Registrar might be directed to sell the War Bonds and to pay him the sum of Rs 15,920, The application was opposed by Rash Benari Ghose who asserted that the shares were in no sense the after acquired property of the insolvent and that their price never formed part of his estate. Mr. Justice Rankin examined Rash Behari Ghose, overruled his objection, and declared that he was the trustee for the Official Assignee in respect of the decree obtained by him on the 27th August 1919 against Jacob and Co., and also in respect of the security deposited by the latter. On this basis, Mr. Justice Rankin has restrained Rash Behari Ghose (and the Official Assignee also) from taking out of Court or dealing with the security until further orders. Rash Behari Ghose has appealed against this order and Mr. Pugh has contended on his behalf that an order of this description should not have been made after summary enquiry in a proceeding under section 36 of the Presidency Towns Insolvency Act, 1909. Mr. Avetoom has controverted this argument, and has further urged that if the contention of the appellant should prevail, the Court should direct the revival of the regular suit which had been instituted by the Official Assignee for determination of the title to the shares but was withdrawn or abandoned in view of the turn taken by the present proceedings. We are of opinion that the order under appeal should not have been made, in the circumstances of the present case, under section 36 (5) of the Presidency Towns Insolvency Act.

Section 36 authorises the Court to summon before it any person, known or suspected to have in his possession any property belonging to the insolvent, and to examine the person so brought before it concerning the insolvent, his dealings or property. Sub sections 5 and 6 then provide as follows:—

"(5) If, on the examination of any such person, the Court is satisfied that he has in his possession any property belonging to the insolvent, the Court may, on the application of the Official Assignee, order him to deliver to the Official Assignee that property or any part thereof, at such time, in such manner and on such terms as to the Court may seem just.

"(6) Orders made under sub-sections (4) and (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908, respectively."

These sub-sections read together make it plain that the property in respect of which the order is made must be in the "possession" of the person examined, and the order may be executed against him in the same manner as if it were a decree for the payment of money or delivery of property. Sub section (5) is apparently modelled on sub-section (5) of section 27 of the English Bankruptcy Act, 1883, and it is worthy of notice that the term "possession" as used in

that section has been somewhat narrowly interpreted. To take one illustration: in *Davis, In re, Goodman, Ex parte* (1), Wright and Darling, JJ., ruled that the Court has no jurisdiction to make an order on an agent to give up goods in his possession as agent for his principal; and they declined to express an opinion on the question, whether such order could be made even if the principal were made a respondent to the application. In the case before us, it might have been a matter for argument whether the War Bonds deposited with the Registrar by Jacob and Co., as security for the due performance of such decrees as might ultimately become binding on them, could be said to be property in the "possession" of Rash Behari Ghose at the time of the order.

Apart from this question, it is plain that no order under section 36 (5) should have been made in this case. That section, like section 26 of the Indian Insolvent Act, 1848, which it replaced, is discretionary. This was well settled under the Statute of 1848, and was elaborately discussed by Sir Barnes Peacock, C. J., *Barlow* v. *Cochrane* (2). In that case, a summary order had been made by Mr. Justice Phear in favour of the Official Assignee under sections 24 and 26 of the Indian Insolvent Act, *Robinson, In the matter of* (3). A suit was thereupon instituted for declaration of title to the disputed fund. Mr. Justice Norman dismissed the suit. On appeal, the question was raised whether the suit was maintainable. Peacock, C. J., and Markby, J., who heard the appeal concurred in holding that the order under section 26 of the Indian Insolvent Act could not deprive the plaintiff of his right to sue in the High Court to establish his right to the goods, if he could prove that he had such an interest in the goods or the proceeds thereof as prevented them from passing to the assignee of the insolvent; the Official Assignee was no more protected than any other Assignee would have been; the Court acted upon his application and the order was obtained and acted upon by the Official Assignee at his own peril. The Judges, however, were not agreed as to the merits of the matters involved in the suit. Peacock, C. J., held that the suit should be decreed, while Markby, J., held that the view taken by Norman, J., in concurrence with the order made by Phear, J., should be upheld. The result was that under clause 36 of the Letters Patent, the judgment of the Chief Justice prevailed against the concurrent opinions expressed by Phear, J., Norman, J., and Markby, J. The matter was then taken on appeal to the Judicial Committee; *Miller* v. *Thomas Barlow* (4). The objection that the order of the Insolvent Court was conclusive and that the suit was not maintainable was reiterated by Sir Roundell Palmer, who appeared on behalf of the appellant and relied upon *Garbett* v. *Veale* (5). The Judicial Committee, however, were not impressed with the objection, heard the appeal on the merits and affirmed the judgment of Peacock, C. J. The view that the exercise of the power vested in the Insolvency Court under section 26 of the Insolvent Act is discretionary and that a regular suit lies for determination of the question of title was uniformly maintained so long as the Statute of 1848 was in force. Reference may be made to the decision in *Dwarkanath Mitter* v. *A. B. Miller* (6), where Peacock, C. J., pointed out that it was not compulsory on the Court in all cases to try whether the disputed property belonged to the insolvent or not, but it was discretionary with the Court to enter upon the trial of such a question and to make an order. Phear, J., added that the order, if made, could only be passed after a process of judicial enquiry and upon the hearing of evidence and that the procedure of the Insolvent Court and the mode prescribed for an application under section 26 were not very appropriate to an enquiry which mainly had regard to conflicting rights of property. Phear, J., added at the same time that though it had been the constant practice of the Insolvent Court to make such orders, it had always been the practice of the Court to abstain from making

(1) (1898) 5 Manson 329.
(2) 2 B. L. R. (O. C. J.) 56; 1 Ind. Dec. (N. S.) 633.
(3) 2 Ind. Jur. (N. S.) 278.

(4) 14 M. I. A. 209; 3 P. C. 733; 2 Sar. P. C. J. 727; 8 Moo. P. C. (N. S.) 127; 20 E. R. 765; 17 E. R. 280.
(5) (1843) D. & M. 158 at p. 430; 5 Q. B. 408; 13 L. J. Q. B. 98; 8 Jur. 85; 114 E. R. 1403.
(6) 4 B. L. R. (O. C. J.) 63; 15 W. R. (O. C. J.) 18 n.

an order under section 26 to deliver over goods or to pay debts when it appeared that there was really a conflict of right or equity between the insolvent and the person in whose possession the goods were or from whom payment of the debt was sought to be obtained. There is really a conflict of two considerations when the Court is called upon to make a summary order of this description; on the one hand, unless the Insolvency Court exercises the power, the property may be made away with before an action can be brought and determined; on the other hand, in a case where there is a substantial conflict of right, the time taken up in enquiry by the Insolvent Court may be thrown away, if a regular suit is instituted for investigation of the rights of the parties. To the same effect is the decision in *Ajodhia Pershad* v. *A. B. Miller* (7). The point was emphasised by Sir Richard Garth, C. J., in *Umbica Nundun Biswas, In the matter of* (8) when he expressed his entire approval of the practice of the Court to abstain from deciding difficult questions of title under section 26 and to leave the parties to settle such questions by a regular suit. He added that the procedure under section 26 was not calculated to effect satisfactorily the trial of difficult questions of title, and as the judgment would not be conclusive, even if the Court thought it right to decide the matter, either party being free if they chose to raise the same question again in a regular suit, the Chief Justice proceeded to allow the appeal and to discharge the order made by Kennedy, J., in favour of the Official Assignee. A similar view was taken in *Kursondas Ramjee, In re* (9). We are not unmindful that there are instances in which cases of some complexity have been dealt with under section 26; see for instance *Kalagurla Suryanarayana* v. *Yarlagadda Naidoo* (10), where there was a marked conflict of testimony upon a simple issue, namely, whether certain payments had been in fact made. See also *Rowlandson* v. *Champion* (11), *Official Assignee of Madras* v. *Mehta & Sons* (12), *Hirth, In re, Trustee, Ex parte* (13), *Slobodinsky, In re, Moore, Ex parte* (14). Amongst cases decided under the Presidency Towns Insolvency Act, 1909, our attention has been drawn to the judgment of Greaves, J., in *Seehase, In re* (15) where the opinion was expressed that a question as to whether a sale of property by an insolvent was fraudulent or void could, in the discretion of the Court, be enquired into under section 36, subject to the right of the party affected to bring a suit, if so advised. The point whether the Presidency Towns Insolvency Act, 1909, has or has not altered the law in this respect, does not appear to have been argued and we express no opinion as to the maintainability of a suit for the determination of the question of title after the matter has been decided under section 36; *Hajee Abdul Latef Sahib* v. *Official Assignee of Madras* (16). This much is plain that the Court should not deal with the matter under section 36, if it really involves difficult questions of title, but should leave the parties to litigate such matter in a regular suit: See *Official Assignees of Madras* v. *Vadda alli Ammal* (17). We are of opinion that, in the case before us, the matters in issue should have been left to be decided in a regular suit. To enable the Official Assignee to succeed, an enquiry must be made as to the terms of the contract between Nitai Charan Ghose and the two ladies and it must be proved that the shares represented the fruits of that contract; that the ownership in the shares was vested in the father of the appellant, that he held them in trust for his father's benefit; that when he sold the shares to Jacob and Co., he acted as trustee for his father; that he obtained a decree against them in the same capacity; and that the security deposited by Jacob and Co., partook of the same character. These are questions which require full investigation and should be determined in a regular suit. Such a suit, it appears, was actually instituted by the Official Assignee,

(7) 7 B. L. R. 74; 15 W. R. (O. C. J.) 16.

(8) 3 C. 434; 1 C. L. R. 661; 1 Ind. Dec. (N. S.) 862.

(9) 4 Bom. L. R. 154; 26 B. 765.

(10) 6 C. W. N. 513.

(11) 17 M. 21; 6 Ind. Dec. (N. S.) 14.

(12) 49 Ind. Cas. 938; 42 M. 510; 36 M. L. J. 190; 25 M. L. T. 265; (1919) M. W. N. 293.

(13) (1899) 1 Q. B. 617; 68 L. J. Q. B. 287; 80 L. T. 63; 47 W. R. 243; 6 Manson 10; 15 T. L. R. 153.

(14) (1903) 2 K. B. 517; 72 L. J. K. B. 868; 89 L. T. 190; 52 W. R. 156; 10 Manson 341; 19 T. L. R. 616.

(15) 46 Ind. Cas. 196; 22 C. W. N. 835.

(16) 44 Ind. Cas. 547; 40 M. L. J. 76.

(17) 86 Ind. Cas. 524; 20 M. L. T. 311; 4 L. W. 425; 40 M. 810.

but has been either abandoned or withdrawn in favour of the more exped tions for a of enquiry contemplated by section 36. There can be little doubt that the suit was the more appropriate remedy.

The result is that the appeal is allowed, the order made by Mr. Justice Rankin discharged, and the application of the Official Assignee dismissed. The suit already mentioned will stand revived. The costs of the appellant both here and before Mr Justice Rankin will be costs in the suit. The Official Assignee will be at liberty to take the costs incurred by him out of the unclaimed dividend revenue account, in so far as the costs cannot be met from the assets in his hands. We make this order, because there is reason to believe that the provisions of the insolvency rules as amended in 1918 have been overlooked and amounts have been drawn from the unclaimed dividend account without the leave of the Court.

FLETCHER, J.—I agree.

B. N.

Appeal allowed.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1 92 OF 19 7.

April 22, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

BEHARI LAL—PLAINTIFF—APPELLANT

versus

NAND LAL, MINOR, SON AND LEGAL REPRESENTATIVE OF JIWAN MAL, DECEASED, AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (v) (c)—"Garden," what is—Garden assessed to revenue with house, suit in respect of—Court-fee.

Where a sale-deed describes the thing sold as a garden together with a house and out-houses and trees of all kinds, the property sold is a garden within the meaning of section 7 *(v) (e)* of the Court Fees Act and even though the same be assessed to land revenue a suit, in respect of it, must, for the purposes of the Court Fees Act, be assessed at its market value and not on ten times the amount of the revenue. [p, 346, col. 1.]

Miscellaneous first appeal from an order of the District Judge, Amritsar, dated the 7th February 1917, returning the appeal for presentation to the Chief Court.

Bakhshi *Tek Chand* and Lala *Hukam Chand*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—The facts in this case are briefly as follows:—On the 13th May 1914, Sant Ram and others sold certain property to Jiwan Mal. On the 9th May 1915 Behari Lal instituted a suit claiming to be entitled to pre-empt the property sold. He described this property as land assessed to revenue and paid the Court-fees on it at ten times the *jama*. The vendee Jiwan Mal contested the suit and claimed that he had purchased a garden. He further pleaded that the value of the suit had been wrongly assessed both for purposes of Court-fee and jurisdiction and that the suit fell within section 7, clause (*v*) (*e*) of the Court Fees Act, the duty payable being an *ad valorem* one on the market-value. After recording evidence the learned Subordinate Judge came to the conclusion that the property sold was a garden, and that under section 7 (*v*) (*e*) of the Court Fees Act the fee payable should be an *ad valorem* one. The property had changed hands for Rs. 14,500 which figure was admitted as correct by Behari Lal who was directed on the 31st August 1915 to make good the Court-fees on that amount by the 18th October 1915 As Behari Lal failed to comply with this order, on the 18th October 1915 the plaint was rejected under O. VII, r. 11, Civil Procedure Code. Against this rejection Behari Lal preferred an appeal to the District Judge who, however, held that the appeal lay to the Chief Court, and by an order, dated the 7th February 1917, returned the

appeal for presentation to the Chief Court. Behari Lal filed the appeal in this Court, and on his behalf we have heard Mr. Tek Chand, while Mr. Moti Sagar has addressed us on behalf of Jiwan Mal, vendee-respondent.

After hearing the Counsel and examining the authorities cited at the bar, we have no hesitation in holding that the property sold comes within the definition of a garden and that, therefore, the order appealed against was right. Mr. Tek Chand referred to *Kullappa Goundan* v. *Abdul Rahim* (1) and claimed that inasmuch as the property sold in this case was assessed to revenue, an *ad valorem* fee was not chargeable. The learned Judges, who decided the Madras case, came to the conclusion that the word 'garden' in section 7, clause (*v*) (*e*) of the Court Fees Act should be taken as referring primarily to a garden in the English sense, that is an ornamental, or pleasure or vegetable garden attached to a house. The case before them, however, related to a cocoa-nut tope, and it was held that the conversion of an assessed arable field into a cocoanut tope did not affect the application of clause (*v*) (*b*) of section 7. On the other hand, in a case reported as *Siri Dhar* v. *Amar Nath* (2) it was held that the term "garden" in section 7 (*v*) (*e*) of the Court Fees Act included a fruit garden, even though the land under it might have been assessed to land revenue, and that the value of a suit for possession of such a garden for the purposes of the Court Fees Act must be assessed at the market value of the garden. *Bhag Bhari* v. *Jawahar Singh* (3) is another decision of a Division Bench which took the same view. A reference to the deed of sale shows that what was sold was described as a garden together with a house and out-houses as well as trees of all kinds. In these circumstances it seems perfectly clear that the learned Subordinate Judge, came to the correct conclusion, and we hold accordingly.

Next Mr. Tek Chand urged that as the matter was not free from difficulty and as his client had filed an affidavit in the Court of the District Judge when the appeal was filed there to the effect that he had every intention of complying with the order of the Court by the 18th October 1915, but had been prevented from purchasing the necessary stamp owing to his having contracted fever, he should now be given further time within which to make good the deficiency in the Court fees. Mr. Moti Sagar strongly contended that no such concession should be given to the appellant. He pointed out that this pre-emption suit had been hanging over his client's head ever since 1915, and further that the prices of land and houses had considerably increased in the interval. It is true that on the 20th November 1915 Behari Lal appellant filed the affidavit referred to. We are, however, unable to understand why, if he was well enough to come to Court, he was not well enough to purchase the necessary stamp or to file the money in Court with an application explaining that he was ill and asking for further time. It seems to us that, as a matter of fact, the appellant had no intention whatever of complying with the order of the Court and making good the Court fee by the 18th October 1915 and that this affidavit was merely an after-thought intended to meet eventualities. We must, therefore, decline to give him any further opportunity, and dismiss his appeal with costs.

N. H. *Appeal dismissed.*

(1) 39 Ind. Cas. 254; 40 M. 824; 5 L. W. 270; 21 M. L. T. 251.

(2) 146 P. R. 1908; 34 P. W. R. 1908; 61 P. L. R. 1908.

(3) 25 Ind. Cas. 545; 71 P. R. 1914; 241 P. L. R. 1914; 155 P. W. R. 1914.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 538 OF 1920.

October 24, 1921.

Present :—Mr. Hallifax, A. J. C.

Thakur HARGOVIND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MEHTAB SINGH—DEFENDANT—RESPONDENT.

Joint Hindu family—Karta, contract by, for family

HARGOVIND v. MEHTAB SINGH.

benefit—Minor members, suit by, for specific performance —Lack of mutuality, plea of—Karta, *relation of, to minor members—Specific performance of contract, who can sue for—General rule.*

Where the *karta* of a joint Hindu family enters into a contract which is binding on the minor members as well, as for instance, where it is for the family benefit, the minor members are entitled to bring a suit for its specific performance There is no lack of mutuality in such a case between the minor members and the other party to the contract so as to stand in the way of their suit [p. 347, col. 2.]

Hari Charan Kuar v *Kaula Rai*, 40 Ind. Cas. 142; 2 P. L. J. 513; 1 P. L. W. 587; (1917) Pat, 201 (F. B.), followed.

The relation of the manager of a joint Hindu family to a minor is not the same as that of a guardian to his ward. The manager is not an agent of the other members, nor is he a mere manager. He is much more like a trustee for the other members. [p. 348, col. 2.]

Annamalai Chetty v. *Murugasa Chetty*, 26 M. 544 at p. 55 ; 7 C. W. N 754; 30 I. A. 220; 8 Sar P. C. J. 523; 13 M L. J. 287; 5 Bom. L. R. 494 P. C.), relied on.

No person can sue for specific performance, if he cannot be sued for it, whether because he is a minor or for any other reason. [p. 348. col. 1.]

Appeal against a decree of the District Judge, Saugor, dated the 26th October 1920, reversing a decree of the Munsif, Saugor, dated the 31st July 1920.

Mr. *G. L. Subhedar*, for the Appellants.
Mr. *C. P. Parakh*, for the Respondents.

JUDGMENT.—The three plaintiffs, who are appellants here, constitute a joint Hindu family. The first plaintiff is the *karta* or manager of the family, and the other two, who are minors, sue through him as their next friend. The common fallacy of supposing that the relation of the manager of a joint Hindu family to a minor member of the family is the same as that of a guardian to his ward was exposed by Batten, A. J. C. in *Asaram* v. *Ratansingh* (1). The learned District Judge has nevertheless fallen into this error and has consequently arrived at a wrong decision. The prayer in the plaint was for specific performance of a contract executed by the first defendant, Mehtab Singh, to convey to the plaintiffs certain property which he subsequently sold to the other four defendants. These defendants pleaded an agreement in their favour prior to that held by the plaintiffs, and also claimed to be purchasers in good faith for value without notice of the plaintiffs' rights. In the First Court both defences failed and the suit was decreed. In appeal to the Court of the District Judge both these questions of fact were again decided in favour of the plaintiffs, and those decisions are now final. The learned Judge, however, accepted a plea, taken by the defendants for the first time in his Court, that "specific performance cannot be obtained of a contract on behalf of minors when such contract could not be enforced against the minors or their property," and ordered the dismissal of the suit on that ground. On the authority of the ruling of this Court in *Suramal* v. *Pandhari* (2) which is based entirely on that of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed* (3) the learned Judge held that "Mehtab could certainly not have enforced the contract as against the minors and similarly the minors cannot enforce it against him."

(2) The Privy Council case mentioned is certainly clear authority for the principle on which the defendants relied in the Court of the District Judge, which is that in certain circumstances a contract made on behalf of a minor cannot be enforced. The learned Judge, however, cites the ruling as authority for his finding of fact that the condition is satisfied in this case and that "Mehtab could certainly not have enforced the contract as against the minors." That it cannot be, and the finding or rather the unwarranted assumption is clearly wrong As was explained in the judgment of Batten, A. J. C, already mentioned and the rulings therein cited, the case of a contract made on behalf of a minor by his guardian is not the same as that of one made by the *karta* of a joint Hindu family on behalf of that family such as that with which we are dealing here. The fact that the other two members of the family happen to be minors makes no difference in the

(1) 32 Ind. Cas, 242; 12 N. L. R, 12,

(2) 41 Ind Cas. 45; 13 N. L. R. 98.
(3) 13 Ind Cas. 331; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156; 11 M. L. T. 8; 39 I. A. 1 (P. C.).

liability of the family as a whole to carry out the contract. If the acknowledged manager of a joint Hindu family executes a contract for himself and the other two members of it, his younger brother aged 30 and his son aged 3, his son is just as much bound by it as his brother, and no question of minority arises.

(3) The principle enunciated by their Lordships of the Privy Council is simple enough but is not infrequently misunderstood. It is not that specific performance of a contract cannot be obtained against a minor and, therefore, cannot be obtained by him, because there are cases in which it can be obtained against him. The Allahabad case of *Babu Ram* v. *Saidunnissa* (4), in which *Mir Sarwarjan's case* (3) was distinguished, is one. The principle is that no person can sue for specific performance if he could not be sued for it, whether because he is a minor or for any other reason. (See pages 219 and 499 of the Sixth Edition of Fry on "Specific Performance").

(4) The point that arises in this appeal was discussed at length by a Full Bench of the Patna High Court consisting of Chamier, C. J., and Mullick and Atkinson, JJ., in *Hari Charan Kuar* v. *Kaula Rai* (5), and I cannot do better than quote from the judgment in that case. The suit was against a joint Hindu family, of which some of the members were minors, for the enforcement of a contract made on behalf of the family by the managing members, and the learned Chief Justice said: "The contention that the contract with the plaintiffs should not be specifically enforced rests on the decisions of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (6) and *Mir Sarwarjan* v. *Fakhruddin Mohamed* (3). In the former case it was held that a contract made by an infant is not merely voidable but void. In the latter the manager of the estate of an infant Muhammadan had contracted to buy an estate and it was held that the infant suing by his next friend was not entitled to obtain a decree for specific performance of the contract inasmuch as the infant was not bound by the contract and, therefore, the contract lacked mutuality. Their Lordships held that it was not within the competence of a manager of a minor's estate or of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. It is sought to apply these decisions to a contract for the sale of property made by the managing members of a joint family consisting of themselves and their minor children. There are cases in which specific performance of such a contract has been decreed against the managing members who made the contract leaving open the question of the validity of the contract as regards the minor members [see *Kosuri Ramaraju* v *Ivalury Ramalingam* (7), *Srinivasa Reddi* v. *Sivarama Reddi* (8)] and there is at least one case in which the contract not being for the benefit of the minors specific performance was decreed against the members who made the contract [see *Ponaka Subba Rani Reddy* v. *Vadamadi Seshachellam Chetty* (9)]. The interest of a member of a joint Hindu family in the family property is not individual property at all [see *Gharibullah* v. *Khalik Singh* (10)]. The manager of such a family is not an agent of the other members nor is he a mere manager. He is much more like a trustee for the other members [see *Annamalai Chetty* v. *Murugasa Chetty* (11)]. It is settled law that a father or managing member of a joint Hindu family may under certain circumstances and subject to certain conditions enter into agreements which may be binding on the minor members of the family [*Ganesha Row* v. *Tulja Ram Row* (12)]. I apprehend that the decisions

(4) 20 Ind. Cas. 916; 35 A. 429; 11 A. L. J. 783.

(5) 40 Ind. Cas. 142; 2 P. L. J. 513; 1 P. L. W. 587; (1917 Pat 201 (F. B.).

(6) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374; (P. C.).

(7) 26 M. 74; 12 M. L. J. 400.

(8) 4 Ind. Cas. 504; 32 M. 320.

(9) 5 Ind. Cas 79; 7 M. L. T. 137; 20 M. L. J. 328; 33 M. 359.

(10) 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 473; 7 C. W. N. 631; 8 Sar. P. C. J. 483 (P. C.).

(11) 26 M. 544 at p. 553; 7 C. W. N. 754; 30 I. A. 210; 8 Sar. P. C. J. 523; 13 M. L. J. 287; 5 Bom. L. R. 494 (P. C.).

(12) 19 Ind. Cas. 515; 36 M. 205; 17 C. W. N. 785; 11 A. L. J. 531; 15 C. L. J. 1; 5 Bom. L. R. 628; 14 M. L. T. 1; (1913 M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.).

of their Lordships in the cases of *Mohori Bibee* v. *Dharmodas Ghose* (6) and *Mir Sarwarjan* v. *Fakhruddin Mahomed* (3) do not apply to contracts made by the managing member of a joint Hindu family for family necessities or for the benefit of the family, *i. e.*, contracts made by the managing members which bind the minor members of the family. Such contracts can be enforced on behalf of the family by the persons who make them and I find nothing in the decisions of their Lordships which requires us to hold that such contracts cannot be enforced against the family. Contracts made not by minors but by persons who have power to make contracts on behalf of a joint family do not appear to come within those decisions. I am not prepared to dismiss this suit for specific performance on the ground that the contract lacks mutuality having been made by or on behalf of minors who are not competent to contract."

(5) I hold that there was no lack of mutuality in the contract executed by the first defendant to convey the property in suit to the plaintiffs as they were all bound by it equally with the other party to it. The plaintiffs are, therefore, entitled to have specific performance of that contract. The decree of the lower Appellate Court is accordingly set aside and that of the First Court is restored. The defendants must pay all the costs incurred by the plaintiffs in all three Courts and must bear their own costs.

N. K. & N. H.

Decree set aside.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1.7 OF 1921.

March 16, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr Justice Shah.

RASUL MALIK PINJAR—PLAINTIFF—APPELLANT

versus

AMINA HANIF—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Arts. 165, 181—*Civil Procedure Code (Act V of 1908), O. XXI, r.* 100—*Application by judgment-debtor for restoration of excess property delivered in execution—Limitation.*

An application under O. XXI, r. 100 of the Civil Procedure Code for restoration of excess property delivered in execution, is, where the applicant is the judgment-debtor, governed by Art. 181 and not Art. 165 of the Limitation Act.

Abdul Karim v. *Islamunnissa Bibi*, 34 Ind. Cas. 251; 38 A. 339 at p. 44; 14 A. L. J. 40, *Thattantavita* [*Pachali Rohini*] v. *Puthalathu Kandi Kombi Aliassan*, 53 Ind. Cas. 437; 42 M. 753 at p 760; 37 M. L. J. 349; 10 L. W. 410; 26 M. L. T. 297; (1919) M. W N. 732 (F. B.), followed.

Ratnam Ayyar v. *Krishna Doss Vital Doss*, 21 M. 494; 8 M. L. J 75; 7 Ind Dec. N. s. 705, *Har Din Singh* v *Lachman Singh*, 25 A. 343; A. W. N. (1903) 55, referred to.

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 252 of 1919, confirming an order passed by the Subordinate Judge at Gokak, in Darkhast No. 212 of 1916.

Mr. *R. A. Jahagirdar*, for the Appellant.

Mr. *S. R. Parulekar* for Mr. *D. N. Deshpande*, for Respondents Nos. 1 to 4.

JUDGMENT.

MACLEOD, C. J.—This appeal raises an interesting question of law which has not previously come before this High Court. A partition decree was passed in a suit, and in execution of the decree the plaintiff complained that he had been dispossessed of certain land by the Collector's subordinate officers which was his own property and not subject to partition. He seems to have originally filed a suit to recover possession of the property, but it was decided by the District Court that the plaint should be treated as an application under section 47 of the Civil Procedure Code, and it was treated so accordingly. The Trial Judge held that Art. 165 of the Indian Limitation Act applied and the application was held barred as not having been filed within thirty days from the

date of dispossession. The question seemed so clear to the applicant's adviser that, as the learned Judge points out, he seems to have admitted that there was no way of getting rid of the application of Art. 165.

In first appeal this decision was upheld. The learned Judge said:

"Partition was made by the Collector in pursuance of a partition decree, and in pursuance of that partition the present applicant was admittedly dispossessed of certain land which he now claims to be his own exclusive property and, therefore, not liable to partition. It is admitted that the suit now treated as an application was instituted several months after this dispossession. These facts, I think, are exactly covered by Art. 165. This is an application 'under the Civil Procedure Code, 1908, by a person dispossessed of immoveable property and disputing the right of the decree-holder to be put into possession.' It is argued by Mr. Majli, the learned Pleader for the appellant, that Art. 181 applies to all applications under section 47. No doubt there are applications under that section to which Art. 181 would apply. But, of course, it can have no application where a period of limitation is provided elsewhere, and, in my opinion, 'elsewhere', in the present case, is Art. 165."

A similar question came before the High Court of Allahabad in *Abdul Karim* v. *Islamunnissa Bibi* (1). The learned Judges said:

"On appeals being brought by both the decree holders and the judgment-debtors, the District Judge, holding himself, as we think quite properly, bound by certain authorities mentioned hereafter, decided that the judgment-debtor's application was time barred, on the ground that Art. 165 of the Limitation Act applied to it, and that the time of thirty days had run out. We are clearly of opinion that when the matter is closely examined this view is untenable. In a technical matter of this kind, when the language relied upon does not in express terms cover the case, it is of the highest importance to realize the position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalizing operation unless it is driven to do so by the irresistible force of language. Now, in the ordinary course of things, a person who is wrongfully dispossessed of immoveable property has a remedy by a suit for possession only. In matters arising out of the execution of decrees, possibly because they are the indirect result of the active interference of the Court itself, the Legislature has provided two exceptions. The judgment-debtor must apply to the Court under section 47. If he is dispossessed of land which is outside the decree, and he does not so apply, he loses his land. He cannot bring a suit. He is worse off than the ordinary person wrongfully dispossessed. On the other hand, if a third person outside the suit is unfortunately the victim of some mistake in the decree itself, or by the decree-holder, he may apply to the Court in a summary manner, and if he is right he may be put back into possession. That is expressly provided by O. XXI, rr. 100 and 101. Such a person is better off than the ordinary person wrongfully dispossessed. He can bring a suit, of course, within twelve years; but he can, if he pleases, apply summarily for possession. That is a privilege of a peculiar and special character, from which the judgment-debtor is excluded in express terms. It is not surprising to find such a privilege accompanied by certain restrictions. By Art. 165 of the Limitation Act of 1908, (the Article now in question) such an application must be made within thirty days. The Article is in these terms:—'*Description of application*:—Under the Code of Civil Procedure, 1908, by a person dispossessed of immoveable property and disputing the right of the decree holder, or purchaser at a sale in execution of a decree, to be put into possession. *Period of limitation*:—Thirty days from the date of dispossession.' Now that is a precise and compendious description of the right given, and the application allowed to 'a person other than the judgment debtor' by O. XXI, rr. 100 and 101. It certainly applies to such an

(1) 34 Ind. Cas. 231; 38 A. 339 at p. 343; 14 A. L. J. 401.

application and there is no other provision in the Code which in the terms it employs at all corresponds to it. We think it quite certain that when the Legislature enacted Art. 165, it had the provisions now contained in O. XXI, rr. 100 and 101 in mind. That is to say, it intended Art. 165 to apply to such an application. The argument for the view adopted in the reported cases and followed by the District Judge in the case, is that the words are wide enough to include a judgment-debtor. Separated from their context this is true. A judgment-debtor is a 'person' in such a case as this. Moreover, the judgment-debtor in his application under section 47 is complaining of the same sort of act as an applicant under O. XXI, r. 100, would have to complain of. But the moment it is realized that what the Schedule to the Limitation Act consists of is an enumeration of suits, appeals, and applications of various kinds, and that the language of Art. 165 is merely a definition or description, all difficulty as to the use of the word 'person' disappears. In our opinion the word 'person' in that context, although wide enough to include a debtor, was never used in any other sense than that of a person who is authorized by O. XXI, r. 100, to make an application of that description. To hold otherwise would result in this, that if a judgment debtor applied to the Court under O. XXI, r. 100, and adopted the language of Art. 165, his application would have to be dismissed because he is precluded from making an application of that description, and yet if he postpones applying under section 47 for more than thirty days, the language of the Article is to be applied to him."

The learned Judges then referred to *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) and *Har Din Singh* v. *Lachman Singh* (3) in which cases it was held that Art. 165 would apply, and eventually they differed from those decisions.

The case of *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) was considered by a Full Bench of the Madras High Court in *Thattantavita [Vachali Rohini]* v. *Puthalathu Kandi Kombi Aliassan* (4) and in overruling the decision the Chief Justice traced the history of Arts. 165 and 168 of the Indian Limitation Act of 1903. The Chief Justice said :—

"The Legislature has, however, itself restricted the scope of Art. 165 by restricting in the Code of 1908 applications by third parties under O. XXI, r. 100, to applications with reference to property covered by the decree or sale in pursuance thereof, and the fact that this procedure is not now applicable to complaints by third parties of dispossession of property not covered by such decree or sale appears to me to afford additional reason for excluding from the scope of the Article similar complaints by defendants who, as I am statisfied, were never intended to be covered by it. I think, moreover, that the rights of defendants are sufficiently restricted by their being required to apply under section 47 within the period limited by Art. 181."

This question, therefore, having been considered recently by the High Courts of Allahabad and Madras, we should have to show very clear grounds for differing from those decisions. For myself, I see no reason why Art. 165 should apply to judgment-debtors so as to very seriously restrict their rights when dispossessed of property which they allege had not come within the terms of the decree which is being executed. Ordinarily they would apply under section 47, and would have a period of limitation for such an application of three years under Art. 181. As pointed out by the learned Judges in *Abdul Karim* v. *Islamunnissa Bibi* (1) a person other than the judgment debtor is not restricted to making an application under O. XXI, r. 100, which is merely a summary remedy, and that his rights to a suit remain the same. The judgment-debtor, on the other hand, has no remedy by suit. I agree that the wording of Art 165 makes it absolutely clear that it was intended to apply to an application

(2) 21 M. 494; 8 M. L. J. 75; 7 Ind. Dec. (N. S.) 706.

(3) 25 A. 343; A. W. N. (1903) 59.

(4) 53 Ind. Cas. 437; 42 M. 753 at p. 760; 37 M. L. J. 340; 0 L. W. 410, 26 M. L. T. 297; (1919) M. W. N. 732 (F. B.).

provided for by O. XXI. r. 100 and no other, and that, therefore, where the applicant is a judgment debtor, the proper Article which applies to his application is Art. 181. I think, therefore, that the appeal should be allowed and the *darkhast* directed to proceed according to law. The appellant should get his costs of the appeal.

SHAH, J.—The point arising in this appeal is not free from difficulty; but on the whole I think that the view taken by the Allahabad High Court in *Abdul Karim* v. *Ilamunnissa Bibi* (1) and by the Madras High Court in *Thattantavita* [*Vacholi Rohini*] v. *Puthalathu Kandi Kombi Aliassan* (4) is to be preferred to the view taken by those Courts in the earlier decisions referred to in these cases. On the wording of the article no doubt it may appear as if it would apply also to the case of a judgment debtor dispossessed of immoveable property: and it is urged on behalf of the respondent before us that Art 166 which follows Art. 165 has been interpreted as governing the case of an application by a judgment debtor to set aside a sale in execution of a decree. It is clear that the considerations applicable to Art. 166 are different. And we are not concerned in this appeal with the scope of Art. 166. I do not desire to suggest for a moment that Art. 165 would not apply to the case of an application by a judgment debtor to set aside a sale in execution of a decree. But the wording of Art. 165 is somewhat different and is capable of being read in a restricted sense, in which it has been read by the Allahabad and Madras High Courts in the cases to which I have already referred. I think that that is the view which we should give effect to in this appeal.

N. H.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 258 OF 1920.

May 13, 1921.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Spencer.

THE HON'BLE B. RAJARAJESWARA SETHUPATHI AVERGAL—PLAINTIFF—APPELLANT

versus

KUPPUSAMI IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s 16—'Undue influence', proof of, requisites of—Suit to set aside gift for undue influence—Cause of action—Limitation Act (IX of 1908), Sch I, Art. 9—'Plaintiff' in Col III, meaning of—Proof of knowledge, onus as to—Composition deed, setting aside of—Position of parties.

A person is said to be in a position to exercise undue influence over another, when the former is in a position to dominate the latter's will If when in such a position of dominance he uses it to obtain an unfair advantage over the person dominated, the transaction brought about by such use is voidable by the latter [p. 355, cols. & 2.]

The expression 'undue influence' cannot be properly used unless either (1) confidence has been reposed on the person charged, as where the latter is a solicitor, trustee, guardian, etc, or (2) unless the influence of the man exercising it is such that the person influenced stands in some sort of respect, awe or fear of him. [p. 355, col. 2.]

Where a legacy bequeathed by a Will or a gift *inter vivos* is sought to be set aside on the ground of undue influence, it is not sufficient to prove that the legatee was in a position to exercise influence, but it must also be proved that the influence was unduly exercised, the burden of proving this latter circumstance being on the party attacking the legacy. [p. 356, col 1.]

Courts do not look with favour on attempts to attack bequests on the ground of undue influence. [p 355, col. 1.]

Ismail Mussajee Mookerdam v. *Hafiz Boo*, 33 C. 773; 10 C. W N 570; 3 A. L J. 353; 3 C. L. J. 484; 8 Bom. L. R. 279; 16 M. L J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.), *Taylor* v. *Johnston*, (1882) 19 Ch. D. 603; 51 L. J Ch 379; 46 L. T. 219; 30 W. R 504, *Howes* v. *Bishop*, (1909) 2 K. B 390; 78 L. J. K B 796; 100 L. T. 820; 25 T. L. R. 533, and *Nedby* v. *Nedby*, (1845) 5 De G. & Sm. 377; 21 L. J. Ch. 440; 80 R. R 105; 64 E. R. 1161, referred to.

A suit to set aside a deed of gift for undue influence is governed by Art. 91 of the Limitation Act. [p. 357, col. 1.]

Janki Kunwar v. *Ajit Singh*, 15 C. 58; 14 I. A. 148; 12 Ind. Jur. 9; 5 Sar P. C. J. 92 Rafique & Jackson's P. C. No. 99; 7 Ind, Dec, (N. S.) 624 (P C.), referred to.

The cessation of undue influence has no relevancy on the question of limitation, unless the matter could be brought under the heading of fraud so as to attract the operation of section 18 of the Limitation Act. [p. 357, col. 1.]

Raja Rajeswara Dorai v. *Arunachellam Chettiar*, 19 Ind. Cas. 596; 38 M. 321; (1913) M. W. N. 468; 13 M. L. T. 469; 24 M. L. J. 592, referred to.

Sri Kishan Lal v. *Kashmiro*, 34 Ind. Cas. 37; 31 M. L. J. 362; 20 C. W. N. 957; (1916) 1 M. W. N. 433; 3 L. W. 528; 44 A. I. J. 1236 P. C.), explained.

In cases to which Art. 9 of the Limitation Act is applicable the onus is not on the defendant to prove that the plaintiff's knowledge arose more than 3 years before suit.[p. 357, col 1.]

Tanto v *Gajadhar*, 2 N. L. R 98, dissented from.

The word 'plaintiff' in Art. 91, column 3, includes his predecessor. [p 357, col. 2.]

When a compromise-deed is set aside, the parties are remitted to their original rights as they stood before the compromise. [p. 358, col. 1.]

Khajooroonissa v. *Rowshan Jehan*, 2 C. 184 at p. 196; 3 I. A. 291; 26 W. R. 3 ; 1 Ind Dec (N.S.) 412 P. C.), *Surjiram Marwari* v *Barhamdeo Persad*, 1 C. L. J. 337 at p. 343 and *Har Chandi Lal* v. *Sheoraj Singh*, 39 Ind. Cas. 343; 39 A. 178; 32 M. L. J. 241; 16 A. L. J. 223; 1 P. L. W. 330; 5 L. W. 502; (1917) M. W.N. 290; 25 C. L. J. 316; 21 M. L. T. 292; 21 C. W. N. 765; 19 Bom. L R. 444; 44 I. A. 60 (P.C.), referred to.

Appeal against a decree of the Court of the Subordinate, Judge, at Madura dated the 25th of March 1920 in Original Suit No. 157 of 1913.

Mr. *S. Srinivasa Iyengar*, for the Appellants.

Mr. *A. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

SADASIVA IYER, J.—The plaintiff appellant is the present Rajah of Ramnad, the owner of an ancient Zamindary. He brought this suit to recover possession with mesne profits for 3 years before suit of the village of Nedumthulasi within the area of his Zamindari which village had been alienated in three ways in the years 1894, 1895 and 1902 respectively in favour of the 1st defendant (Kuppusami Iyer *alias* Naganatha Iyer). Unless all these three transactions are set aside or are nullities it seems *prima facie* difficult to see how the plaintiff's suit in ejectment and for possession could succeed, as each of the three transactions gives to the 1st defendant the right to hold possession of the village on the date of this suit (namely, 30th June 1913).

The first transaction was a lease granted by the plaintiff's father, the then Rajah, in September 1894 under Exhibit C. Under this deed, the 1st defendant was entitled to enjoy the village as lessee for 40 years till the 1st July 1934, that is, till more than 21 years from the date when the suit was brought and more than thirteen years from the date on which this judgment is pronounced by me.

The second transaction was again an alienation by the plaintiff's father in June 1895 under Exhibit I by which the village was gifted outright to the 1st defendant with full powers of gift, sale, etc.

The third transaction was an agreement between one Rao Bahadur Venkataranga Iyer (who was constituted the present plaintiff's trustee under a settlement-deed of July 1895 which I shall refer to again later on) on the one side and the 1st defendant on the other side and was made in April 1902. (Besides the Dewan trustee and the 1st defendant, two Nattukottai Chetties, who were the lessees of the whole Zemindary were also parties to the agreement, but it is unnecessary to refer to them further). That agreement is Exhibit II. The trustee had threatened the 1st defendant with a suit to set aside the gift-deed, (Exhibit I, June 1895). Thereupon, the dispute was settled by this agreement, Exhibit II, the 1st defendant agreeing to hold the village on perpetual lease at half the usual rent and thus altering the gift under Exhibit I (the gift-deed of 1895) with full ownership right in the village to the gift of a perpetual and heritable and transferable occupancy right on favourable rent.

Now, the plaint ignores altogether the first transaction, namely, the 40 years' lease of 1894, attacks the other two transactions as "not *bona fide*," as "fraudulently and dishonestly obtained," as due to "undue influence" and in several other ways.

The defendants (the defendants Nos. 2 and 3 being the sons of the 1st defendant) raised several pleas and the lower Court framed nineteen issues for disposal. It is curious that no *specific* issue was raised in respect of the defendants' right to hold the village under the 40 years' lease of 1894 and the liability of the plaintiff's suit filed in 1913 for possession to be dismissed on that short ground, even though the 1st defendant specifically mentioned the 40 years' lease and relied upon it also in the 7th and 8th paragraphs of his written statement.

A few more facts and dates may be here mentioned. The late Raja was born in 1868 and his father died when he was a boy of 4 or 5. Though he was only a titular Rajah and was for all practical purposes only the owner of an impartible Zamindary estate, the pomps and ceremonials and the retinue of a Royal Court were kept up in many ways in the Zemindar's residence and the unwholesome atmosphere of hangers-on,

favourites, flatterers, idlers, the Zenana, etc., affected the Zamindar's residence (known, of course, as the palace) and his surroundings and the effects of such influence were too strong on the young man, (the plaintiff's father), notwithstanding that his estate was taken up by the Court of Wards during his minority and his education was conducted in Madras. His mother (the Dowager Rani) had naturally great influence over him. She arranged to have him married to two wives at the same time when he was only 18 or 19 years old and by intrigues and importunities persuaded the Court of Wards to consent to his marriage with one girl and had him married almost simultaneously to the two wives she had selected for him, it being considered a matter of dignity in these aristocratic families that the proprietor should have at least two wives living. He was a young man of extraordinary intelligence. He passed his Matriculation in the first class.

The lower Court in dismissing the suit arrived at the following findings (among others) and I shall note them (as far as possible) in the words of the lower Court.

(1). "The first defendant was not in a position to exercise undue influence over the late Raja" and "the deed of gift in favour of the 1st defendant was not brought about by the undue influence" and "the gift is valid." (This finding relates to the gift-deed of June 1895, Exhibit I).

(2). "The agreement of 1902 between the Dewan Trustee and the lessees on the one hand and the 1st defendant on the other confirming the deed of gift with stipulation to pay half the Poruppu" was "beyond his" (the Dewan Trustee's) "powers" and "not valid." "But in view of the fact that the plaintiff could not succeed unless the gift" (of 1895) "was invalid, the plaintiff is not entitled to any relief by declaring that the agreement" (of 1902) "is invalid."

3. "The suit is practically to set aside the deed of gift and agreement and Art. 91 of the Limitation Act is applicable." *Vide Raja Rajeswara Dorai* v. *Arunachellam Chettiar* (1).

4. "There is no evidence on the plaintiff's side that the late Rajah continued to be under the influence of the 1st defendant after the deed of gift (June 1895) till the date of the deed of settlement (July 1895) under which he appointed Venkataranga Iyer as Dewan Trustee for his son (the present plaintiff). "The limitation, therefore, began to run before the execution of the trust deed" (July 1895) "and no subsequent circumstance can interrupt the running of the limitation"

Besides the above four findings, several other findings on mixed questions of law and fact were recorded by the lower Court, but in the arguments before us on appeal, neither side advanced any arguments on those questions or contested the lower Court's findings thereon. I need only say that I agree with the lower Court in its conclusions on these questions for the reasons given in its judgment.

I shall now take up the four findings dealt with before us one by one. The first question relates to the allegation of undue influence. The late Rajah was a person who by temperament was immoderately extravagant. His education and bringing up only tended to increase his natural foibles. D. W. No. 1 says "the late Rajah was a very emotional person." Under the Roman Law, he would be considered as a person permanently affected with incapacity to manage his own affairs, solely on the ground of his immoderate extravagance, not because he did not know the consequences of his actions or was at all weak of intellect. He was in perpetual need of the excitement of being praised for his reckless generosity and continuous liberality. Shrewd Nattukottai Chetties took advantage of this perpetual need of money even before he attained majority (which was on 3rd November 1893) and lent him large sums depending upon his generous disposition to re-pay them several times over after he took possession of the estate and they were not at all disappointed. The late Rajah was much attached to the 1st defendant, Kuppuswami Iyer, because the latter was a trusted servant of his mother for several years and he made the 1st defendant his own vernacular Secretary, (Javabnavis). But the 1st defendant was in no better position to dominate the will of the Rajah than any other person who appealed to his generous instincts and love of pomp, show, display and fame. I do not think it will be going too far to say that the late Rajah's temperament was such that he courted

(1) 19 Ind. Cas. 596; 38 M. 321; (1913) M. W. N. 453; 13 M. L. T. 469; 24 M. L. J. 592.

opportunities for the display of his reckless generosity. I agree with the learned Subordinate Judge that the story of P. W. No. 8 that the 1st defendant related to the late Rajah that the late Rajah's mother appeared to the 1st defendant in a dream and told him "Ask my son and he will grant you all benefit" and that on telling this story the Rajah agreed to make the gift is a false story. On the contrary, I believe the evidence of D. Ws. Nos. 1 and 2 who say that on the 2nd monthly ceremony after the Dowager Ranee's death, there was a religious gift of the village by the Rajah accompanied by the pouring of water through the right palm and that the gift deed was written a few days afterwards in consonance with the religious gift, and this is corroborated by the recital in the gift-deed.

Where a legacy bequeathed by a Will is sought to be set aside on the ground of undue influence, it is not sufficient to prove that the legatee was in a position to exercise influence and it must also be proved that the influence was unduly exercised, the burden of proving this latter circumstance being on the party attacking the legacy. Again, as a legacy given by a Will takes effect only after the death of the testator, the testator does not deprive himself of the bequeathed property but deprives only his natural heirs. Hence also Courts do not look with favour on attempts to attack bequests on the allegation of undue influence.

I admit that the case of a gift *inter vivos* stands on a less favourable footing. But it must be remembered in this case that the gift attacked was made on the 2nd June 1895 after the late Rajah had carried on his course of extravagance for more than $5\frac{1}{2}$ years after he attained majority; after he had been advised before the end of 1894 by the Government to settle his estate upon his eldest son, the present plaintiff (see paragraph 4 of the plaint) and just on the eve of the settlement-deed, Exhibit IV, which was executed one month and six days after the gift deed. The gift now in question, therefore, stands almost in the position of a bequest. Now, if *A* is said to be in a position to exercise undue influence over *B*, according to Indian Law (see section 16 of the Contract Act) *A* must be in a position to dominate the will of *B*. If when in such a position of dominance, he uses it to obtain an unfair advantage over *B*, the transaction brought about by such use is voidable by *B*. Though the expression "dominate the will of another" is an expression of wide import and though I am aware that Courts do not like to give exact and exhaustive definitions of undue influence any more than they like to give exact and exhaustive definition of fraud, I think the expression "undue influence" cannot be properly used unless either, (1) confidence has been reposed on the person charged (*A* in our illustration), as where the latter is a solicitor, trustee, guardian, etc., or (2) unless the influence of the man *A* is such that *B* stands in some sort of respect, awe or fear of him such as a child towards its parent or a pupil towards a spiritual preceptor and so on, so that the idea of displeasing *A* by a refusal to submit to his wishes puts *B* in fear of prospective injury to his secular or spiritual welfare and happiness. An ordinary servant and dependent like the 1st defendant could not have had and is not proved to have had any such influence over the late Rajah and it is impossible to hold that the Rajah stood in awe or fear of the 1st defendant's displeasure. On the other hand, the letters, Exhibits E to H, L and N, show that the 1st defendant was a mere servile flatterer and dependant of the Rajah and not a person in a position of authority to dominate the will of the Rajah. He was not in a position of trust and confidence such as a solicitor holds over his client. The numerous cases quoted where a father obtains a gift from his son who had just attained majority or a *gosha* lady makes a gift to the manager who manages all her affairs and persuades her to believe that the gift made to him is only nominal or a solicitor obtains a gift from his client or a spiritual preceptor from his pupil or a person who is nominally a servant but has really made himself so indispensable to his master for the latter's comforts that the master has really become the servant's servant, have all no relevancy in arriving at a conclusion on the facts of this case. From the evidence, I am clear that the 1st defendant's position towards the late Rajah was not such that the Rajah's volition could be overborne by or could be subjected to the domination of the 1st defendant's will. Undue influence and coercion

were not clearly distinguished in the old English Law, and though there is a well defined distinction now, the two are similar in this respect that their legal effect in making transactions voidable depends on the will of the person subjected to either being influenced to such a degree as to lose its freedom. I do not intend to quote many cases. The only Indian case which I need quote is *Ismail Mussaiee Mookerdum* v. *Hafiz Boo* (2), a passage from which is applied to the facts of this case by my learned brother in the judgment to be pronounced by him. There is an English case *Taylor* v. *Johnston* (3) which was a case not of a bequest but of a gift *inter vivos* like the present. It was a case where a young woman of twenty made a gift to a relative with whom she had been residing from her father's death for a period of five months until her own death, and to whom she became greatly attached. It was held that the gift was not invalid. It cannot, in my opinion, be stated in this case that the 1st defendant stood in a fiduciary relation to the late Rajah on the date of the gift-deed. When the late Rajah was 27 years of age and the Rajah's benefactions ranged over wide areas from the Sringeri Mattam in the Mysore Province to wealthy Nattukottai Chetties such a contention seems to me to be extravagant. In *Howes* v. *Bishop* (4) it was held that the doctrine of undue influence could not be invoked in favour of a wife who was influenced by the fact that her husband wanted money and who, therefore, joined in executing a promissory-note, though the Jury found that her signature was procured by the influence of her husband. The case of *Nedby* v. *Nedby* (5) is also instructive. There a deed was prepared by the husband's solicitor and was executed by the wife in the presence of two of the clerks of the solicitor and it was not read over to her. The wife was agitated and distressed and she signed and agreed to sign in a reluctant manner and yet the Vice-Chancellor refused to set aside the deed in the suit brought by her. There is no evidence at all in this case that the late Rajah executed the gift unwillingly or through fear of any unpleasant consequence if he refused to execute it, or even that the 1st defendant made the late Rajah uncomfortable by excessive importunities. I, therefore, agree with the lower Court that the gift-deed of June 1895 is not vitiated by undue influence. This is sufficient for the disposal of the appeal. I may even go further and say that the plaintiff did not even allege that the older lease deed of 1894, Exhibit C, for 40 years' term was invalid and the term of 40 years mentioned therein not having expired, the present suit for possession ought to have been summarily dismissed on that sole ground.

I shall now take up the second finding relating to the agreement of 1902. Section 36 of the Trusts Act says that the trustee may do all acts which are reasonable and proper for the protection or benefit of the trust property (subject, of course, to the restrictions contained in the instrument of trust). Section 43 of the Trusts Act says that a sole acting trustee authorised to execute the trusts and powers of the instrument of trust may compromise, compound, abandon, submit to arbitration, or otherwise settle any claim whatever relating to the trust. The Dewan Trustee as the sole acting trustee was, therefore, empowered to compromise and compound the claim made by the 1st defendant under the gift-deed which had been in force for nearly 7 years on the date of Exhibit II. The late Rajah had not set it aside before the date of the settlement deed. The late Rajah died in December 1903. The suit to set it aside was *prima facie* clearly barred on the date of Exhibit B and the Dewan Trustee acted, in my opinion, very prudently in getting the 1st defendant to sign Exhibit B agreeing to pay half the Poruppu. I, therefore, disagree with the lower Court in its conclusion (for which it gives no reason in its judgment) that the compromise was beyond the powers of the trustee and was invalid. See as to powers of executors and trustees to compromise, *Houghton, In re, Hawley* v. *Blake* (6)].

(2) 33 C. 773; 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.).

(3) (1882) 19 Ch. D. 403; 51 L. J. Ch. 879; 46 L. T. 219; 30 W. R. 508.

(4) (1909) 2 K. B. 390; 78 L. J. K. B. 793; 100 L. T. 826; 25 T. L. R. 533.

(5) (1852) 5 De G. & Sm. 377; 21 L. J. Ch. 446; 90 R. R. 105; 64 E. R. 1161.

(6) (1904) 1 Ch. 622; 73 L. J. Ch. 317; 90 L. T. 252; 52 W. R. 505; 20 T. L. R. 276.

Lastly, dealing with the question of limitation and assuming for the sake of argument that the gift-deed, Exhibit I, was brought about by undue influence, Article 91 of the Limitation Act clearly applies to this suit, as the plaintiff cannot obtain possession without setting aside the gift-deed which is not a void transaction but only voidable. [See *Janki Kunwar* v. *Ajit Singh* (7)]. The limitation period is three years from when the facts entitling the person to have the instrument cancelled or set aside become known to him. Now the late Rajah who executed the instrument knew the facts perfectly from the very date of execution and hence the cause of action arose at once in June 1895. I need not say that when once time begins to run it does not cease to run, except under very peculiar circumstances which do not exist in this case. In June 1898, the gift-deed became unavoidable thereafter through the expiry of three years' limitation period. I do not deny that undue influence might be set up as a defence by a donor to the suit brought by the donee for possession even after the period of limitation, but that is not the case here.

It was argued by Mr. S. Srinivasa Iyengar that the cause of action arises only when the undue influence ceases. I considered this question in a case brought by the plaintiff himself, *Raja Rajeswara Dorai* v. *Arunachellam Chettiar* (1), and expressed the opinion that the cessation of undue influence has no relevancy on the question of limitation unless, of course it, could be brought under the heading of fraud so as to attract the operation of section 18 of the Limitation Act. It was, however, argued that in *Sri Kishan Lal* v. *Kashmiro* (8) their Lordships of the Privy Council expressed such an opinion. I do not think there is anything in that case which supports the contention of Mr. Srinivasa Iyengar. The facts there were very peculiar. A single sentence in the judgment at page 374* is relied on, namely, that time would not under the circumstances of that particular case begin to run against a widow (defendant) even if she had to bring a suit to set aside the disputed transaction till her husband's brother's influence ceased at his death. She had executed an arbitration agreement under the undue influence of her husband's brother and she set up the undue influence as a defence and succeeded. But as a mere *obiter dictum* their Lordships of the Privy Council said that even if she had sued as plaintiff, she would not be barred. The facts were very peculiar and their Lordships found there was fraud practised upon her, and that she did not have full knowledge of the facts and the rights arising out of these facts till her husband's brother died. Thus, even that *obiter dictum* was based, not on the ground that the death of the husband's brother and the cessation of his influence was the date for the *terminus a quo* of the cause of action under the law, but that it was on the ceasing of the undue influence that the real state of facts entitling the widow to have the instrument cancelled became known to her. (Though the third column of the Article 91 uses the word "plaintiff," the "plaintiff" includes his predecessor. See definition given in section 2 of the Limition Act). Therefore, time began to run in this case as soon as the facts were known to the late Rajah. The suit is again hopelessly barred even if we take the date of the knowledge of the Dewan Trustee or any of his successors as the date of the cause of action. In this connection I wish to express with great respect my dissent from the decision in *Tanto* v. *Girjadhar* (9) which has been relied on by Rustomji and Mitra (the former at page 327 of his book and the latter at page 1003 of his book) in their valuable treatises on Limitation that the onus of proof is on the defendant to prove that the plaintiff's knowledge arose more than 3 years before suit. The analogy of a defendant relying on Article 127 of the Limitation Act against the claim of an undivided co-parcener for partition, which analogy was relied on by Mr. Sreenivasa Iyengar is, in my opinion, entirely irrelevant and misleading. There is not a tittle of evidence that either the Dewan Trustee, Mr. Venkataranga Iyer, a very capable retired Judicial Officer who was the trustee for 11 years till September 1903, or Mr. Varadaraja

(7) 15 C. 58; 14 I. A. 143; 12 Ind. Jur. 9; 5 Sar. P. C. J. 92; Rafique & Jackson's P. C. No. 99; 7 Ind. Dec. (N. S.) 624 (P. C.).

(8) 34 Ind Cas. 37; 31 M. L. J. 362; 20 C. W. N. 857; (1916) 1 M. W. N. 433; 3 L. W. 528; 14 A. L. J. 1238 (P. C.).

*Page of 31 M. L. J.—[*Ed.*]

(9) 2 N. L. R. 98.

Sarma (Deputy Collector) who was the Dewan Trustee after him till May 1908 or Mr. Kista Rao who was the Dewan Trustee till April 1910 was ever subjected to any undue influence. In the result, I agree with the lower Court that the suit is barred.

A very ingenious argument was finally put forward, namely, that the 40 years lease-deed, Exhibit C of 1894, was superseded by the registered gift-deed of June 1895, that this gift deed in its turn was superseded by the compromise agreement of 1902, and that if the plaintiff is able to set aside this compromise-deed of 1902 he is entitled to possession as the earlier two deeds had been superseded once for all, each earlier deed having been superseded by its successor beyond resurrection. I have already found that the compromise-deed of 1902 is a valid deed. But even assuming that it is invalid, I cannot accept the argument that the defendant, who is trying to protect his possessory rights, cannot fall back upon his earlier title-deed if the later title-deed which was intended to supersede the earlier title-deed was found to be invalid or was invalidated.

I am clear that if the compromise deed is set aside, the parties are clearly remitted to their original rights as they stood before the compromise. The effect of setting aside a compromise brought about by fraud and collusion was considered by their Lordships of the Privy Council in *Khojooroonissa* v. *Rowshan Jehan* (10), and differing from the Calcutta High Court, their Lordships say that all rights which were attempted to be settled by the compromise were revived on both sides when the compromise was set aside. A similar question was considered by Mookerjee, J. in *Surjiram Marwari* v. *Barhamdeo Persad* (11) where he holds that if a mortgage right was intended to be merged in a conveyance and the conveyance proved ineffectual, the right under the mortgage revived. In *Har Chandi Lal* v. *Sheoraj Singh* (12) a mortgagee sued to enforce his mortgage of 1876, though he had accepted two later deeds of 1887 in satisfaction of his mortgage and even though he had handed over the document of 1876 to the mortgagor. It was argued in defence that the mortgage of 1876 was destroyed by the two deeds of 1887 and could not be revived. Their Lordships, however, say: "But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on *Musammat* Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on *Musammat* Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th November 1876." Thus their Lordships hold in the above case that even defendants could not plead against the revival of a former deed when the later deeds intended to supersede it were invalidated at their instance. *A fortiori* it is clear that a plaintiff could not invalidate a compromise-deed and yet contend that the rights under the gift-deed which were intended to be superseded by the compromise-deed could not be revived even as a shield by the defendants. In fact, the matter seems to me to be unarguable.

In the result I would dismiss the appeal with costs. We certify for two Vakils for each side.

SPENCER, J.—This suit was instituted by the Rajah of Ramnad to recover possession of the village of Nedunthulasi which was gifted away by his father, the late Rajah, by a permanent rent-free gift-deed dated June 2nd, 1895, to the 1st defendant. It is alleged in the plaint that the 1st defendant in his capacity of Javab Navis (private secretary) to the Rajah exercised undue influence over his master, a man of weak will, to obtain this and other benefits for himself. About a month after this gift the late Rajah entered into an arrangement on July 12th, 1895 (Exhibit IV) by which he handed over his estate upon trust to be managed by a pensioned Subordinate Judge named Rao Bahadur Venkataranga Iyer (styled a Dewan

(10) 2 C 184 at p. 196; 3 I. A. 291; 26 W R. 86; 1 Ind. Dec, (N. s.) 412 (P. C.).
(11) 1 C. L. J. 337 at p. 343.
(12) 39 Ind. Cas. 343; 39 A 178; 32 M. L. J. 241; 15 A. L. J. 224; 1 P. L. W. 330; 5 L. W. 502; (1971) M. W. N. 290; 25 C. L. J. 316; 21 M. L. T. 292; 21 C. W. N. 765; 19 Bom. L. R. 444; 44 I. A. 60 (P. C.).

Trustee) with one co adjutor, Mr. Chentsal Rao, C. I. E., and with a Committee of three, consisting of himself and two distinguished legal practioners who had power to remove the trustee or the co-adjutor and to fill their places when they became vacant. The estate was to be thus managed till the present Rajah attained the age of 21, which happened on June 3rd 1910, within 3 years before the filing of the plaint in this suit.

On April 24th 1902, the said Dewan Trustee together with the two lessees of the Ramnad Estate entered into an amicable arrangement of compromise (Exhibit II) with the 1st defendant whereby he was to continue to enjoy the village of Nedunthulasi hereditarily and in perpetuity, but instead of its being rent free he was to pay a Poruppu or quit rent of Rs. 402-1-10 annually which amounted to a moiety of the *sarasari* or average rent of Rs. 804-3-7. The present suit, whether its object be to set aside the gift-deed of 1895 or the settlement of 1902, is hopelessly time barred under Art. 91 of the Limitation Act.

Mr. S. Srinivasa Iyengar argued that the later transaction having superseded the earlier gift, the plaintiff need not sue to set aside the gift but he could within 3 years of attaining majority repudiate the acts of his trustee if they were improvident and injurious to his interests.

When this case came before a Bench of this High Court on a previous occasion, the learned Chief Justice and Seshagiri Iyer, J. sent it back for fresh consideration and for further evidence on the questions whether the undue influence to which the Rajah was alleged to have been subjected, continued to affect the succeeding trustee as was alleged in paragraph 22 of the plaint, and whether the transfer (Exhibit II) was inconsistent with the duties of the trustee.

The Subordinate Judge has now found that "there is no evidence, much less any allegation that the succeeding trustees were subject to any undue influence"; he also observed that it was "difficult to hold that the suit was in time in view of the fact that there was no evidence or even any allegation that the late Rajah continued to be under the undue influence of the 1st defendant for 8 years after the gift till he died in 1903."

Accordingly, it is not now contended in appeal that the trustee, Venkataranga Iyer, was under undue influence. It is only argued that his act in confirming the Rajah's grant, though with the modification that quit rent was to be paid, was an improvident act and in excess of his powers, as he should have sued to have the gift set aside if he had realised his responsibilities and if he had been aware of the facts which would have enabled him to succeed in such a suit.

Now, Rao Bahadur Venkataranga Iyer had been given facility for obtaining the advice of that distinguished Hindu gentleman of unquestioned probity, Mr. Chentsal Rao, C. I. E., on all important matters connected with his trust. I am of opinion that he may have realised the difficulty of establishing in a Court of law that the Rajah was actuated by undue influence when he made the gift of this village, and the further difficulty of proving that that influence prevailed so long as to excuse the failure of those in whom the management of the estate vested for 3 years after 1895 to make any attempt to revoke the gift. In 1902 he may have *bona fide* considered that half a loaf was better than no bread and that, therefore, in the best interests of the minor he was well advised to save at least Rs. 402 a year out of the village in view of the improbability of a suit to recover the whole village intact being successful. It was thus a compromise of a doubtful claim. He was acting within his powers under section 43 of the Trusts Act, read with the proviso to the section which relates to sole trustee and with clause 22 of the deed of trust. The meaning of the words "sole acting trustee" occurring in section 43 of the Indian Trusts Act becomes clear from a reference to section 21 of the English Trustees Act of 1893. If the instrument creating the trust authorises a sole trustee to execute the trusts and powers thereof he is termed a sole acting trustee when he enters into an agreement of composition or other arrangement.

But it is argued that the deed of gift of 1895 bears on its face traces of undue influence because it contains false statements, (1) that the village was only worth Rs. 7,000, whereas it is, on the statement of D. W. No. 1 now worth about Rs. 30,000, and must have then been worth about Rs. 20,000, (2) that the Rajah was acting in deference

to his mother's wishes though she had died 2 months before, and (3) that the donee had been working for 12 years without any salary. It is further argued that under section 16 (3) of the Indian Contract Act the burden of proving that the gift to 1st defendant was not induced by undue influence lay on the defendant.

The case of *Bridgemen* v. *Green* (13) is cited as an instance of undue influence exercised by a servant over his master. The circumstances of that case were exceptional. Conveyances which purported to have been made for valuable consideration were held to be not supportable even as gifts when their execution was obtained by fraud and undue influence. There is no presumption that all servants wield such influence as Green wielded over their masters, or that all masters are so weak-willed as Bridgemen. The evidence in the present case tends to show that the late Rajah was emotional and "generous to a fault" but not of weak intellect or irresponsible for his actions. It has not been proved that the 1st defendant was in a position to dominate the will of the Rajah or that the transaction was an unconscionable one. The 1st defendant already had a lease of this village for which he had to pay a Poruppu of Rs. 600 and odd. The statement in the gift-deed that the Rajah's mother wished to confer some benefit on the 1st defendant for his services is not shown to be false, and the fact that the occasion was that of the mother's second *marigam* makes it probable that the Rajah was actuated by pious feelings evoked by his mother's memory when he made the gift. To adopt the words of Sir Arthur Wilson when delivering the judgment of the Privy Council in *Ismail Mussajee Mookerdum* v. *Hafiz Boo* (2) but substituting the words 'servant' for 'daughter' and 'master' for 'mother', the circumstances of this gift may well be summed up in these words :—

"The mere relation of servant to master, of course, in itself suggests nothing in the way of special influence or control. The evidence seems.....quite insufficient to establish any general case of domination on the part of the servant and subjection of the master, such as to lead to a presumption against any transaction between the two. With regard to the actual transactions in question, there is no evidence whatever of undue influence brought to bear upon them" Now looking at the facts of this transaction in the same light as they have been presented at the trial of this suit, the Dewan Trustee with his co-adjutor having the resigned Rajah with his Committee of lawyers behind them may well have doubted the practicability of getting a Court of Justice to undo what had been done and so they may have allowed the claim to become barred by time and finally to have made the best terms possible out of a bad case. The result of that settlement is Exhibit II in which it is recited that the trustee and the lessees in consideration of the costs, trouble, and inconvenience that both parties might be put to if proceedings were instituted in Court in respect of the deed of June 2nd, 1895, as well as of the uncertainty of the result of litigation and other facts, had decided to have the dispute settled amicably and have entered into the arrangement detailed therein.

That arrangement, in my opinion, cannot now be legally set aside. Even if the plaintiff could now succeed in setting it aside his position would be worse, as he would then be confronted with the more formidable obstacle of the absolute gift by his father to 1st defendant. His suit to set aside the gift is long out of time. The appeal fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

(13) (1757) 27 E. R. 22; Wilm. 58.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 222 OF 1920.

June 24, 1921.

Present:—Mr. Justice Rankin.

BITHALDAS CHANDAK—

PLAINTIFF

versus

LALBEHARI DUTT AND SONS—

DEFENDANTS.

Calcutta Rent Act (III B. C. of 1920), s. 11—"Tenant," meaning of—Monthly tenant—Tenancy determined before, but ejectment suit pending at, passing of Act—Tenant, whether within the meaning of "tenant" in section.

The word "tenant" in section 11 of the Calcutta Rent Act as shown by the language of section 12 includes the case of a monthly tenant whose tenancy is determined by regular notice before, but against whom an ejectment suit is pending at, the date of the coming into operation of the said Act. [p. 362, col. 2.]

Mr. *S. N. Banerjee*, for the Plaintiff.

Mr. *M. N. Kanjilal*, for the Defendants.

JUDGMENT.—In this case there must be a decree for ejectment. The suit was brought for ejectment on the 3rd February 1920, and it appears, and, indeed, it is admitted, that the plaintiff on the 12th August 1919 took an assignment from Luchminarain Sadani for a term granted by an Indenture bearing date the 20th September 19 8 and made between the Archbishop of Calcutta and Luchminarain Sadani. The defendant firm Messrs. Lalbehari Dutt and Sons had been in occupation of two rooms in the premises for sometime before. Luchminarain Sadani was granted his lease. Luchminarain Sadani raised the rent to Rs. 175 per month. After the plaintiff took an assignment of the term the defendants paid that rent to the plaintiff and took two receipts for the month of August and the month of September 1919. They began to fall into arrears from the month of October 1919 and, in point of fact, they paid no rent at all until the time when, in June of this year, 1921, they paid into the hands of the Rent Controller under the Rent Act a sum of over Rs. 3,000, being the rent from October 1919 until May of this year. In the meantime, on the 3rd February, this suit was instituted. On the 26th April 1920 the written statement was filed. On or about the 5th May the Rent Act came into force in Calcutta What has happened is, that, notwithstanding the Rent Act, no amendment of pleadings has taken place and the suit in some way, which I do not quite understand, comes on now in June 1921 before me as a short cause. Prior to the Rent Act the position was shortly this. The defendants, as they quite admit, were monthly tenants. In November they got more than a month's notice determining their tenancy at the end of December, and at the end of December, therefore, the landlord, in this case, the plaintiff, was entitled to re-entry. That position is the position pleaded in the plaint with this exception that the plaint contains some irrelevant matters purporting to explain why the plaintiff desired to have his premises back again. Before the Rent Act came into force it was, so far as I know, entirely irrelevant for the landlord, whose tenancy had been properly determined by a notice of quit, to explain why he wanted to have his rights. The written statement, however, deals with certain matters by way of showing that the purpose of repairs which the landlord had alleged was not one which made it necessary for the landlord to be allowed to re-enter. When the Rent Act came into force the matter took a different complexion. Nothing was done to put the pleadings into order, and before me at the opening of the case the landlord desired to maintain that he came within the proviso to section 11 of the Rent Act, as being a landlord who required the premises for the purpose of building or re-building. That matter has not been enquired into by me for the reason that it did not appear to me probable that this course would be necessary. If it had been necessary, I should certainly have, on some terms, allowed the defendants an opportunity of investigating into that question. However, Mr. Kanjilal, who has very ably conducted the case for the defendants, has offered me on the question of the Rent Act the issue as to whether the defendants have fulfilled the conditions of section 11. Undoubtedly, as I am giving him leave to raise the Rent Act, he has to show that he has fulfilled those conditions So far as they are concerned, the first question is, whether the defendants here are within the meaning of the words "so long as the tenant pays rent to the full extent allowable by this Act." Mr. Banerji for the plaintiff takes the point that in this case the tenancy had

been determined at the end of 1919, so that in May 1920, he says, the defendants, were mere trespassers. When one comes to consider the meaning to be attached to the word "tenant," one has the definition under section 2 to guide one. That states "any person by whom or on whose account rent is payable for any premises." In answer to that Mr. Banerji naturally says that mesne profits are not rents. What a trespasser has to pay for his trespass, is not rent. Therefore, he puts the problem before me whether the defendant company are within the meaning of section 11 at all. I think the defendant company are within the meaning of "tenant" in section 11 and are tenants in the special sense in which that word is used. It seems to me that this is shown by section 12 which contemplates the case of a person who has had an order made against him for recovery of possession of property before the operation of the Rent Act, and it goes on to say that if the Court is of opinion that the order or decree would not have been made if this act had been in operation, the Court can even yet give relief. In strictness of language, decree for the recovery of possession of property is never made against a tenant. If there has been a tenancy and the decree is upon a forfeiture, it is on the footing that the term was forfeited either before suit or at the latest by the issue of the writ. In the same way against a tenant at will or a tenant-on-sufferance, the issue of the writ would determine the tenancy. So far as I know, it is never correct that a decree for recovery of possession should go against a person who is in strict sense a tenant. Mr. Kanjilal has drawn my attention to the fact that in the English Rent Act the word "tenant" has been given a very special and specially wide meaning. I should say that persons in the position of the defendants are not outside the scope of section 11 on the ground that they are not tenants.

I now come to the question whether the defendants here have not been shown to be hit by sub-section 5 of section 11. The position was that, when the Rent Act came into force, they were in arrear with their rent since October 1919, and until June of 1921, when they paid money to the Rent Controller, they did nothing in the way of paying rent at all.

Sub-section 5 is intended, as I think, to give persons who are tenants three months within which they may pay up and put themselves in the position of being entitled to claim the benefits of the Rent Act. If a person is in arrear in May 1920 with his rent, he still has three months in which he can pay up those arrears under the first part of that sub-section. Three months in this case would take us to August 1920, as a matter of fact the 5th or 4th. By that time this defendant had done nothing to pay up any of the arrears that were standing over since October 1919. He says with regard to that two things. First of all, he says, it was for the plaintiff by the custom to send and collect rent, that the *durwan* never came, that the plaintiff never came although the defendants were asking him to come and collect their own rent. The plaintiff's story is that he went for the rent on some three occasions and could not get the rent. Of these two stories I have no hesitation at all in believing the plaintiff and rejecting the story of the defendant.

Then it is said that in June 1920 a letter was received from a Firm of Hastamull-Chunilal claiming that the plaintiff was not the proper person to be paid the rent. As a matter of fact, Luchminarain, the previous landlord, had told the defendants himself that he was assigning to the plaintiff. The defendants had paid rent in respect of two months at least to the plaintiff and accepted his receipt. Further, it appears now that some body had a quarrel with Luchminarain, namely, Luchmichand, a partner in the Firm of Hastamull Chunilal. Because this gentleman in June sent from Bikaneer this letter to the defendant the defendant says that he did not pay his rent at all to any body until June of 1921. No proof has been adduced before me of any letter written by or on behalf of the defendants in June of 1920 to the plaintiff asking about this matter or seeking to pay the money into Court or into the hands of any neutral party.

I regret to say that, as the Legislature has seen fit to forbid all the benefits of the Rent Act to any tenant who has not within three months from 6th May 1920 paid all arrears of rent due by him in respect of the said premises, it is not possible for me to hold that the defendants are entitled to them. It may be said that on the plaintiff's view after the

beginning of 1920 what was due was not strictly rent but more strictly mesne profits; but, as I have pointed out, the defendant cannot claim the benefits of this section at all except by saying that he is in the position of a tenant within the meaning of the section. and, of course, he cannot have it both ways. He cannot claim, as he does claim and has all along claimed, to be in possession not as trespasser but as a tenant, and also claim to be under the words "so long as the tenant pays rent in section 11," and also for the purpose of sub-section 5 say that it is not rent at all. The second half of sub-section 5 is this "and also unless he pays the rent due by him to the full extent allowable by this Act within the time fixed in the contract with his landlord, or, in the absence of any such contract, by the 15th day of the month next following that for which the rent is payable." In the same way also the defendants here can make no pretence that they has done anything of the sort.

Under sub-section 4 where a landlord refuses to accept the rent, the tenant may deposit it with the Controller within a fortnight of its becoming due. It is said that he is not bound to deposit it with the Controller. That is perfectly true. He is not bound to bring himself within sub-section 5 at all; but if he wants to come under sub-section 5, so as not to lose the benefits of the Rent Act, then, where the landlord refuses to accept it as rent, he may pay to the Controller and thus preserve his rights.

In these circumstances, it seems to me that it is entirely unnecessary to go into the question of whether these premises are *bona fide* required for the purpose of building or re-building.

Mr. Kanjilal has argued that the question under sub section 5 is a mere question of non-payment of rent and that equity can relieve against any forfeiture for non payment of rent. I must say at once that that contention is entirely unfounded, If the defendant, apart from the Rent Act, had had a term, say 2, 3 or 5 years, and the landlord was proposing to forfeit that term by reason of non-payment of rent, equity could relieve against that forfeiture. But, apart from the Rent Act, if he had not a term but was only a monthly tenant and had his month's notice, there would have been no equity on the part of the defendant to insist upon the Court giving him any larger interest in the property than he had agreed to with his landlord.

That being the position apart from the Rent Act, the defendants would have no defence here at all. The Rent Act puts the tenant who complies with its conditions into much the same position as a tenant who is entitled to a term. At all events it gives him some fixity of tenure so long as the Rent Act is in force; but that privilege is given to a tenant who pays his rent and performs his conditions and to no once else.

The result is that, not being within section 11 by reason of the non-payment of rent, the defendant has got no equity at all to ask the Court to give him the special relief provided by the Rent Act in the plain teeth of the section which says that such relief should go only to the tenant who has paid.

As regards the question of ejectment this is now towards the end of June, and I do not propose that the defendants should be ejected until the end of July. This is reasonable, The defendants must pay the rent for July as a condition. They will, in any case, have till the 15th July. If by that time they pay Rs. 175 for July rent they will get till the end of July.

As regards the amount of mesne profits, there does not seem to be dispute.

As regards the money that has been paid to the Rent Controller, there must be some sensible arrangement for withdrawing that.

The plaintiff will get costs on scale No. 2.

N. H.

Order accordingly.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 11 OF 1922.

August 3, 1922.

Present:—Sir Dawson Miller KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

Rai WAZIR NARAIN SINGH—

APPELLANT

versus

BHIKHARI RAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 51, O. XXI, rr. 64, 69—Execution sale—Attachment, whether essen-

WAZIR NARAIN SINGH v. BHIKHARI RAM.

tial—Attachment of property not ordered to be sold by decree—Sale within 30 days of proclamation—Irregularity.

The failure to attach the property before the execution sale, although an irregularity under the Civil Procedure Code does not render the sale null and void. [p. 367, col. 1]

Kishory Mohun Roy v. *Mahomed Mujaffar Hossein*, 18 C. 183; 9 Ind. Dec. (N. S.) 12[illegible], *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*, 8 W. R. 9, *Hari Charan Singh* v. *Chandra Kumar Dey*, 34 C. 787; 11 C. W. N. 745 and *Sheodhyan* v. *Bholanath*, 21 A. 311: A. W. N. (1899) 84: 9 Ind. Dec. (N. S.) 907, referred to.

Raja Thakur Barmha v. *Jiban Ram Marwari*, 21 Ind. Cas. 936; 41 C. 590; 18 C. W. N. 313; 15 M. L. T. 137; A. L. J. 156; 19 C. L. J. 161; 26 M. L. J. 89; 16 Bom. L R 15[illegible]; (1914. M. W. N. 118; 41 I. A. 38 (P. C), distinguished.

Panchanan Das Majumdar v. *Kunja Behari Malo*, 42 Ind. Cas. 259 and *Sorabji Coovarji* v. *Kala Raghunath*, 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193, disapproved.

Under section 51 of the Civil Procedure Code which relates to procedure in execution, the general powers of a Court executing decrees enable it to order execution by attachment and sale or by sale without attachment of *any* property. Therefore, the Court has power to sell property not ordered to be sold by the decree without first causing an attachment of the same. [p 367, col. 2.]

A sale of the property, ordered to be sold by public auction in execution of a decree, within 30 days of the proclamation, although clearly an irregularity, has not the effect of making the sale a nullity without proof of substantial injury thereby to the judgment-debtor. [p. 367, col. 2.]

Tasadduk Rasul Khan v. *Ahmad Husain*, 21 C. 66; 20 I. A. 176; 17 Ind Jur. 534; 6 Sar. P. C. J. 324; Rafique and Jackson's P. C. 131; 10 Ind. Dec. (N. S.) 676 (P. C.), followed.

Letters Patent Appeal from the following judgment of Mr. Justice Das in Miscellaneous Appeal No. 131 of 1921, analagous to Civil Revision No. 302 of 1921, dated the 6th March 1922:

DAS, J.—It is unfortunate that the point which is now argued before me, and on which, in my opinion, the appellant is entitled to succeed, was not placed before me on the last occasion; and the result is that I am compelled to set aside the judgment of the learned Judicial Commissioner of Ranchi, though I do not differ from the view which has been taken by him on the point which was argued before him. It is now argued that the judicial sale was a nullity inasmuch as the procedure laid down in the Code of Civil Procedure was not adopted. Now I find that Mr. Reid, in his appellate judgment, which was set aside by this Court, says that one of the points which was argued before him was that the decree-holder ignored the provision of sub-section (2) of section 210 in so far as he failed to get a written permission from the Deputy Commissioner to sell this property. He then discussed the point and came to the conclusion that the sale was bad inasmuch as the proper procedure as laid down in section 210 of the Chota Nagpur Tenancy Act was not followed. I think it is quite clear from the judgment of Mr. Reid that what was sold by the decree-holder in execution of his rent-decree was not the property in respect of which the rent-decree had been obtained but some other property. Now, if that be so, then section 210 of the Chota Nagpur Tenancy Act applies and not section 208. Section 210, sub section (2) provides as follows:—"Notwithstanding anything contained in sub-section (1), a decree-holder may, with the permission of the Deputy Commissioner, granted for reasons to be recorded in writing, proceed against any other property, moveable or immoveable, of the judgment-debtor, without first making application for the sale of the tenure or holding in respect of which the arrear has accrued." Sub-section (3) then provides that property referred to in sub-sections (1) and (2) may be brought to sale if immoveable, in the manner provided in sections 237, 23[illegible], 274 to 27[illegible], 278 to 284, 286, 287, 289 to 29[illegible], 305 to 310, 312 to 316, 318, 319, 334 and 335 of the Code of Civil Procedure. In other words, if the decree-holder chooses to proceed against any property, moveable or immoveable, of the judgment-debtor other than the tenure in respect of which the rent-decree is obtained, he must first obtain the permission of the Deputy Commissioner and in the next place proceed under the provisions of the Code of Civil Procedure. Now if the decree-holder chooses to proceed against property other than the tenure in respect of which the rent decree is obtained he chooses to execute the decree not as a rent decree but as a money decree and if that be so attachment of the property is essential before the sale can take place. Section 274, which now corresponds with O. XXI, r. 54, is expressly mentioned in section 210 and there are numerous decisions to the effect that there is no jurisdiction to sell a property in execution of a money-decree which has not in fact been attached. A mortgage-decree stands on a different footing, for that which has been mortgaged or is

charged with the payment of a sum of money need not again be attached. Now it was in fact found by Mr. Reid in his appellate judgment that the decree-holder did not attach the property before proceeding to sell the property. If that be so, then the sale is a nullity.

I must accordingly set aside the judgment of the learned Judicial Commissioner and declare that the sale which has taken place is wholly inoperative so as to affect the interest of the appellant. As the point was not argued before me on the last occasion, I think that the appellant must pay the costs of this appeal and the costs of the hearing before the Judicial Commissioner to the respondent.

No order need be passed on the revision petition.

Messrs. *J. Prasad* and *A. Upadhya*, for the Appellant.

Messrs. *N. C. Sinha* and *B. Prasad*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal under clause 10 of the Letters Patent from a decision of Mr. Justice Das. It arises out of an application made by the respondents under section 213 of the Chota Nagpur Tenancy Act to set aside a sale of their tenure in execution of a rent-decree obtained by the appellants, their landlords.

The decree was obtained in the year 1915. After one unsuccessful application to obtain execution the decree-holders made a fresh application in July 1918 asking for realisation of the decretal amount by attachment and sale of the judgment-debtor's moveable property and in case the decree still remained unsatisfied by attachment and sale of their immoveable property, namely, an 8-annas interest in village Mohanpore. This was not the tenure or holding in respect of which the rent decree was obtained. It appears that an application was made under section 210 (2) to the Deputy Collector who had the powers of a Deputy Commissioner for permission to sell the property in question in this appeal without first making an application for the sale of the tenure or holding in respect of which the arrears of rent had accrued. Permission was granted but it does not appear that the Deputy Collector's reasons were recorded. Section 210 (3) of the Act provides that property referred to in clause (2) may be brought to sale, if immoveable in the manner provided in the sections therein named of the Code of Civil Procedure of 1882 including section 234, which corresponds to O. XXI, r. 64 of the present Code, which gives the Executing Court power to order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold and the proceeds or a sufficient portion thereof paid to the party entitled under the decree to receive the same. No preliminary attachment of the property was in fact made but the judgment-debtors were served with notice of the sale and were aware of the date thereof. The sale having been advertised took place on the 9th May 1919. Two of the judgment-debtors, the respondents in the present appeal, filed an objection under section 213. Their grounds of objection were (1) that the property sold belonged to them only and not to the other judgment-debtors and (2) that there had been a material irregularity in publishing the sale. The first ground of objection was given up and we are no longer concerned with it. In support of the second ground they contended that there had been no preliminary attachment as required by the Civil Procedure Code and further that the sale was held within less than 30 days from the date of notification. The Sub-Divisional Officer held that these irregularities were not material and further that the judgment-debtors had sustained no substantial injury by reason of the irregularities.

On appeal by the judgment-debtors to the Judicial Commissioner it was held that the failure of the Deputy Collector to record his reasons for permitting the sale and the failure to attach the property under the provisions of the Civil Procedure Code as well as the fact of holding the sale within 30 days of the sale proclamation under O. XXI, r. 68 of the Civil Procedure Code were material irregularities and rendered the sale void. The learned Judicial Commissioner further found that there was substantial injury to the appellants, adding: "Although, in the view I take, such a finding is unnecessary. This injury resulted from the prejudice to their rights which to my mind must of necessity follow from the adoption of the shortened procedure."

A second appeal was preferred by the

decree-holders to the High Court and was heard before Mr. Justice Das who held that mere non compliance with the provisions of O. XXI, r. 68 of the Civil Procedure Code does not *ipso facto* make the sale a nullity and that the sale should not be set aside without proof of substantial injury to the judgment-debtors. He further considered that the finding of the learned Judicial Commissioner as to substantial injury was not a proper finding in law as it was based upon the view that non-compliance with the rule mentioned necessarily prejudiced the right of the judgment-debtors. He accordingly set aside the order of the learned Judicial Commissioner and remanded the case to him for a decision according to law with directions to come to a definite finding as to whether the judgment-debtors sustained substantial injury and, if so, whether such injury was sustained by reason of the admitted irregularity. It would appear from this judgment that no point was taken before the learned Judge on behalf of the judgment-debtors that the sale was void either by reason of the non-attachment of the property or by failure of the Deputy Collector to record his reasons for permitting the sale under section 210 of the Chota Nagpur Tenancy Act and it is not suggested before us now that these points were argued before him.

When the case went back on remand Mr. Foster had succeeded Mr. Reid as Judicial Commissioner of Chota Nagpur. Mr. Foster found that the irregularities complained of were material, as the sale was held 28 days instead of 30 days after the notice published in Court. The price fetched at the sale was considerably below the value set upon the property by the judgment debtors but there is no finding as to what the value of the property was. No evidence was produced to show that the low price was directly due to the irregularity, the judgment-debtors were present at the time of the sale and the learned Judicial Commissioner considered that if the property were worth Rs. 6,000 as they stated it was very unlikely that they could not have raised a loan of under Rs. 500 to save the property by depositing the decretal amount. He also considered that the absence of attachment and the fact that the sale was held within 30 days of the notice did not cause any substantial injury to the judgment-debtors. He accordingly dismissed the appeal. Again it should be pointed out that it was nowhere argued before Mr. Foster that the sale was void by reason of any irregularity which had taken place.

From this order the judgment debtors preferred a second appeal to the High Court which again came before Mr. Justice Das. The learned Judge did not differ from the conclusions of fact arrived at by the learned Judicial Commissioner but it was argued before him that the failure to attach the property before sale rendered the sale a nullity. The learned Judge acceded to this view and set aside the judgment of the learned Judicial Commissioner and declared that the sale was inoperative and ought to be set aside but as the point had not been argued before him on the previous occasion when he made the order of remand he ordered the judgment-debtors, the appellants before him, to pay the costs of that appeal and of the hearing before the Judicial Commissioner on remand.

From this decision the present appeal is brought by the decree-holders. Two points have been argued before us in support of the appeal (1) that the learned Judge, whose decision is now under appeal, ought not to have allowed the point, upon which his decision was based, to be taken as it had not been argued before him on the previous occasion, and (2) that the failure to attach the property although irregular does not render the sale void. In support of the first point it is argued that the order of remand which set aside the decree of the Judicial Commissioner was a final order from which an appeal would lie to a Division Bench and that, no appeal having been preferred from that decision on behalf of the judgment debtors, the learned Judge ought to have considered the point raised before him as precluded by his previous judgment, under the provisions of section 105 of the Civil Procedure Code. Assuming that an appeal lay from Mr. Justice Das I think that there is much force in the argument that where a point which goes to the root of the suit is not argued before an Appellate Court

it must be taken to have been abandoned and if an appeal is permissible and no appeal is preferred the party who abandoned the point should not be allowed to re-open it subsequently in the same case. See *Hansraj* v. *Bijai Ram Singh* (1). It is unnecessary, however, to decide this question, as in the view I take of the second point the appellants must succeed.

In my opinion, the failure to attach the property before sale, although an irregularity under the Civil Procedure Code, does not render the sale null and void In *Kishory Mohun Roy* v. *Mahomed Mujoffar Hosein* (2) it was held that a sale is not to be considered a nullity merely by reason of the absence of any attachment. In that case the sale had been confirmed and a sale certificate granted before the question arose. In my opinion, this fact does not distinguish that decision from the present case, because if the sale was in fact a nullity by reason of the absence of attachment its subsequent confirmation could not make it valid. That case followed the earlier decision of Jackson, J. in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (3) which also held that an attachment was not an essential preliminary to an execution sale. The case of *Kishory Mohun Roy* v. *Mahomed Mujoffar Hossein* (2) was referred to with approval and followed by Woodroffe, J. in *Hari Charan Singh* v. *Chandra Kumar Dey* (4). The High Court at Allahabad has also held in *Sheodhyan* v. *Bholanath* (5) that the absence of an attachment prior to the sale of immoveable property in execution of a decree amounts to no more than a material irregularity and is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. The object of the attachment is, as stated in that case, to bring the property under the control of the Court with a view to preventing the judgment debtor from alienating it, and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree-holder. It is difficult to see why the absence of attachment which is primarily in the interests of the decree-holder can prejudice the rights of the judgment debtor who has due notice of the sale.

It was contended, however, that the Court has no power to sell property not ordered to be sold by the decree unless such property has first been attached, and O. XXI r. 64 was relied upon in support of this argument. That rule no doubt gives the Court executing the decree power to order that any property attached by it and liable to sale shall be sold or only such portion thereof as may seem necessary to satisfy the decree. The object of this rule would appear to be to give the Court a discretion to sell the whole or a part of the attached property as it thinks fit, but under section 51 of the Code, which relates to procedure in execution, the general powers of a Court executing decrees enable it to order execution by attachment and sale or by sale without attachment of any property. It seems clear, therefore, that the jurisdiction of the Court to sell without attachment exists. Again the irregularity arising by reason of the sale within 30 days of the proclamation, although clearly an irregularity, has not the effect of making the sale a nullity without proof of substantial injury thereby to the judgment-debtor. It was so decided by their Lordships of the Judicial Committee in *Tasadduk Rasul Khan* v. *Ahmad Husain* (6).

The case of *Raja Thakur Barmha* v. *Jiban Ram Marwari* (7) was relied on by the respondents for the proposition that nothing could be sold at a Court sale except the prop-

(1) 40 Ind. Cas. 621.
(2) 18 C. 188; 9 Ind. Dec. (N. S.) 126
(3) 8 W. R. 9.
(4) 34 C. 787; 11 C. W. N. 745.
(5) 21 A. 311; A. W. N. (1899) 84; 9 Ind. Dec. (N. S.) 907.
(6) 21 C. 66; 20 I. A. 176; 17 Ind. Jur. 534; 6 Sar. P. C. J. 324; Rafique & Jackson's P. C. No. 181; 10 Ind. Dec. (N. S.) 676 (P. C.).
(7) 21 Ind. Cas. 936; 41 C. 590; 18 C. W. N. 316; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 20 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 109; 41 I. A. 38 (P. C.).

erty attached. The effect of that decision, however, as I read it, merely is that where property is in fact attached and sold under the description mentioned in the Schedule what is in fact sold is the property comprised within the description and not some other property which was not in fact attached and sold. In that case a six-annas share in a certain *mahal*, described as subject to a mortgage in the Schedule to which the attachment referred, was attached in execution and advertised for sale and eventually sold. Some months later the purchasers applied for a certificate of sale alleging that there had been a mistake in the Schedule which ought to have described the property as a six-annas unencumbered share Ten-annas were subject to the mortgage and six-annas were free and no doubt a mistake had been made. A sale certificate was granted by the Subordinate Judge with the altered description of property and a notification was issued in the Calcutta Gazette describing the property as unencumbered. This procedure was approved by the High Court, but on appeal to His Majesty in Council their Lordships held that that which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the Schedule to which the attachment refers and that the effect of the certificate was to make the sale that of a property not attached which could not be sold in such proceedings. It was held that it was not a matter of mere misdescription which could be treated as an irregularity but one of identity and that an existing property accurately described in the Schedule had been sold, whereas the order of the Subordinate Judge granted a sale certificate which stated that another and different property had been purchased at the sale, and that what was done could not validate a sale of property which had not in fact taken place. The certificate was accordingly set aside. The decision is no authority for the proposition that if no attachment is in fact made the Court has no power to sell property at all.

It is true that in spite of the decisions already referred to of the Calcutta High Court that Court in the more recent case of *Panchanan Das Majumdar* v. *Kunja Behari Mulo* (8), decided in 1917, held that the Court has no jurisdiction to sell property in execution which has not been duly attached. In that case the decision of their Lordships of the Judicial Committee in *Rajа Thakur Barmha* v. *Jiban Ram Marwari* (7) was relied upon in support of the decision but, as already stated, in my opinion, the decision of the Judicial Committee does not support the proposition there laid down. The High Court of Bombay in the case of *Sorabji Coovarji* v. *Kala Raghunath* (9) has also expressed the view that no sale can take place without attachment. In that case before the sale actually took place an appeal against the order for sale made by the Executing Court was preferred to the District Judge. Pending that appeal the property was sold. The District Judge dismissed the appeal but on second appeal to the High Court that Court set aside the sale considering that property could only be brought to sale after it had been duly attached and whilst it remained under attachment. That case, however, was complicated by the fact that before sale the decretal amount of the attaching decreeholders had been paid into Court and the property released from attachment but it was ordered nevertheless to be sold at the instance of other judgment-creditors who applied for rateable distribution of the money paid into Court and a further sale of the property which had been released but not re attached. In so far as that case and the later decision of the Calcutta High Court in *Panchanan Das Majumdar* v. *Kunja Behari Malo* (8) differ from the earlier decisions of the Calcutta High Court and the decisions of the Allahabad High Court already referred to, I prefer to follow the latter, which, in my view, express the correct principle. In my opinion this appeal should be allowed with costs here and in each of the Courts below and the order of the Sub-Divisional Officer rejecting the judgment-debtors' objection and affirming the sale should be restored.

MULLICK, J.—I agree.

N. H. *Appeal allowed.*

(8) 42 Ind. Cas. 259,

(9) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193.

NAURATAN LAL v. MRS. STEPHEN.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 103 OF 1921.

July 25, 1922.

Present:—Mr Justice Coutts and Mr. Justice Das.

NAURATAN LAL—DECREE-HOLDER—APPELLANT

versus

MRS. MARGARET ANNE STEPHEN AND OTHERS—JUDGMENT DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 58, 60—S. 47, scope of—Execution proceedings—Representative of party to suit—Attachment, objection to—Objection based on personal claim to property—Court, order of—Appeal.

Where *qua* the execution proceedings a person happens to be the representative of the judgment-debtor, any question raised by him can only be decided under section 47 of the Civil Procedure Code. The distinction between a proceeding under section 47 and a proceeding under O. XXI, r. 8 is that all objections to attachment raised by a party to the suit in which the decree was passed, or his representative, come under section 47, but objections to attachment raised by a third party come under O. XXI, r. 58, Civil Procedure Code. [p. 370, cols. 1 & 2.]

Therefore, an order passed on objection raised by the representative of a party to the suit, although the claim to the property is set up by him in his own personal capacity and not as representing the judgment-debtor, must be deemed to be an order passed under section 47 and not under O. XXI, r. 60 of the Civil Procedure Code and as such is open to appeal. [p. 369, col. 2; p. 370, col. 2.]

Appeal from an order of the Subordinate Judge, First Court, Muzaffarpur, dated the 14th March 1921.

Messrs. *C. C. Das*, *Rai Gurusaran Prosad* and *Gangadhar Das*, for the Appellant.

Messrs. *W. H. Akbari* and *C. S. Banerji*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of an order passed by the learned Subordinate Judge, First Court, Muzaffarpur, dated the 14th March 1921 and the first question which we have to consider is whether the order passed by the learned Subordinate Judge was one under section 47 of the Code of Civil Procedure or one under O. XXI, r. 60 of the Code.

On the 30th June 1909 the appellant recovered a decree against one Stephen for recovery of possession of certain properties and for ascertainment of mesne profits. In July 1909 Mr. Stephen executed a deed of trust, by which he transferred all the immoveable properties of which he was then possessed, to his wife, Mrs Margaret Anne Stephen, as trustee on her own behalf and on behalf of her minor children. The deed recited that the settlor was desirous of making a settlement of his share in the properties conveyed for the benefit of his wife and children. It is admitted that the deed of settlement of the 23rd July 1909 covered all the properties to which Mr. Stephen was entitled or of which he was in possession. Mr. Stephen died on the 15th January 1915, and the applicants respondents were substituted in the record of the suit as legal representatives of Mr. Stephen on the 26th June 1916. The Court which passed the decree proceeded to ascertain the amount of mesne profits payable to the decree-holder and on the 3rd March 1917 it found that about Rs. 15,000 was due to the decree-holder in respect of such mesne profits. It is to recover the sum awarded to him for and by way of mesne profits that the present execution proceedings were commenced by the decree-holder. On the 5th July 1920 Mrs. Stephen for herself and on behalf of her minor children presented a petition which purported to be a petition under section 47 and O. XXI, r. 58 of the Code by which they insisted that the properties attached in execution of the decree for mesne profits were their properties and not the properties of the judgment debtor and prayed that those properties be released from attachment. At the time when the petition of Mrs Stephen and her minor children was presented to the Court they were in the record of the proceedings as the legal representatives of Mr. Stephen.

The learned Subordinate Judge has come to the conclusion that the transaction which resulted in the deed of settlement was a *bona fide* transaction and has directed the properties to be released from attachment. If the order passed by the learned Subordinate Judge was an order under O. XXI, r. 60 of the Code, then no appeal lies from that order, but if, on the other hand, the order was one under section 47 of the Code, the order is appealable as a decree.

Section 47 of the Code provides that all questions arising between the parties to

the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. It has been held in cases far too numerous to mention that this section should receive the widest interpretation. It is not open to doubt that at the time when the execution proceedings were taken the respondents had been substituted in the record of the suit as the representatives of the judgment-debtor. The question raised in this application is a question that arises between the parties to the suit in which the decree was passed or their representatives, and it undoubtedly relates to the execution, discharge or satisfaction of the decree. It is no doubt claimed on behalf of the respondents that they have raised the question not as parties to the suit or as representatives of one of the parties to the suit, but as claiming in their own right and by a title paramount to that of the judgment-debtor. It has, however, been held that an objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under section 47 of the Code of Civil Procedure and not the proper subject matter of a separate suit by a party against whom an adverse order may have been passed. See *Panchanun Bandopadhya* v. *Rabia Bibi* (1). This view of the law has been affirmed by the Calcutta High Court in the later case of *Ajo Koer* v *Gorak Nath* (2). It appears to me that where *qua* the execution proceedings a person happens to be the representative of the judgment-debtor, any question raised by him can only be decided under section 47 of the Code. The distinction between a proceeding under section 47 and a proceeding under O. XXI, r. 58 is this: that all objections to attachment raised by a party to the suit in which the decree was passed or his representative come under section 47; but objections to attachment raised by a third party come under O. XXI, r. 58. In this case the objection was raised not by a third party but by the representatives of a party to the suit. In my opinion, then the order passed by the learned Subordinate Judge was an order under section 47 and is, therefore, appealable as a decree.

I now come to the merits. Section 53 of the Transfer of Property Act provides as follows:—"Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed." Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid. Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration." Now in order to determine the question which has been raised in this appeal it is necessary to remember first that the trust deed was executed within one month of the decree passed against Mr. Stephen for the ascertainment of mesne profits payable by him to the decree-holder; and secondly, the deed of settlement has in fact put out of the reach of the decree holder every item of immoveable property to which the judgment-debtor was entitled or of which he was in possession. The learned Subordinate Judge has, however, come to the conclusion that the judgment debtor was at the time of the decree in a solvent position and that he was able to pay off any debts that he might have contracted. I regard this finding as a finding that the effect of the transfer was not to defraud, defeat or delay any creditor. It is, therefore, necessary to see whether his finding can be supported by the evidence in the record.

The learned Subordinate Judge has relied upon the evidence of Mrs. Stephen and on the following circumstances; first, upon the letter, Exhibit 2, dated the 29th January

(1) 17 C. 711; 8 Ind. Dec. (N. S.) 1016 (F. B.).

(2) 27 Ind. Cas. 321; 19 C. W. N. 517; 20 C. L. J. 481.

1910 which constitutes an admission by one Knowles to Mr. Stephen to the effect that he owed Mr. Stephen Rs. 26,109-11-3; secondly, upon the pass-book of Allahabad Bank which shows that in June 1912 two separate sums consisting of Rs. 1,040 and Rs. 17,450 were transferred to the account of Mrs. Stephen from the account of Mr. Stephen; thirdly, upon the fact that Mr. Stephen had several accounts with several Banks. I shall come to the evidence of Mrs. Stephen presently; but so far as the other circumstances relied upon by the learned Subordinate Judge are concerned, they do not, in my opinion, establish that on the 23rd July 1909 he was in insolvent circumstance. The letter of Mr. Knowles, Exhibit 2, is dated the 29th January 1910 and it appears to me that for the purpose of disposing of the point which has been raised in the case, it is not material to consider what the circumstances of Mr. Stephen were in 1910. Apart from this, all that the letter establishes is that there was a sum of money due to Mr. Stephen from Mr. Knowles. Mrs. Stephen's evidence establishes that this sum of money was due to Mr. Stephen on account of a share which he had in the business which was being managed by Mr. Knowles. Although Mrs. Stephen does not admit that the business has failed, she admits that the business never at any time paid anything substantial to Mr. Stephen I regard the letter of the 29th January 1910 as entirely irrelevant.

The extract from the pass book of the Allahabad Bank, Exhibit 3, upon which the learned Subordinate Judge relies, shows that a certain sum of money was transferred to the account of Mrs. Stephen from 4½ per cent. fixed deposit account. The learned Subordinate Judge has assumed without any evidence whatever that this sum of money was transferred to her account from the account of her husband. Mrs. Stephen did indeed make an attempt to establish that these sums of monies were transferred to her account from the account of Mr. Stephen; but she had to admit in cross-examination that the fixed deposit accounts were her own accounts and that there was no transfer to her account from the account of her husband. This was, therefore, not a circumstance on which the learned Subordinate Judge should have relied for coming to the conclusion that Mr. Stephen had funds out of which the demands of his creditors could have been met. The learned Subordinate Judge then says that Mr. Stephen had accounts with several Banks which presumably means that he had a large sum of money standing to his credit in several Banks. There is, however, no evidence on this point. All that Mrs. Stephen does say in her evidence is that she thinks that Mr. Stephen had a banking account in 1909, but that she does not know in what Bank he had an account. The learned Subordinate Judge has completely misunderstood the evidence on the point. Mrs. Stephen's evidence shows that she had several accounts in several Banks. She admits that she had no money of her own and that she started these accounts with monies given to her by her husband. Her evidence also shows that her husband was speculating in stocks and shares. Her husband's pass-books have not been produced in the case. It was possible for Mrs. Stephen to produce the pass-books of her husband if it be her case that he had several banking accounts. The evidence of Mrs. Stephen leaves no doubt in my mind that Mr. Stephen put all his money in the name of his wife and that at no time did Mr. Stephen have a banking account of his own. In my opinion, the learned Subordinate Judge was not justified in coming to the conclusion that Mr. Stephen was in a solvent condition in 1909. The trust-deed effectively put out of the reach of the decree-holder all the immoveable properties that Mr. Stephen had. So far as actual money is concerned, he put it all in the name of his wife while he was gambling in stocks and shares. Mrs Stephen has not shown that there was any fund against which the decree-holder could have proceeded for the realization of the money found due to him by the decree for mesne profits. The effect of the transfer of the 23rd July 1909 has undoubtedly been to defraud, defeat or delay the decree-holder. We must accordingly presume that the transfer was made with the intent to defraud, defeat or delay the creditors. The transfer was, as I have said before, made within one month of the decree and I have no doubt whatever in my mind that it was made with intent to defeat the decree-holder. Mrs. Stephen herself says in her evidence that when they heard that her husband had lost

the suit which the decree-holder has instituted against him she and other people advised her husband to execute a deed to safeguard the interest of herself and her children. There is no apparent reason why he should have executed the trust-deed. Mrs. Stephen in her evidence says that her husband anticipated trouble with his step-mother and step-sister; but why he should have anticipated the trouble has not been made clear in the evidence. Mrs. Stephen does say that after the execution of the trust-deed she was in possession of the properties; but she admits that she has lost all the accounts dealing with the trust estate and that she has no counter-foils of the receipts granted by her to the tenants. She admits that she executed a power-of-attorney in favour of her husband to enter into all business transactions on her behalf. I have no doubt whatever that possession remained with Mr. Stephen notwithstanding the execution of the trust-deed. I hold that the trust deed of the 23rd July 1909 was a fraudulent device to defeat the appellant and that he is entitled to proceed with his execution proceedings notwithstanding that document. The transaction resulting in the execution of the trust-deed is, therefore, voidable at his option and the fact that he has instituted execution proceedings in respect of those properties establishes that he has exercised the option to avoid the transaction.

I would allow this appeal, set aside the order passed by the learned Subordinate Judge and direct that execution proceedings do proceed. The appellant is entitled to his costs throughout.

COUTTS, J.—I agree.

P. D. & N. H. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 32 OF 1919.

August 2, 1922.

Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Adami.

MOHAMMAD YAKUB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL QUDDUS AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 11, 12—Unsoundness of mind—Presumption in favour of sanity—Temporary aberrations of intellect—Burden of proving insanity—Undue influence, what constitutes.

In all transactions there is a presumption in favour of sanity of the contracting parties, and the test of soundness of mind is, that a person entering into a transaction, is capable of understanding the business, and of forming a rational judgment as to its effect upon his interests. Where, therefore, in a suit challenging the validity of certain deeds, the plaintiff relies on unsoundness of mind, he must establish it sufficiently to satisfy this test Mere weakness of mind is not sufficient, nor is it necessary to prove utter mental darkness or congenital idiocy. [p 377, col. 1.]

Hall v. *Warren*, (1804) 9 Ves. (Jun.) 605 at p. 611; 7 R. R. 306; 32 E. R. 738, *Durga Bakhsh Singh* v. *Muhammad Ali Beg*, 27 A. 1; 7 O. C. 87; 31 I. A. 235; 8 Sar. P. C. J. 725 (P. C.), *Tirumamagal Ammal* v. *Ramasvami Ayyangar*, 1 M. H. C. R. 224, *Ram Sahye* v. *Laljee Sahye*, 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306; 4 Ind. Dec. (N. S.) 95, *Drew* v. *Nunn*, (1879) 4 Q. B. D. 661; 48 L. J. Q. B. 691; 40 L. T. 671; 27 W. R. 810, relied on.

Mistaking one person for another, dusting the wall, drinking tea from tea pot and mistaking grapes for pieces of stone indicate only temporary "aberrations of intellect" or temporary "insane delusions" and when occurring in isolated cases, few and far between, would not necessarily indicate that the person subject to them was incapable of managing his affairs. [p. 376, col. 1.]

Where a deed of gift is impugned on the ground of undue influence, the mere circumstance that the donee always lived with the donor would not be sufficient to raise any presumption of the donee having dominated the will of the donor, in the execution of the deed in his favour, especially when it is shown that though the donor was very old and was losing the strength of his mind and body, he was able to exercise an independent and intelligent mind over what he was doing. [p. 379, col. 2.]

Ismail Mussajee v. *Hafiz Boo*, 10 C. W. N. 570; 3 A. L. J. 85; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 C. 773; 33 I. A. 86 (P. C.), relied on.

MOHAMMAD YAKUB *v.* ABDUL QUDDUS.

Appeal from a decision of the Subordinate Judge, Saran.

Messrs. *Hasan Jan* and *Janak Kishore*, for the Appellants.

Messrs. *P. S. Sen*, *Hyder Imam*, *S. M. Tahir*, *Kailashpati*, *Sambhu Saran* and *S. C. Mozumdar*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of a suit for recovery of properties, moveable and immoveable, mentioned in Schedules 1, 2, 3 and 4 of the plaint, with the exception of the shares in Mouza Madarpur, Pargana Goa, Touzi No. 2559, and Chandpura, Touzi No. 2370, with respect to which the plaintiffs prayed for confirmation of their possession upon an adjudication of their right thereto and on invalidating the deeds mentioned in paragraphs 10 and 15 of the plaint.

The facts of the case have been fully and clearly given in the judgment of the Court below, which may safely be adopted for the purpose of this appeal. The following geneology will show the relationship of the parties :—

Moulvi IMDAD HOSSAIN,
died on 26th January 1915.

Moulvi Ali Hasan.	*Moulvi* Muhammad Yakub, plaintiff No. 1.	*Hafiz* Muhammad Yusuf, defendant No. 6.	*Moulvi* Ishfaq.	*Moulvi* Abdul Razzak, plaintiff No. 2.	*Moulvi* Abdul Wahab, defendant No. 7.	*Moulvi* Abdul Aziz, died on 15th January 1912 = *Musammat* Bibi Azmat, defendant No. 5

Abdul Quddus, defendant No. 1.	Abdul Waddud, defendant No. 2.	Fakhruddin, defendant No. 3.	Bibi Zohra, defendant No. 4.	Mohiuddin.

The two plaintiffs are the sons of one Imdad Hossain. Defendants Nos. 1 to 3 are the sons, defendant No. 4 is the daughter, and defendant No. 5 is the widow, of Moulvi Abdul Aziz, the youngest son of Imdad Hossain. Defendants Nos. 6 and 7 are two other sons of Imdad Hossain. Imdad Hossain had two more sons with whom we are not concerned in this litigation. In all he had seven sons. He died on the 26th of January 1915, at the age of about 97 years. His wife had predeceased him in 1891. He had during his lifetime acquired considerable property by his own exertion. On the 17th of February 1877 he divided by a deed of partition, (Exhibit 14), the bulk of the properties acquired by him up to that time amongst all his seven sons keeping some of the properties for himself. Moulvi Abdul Aziz, however, lived with his father, while all the other sons lived separately from him.

The plaintiffs' case is that Abdul Aziz managed his own properties as well as the properties and business of his father from 1888 up to September 1911, and as his father advanced in age he became weak mentally and physically, and in the last two decades of his life lost his senses and became of unsound mind and incapable of managing his affairs. Moulvi Abdul Aziz, taking advantage of the unsoundness of his mind and exercising undue influence over him, caused several deeds to be executed by his old father in his favour, which deeds are invalid and without consideration. Moulvi Abdul Aziz died on the 15th of January 1912. The properties left by him and detailed in Schedule 4 of the plaint were inherited by defendants Nos. 1 to 5 and his son, Mohiuddin, since deceased, and his father, Moulvi Imdad Hossain, as his legal heirs. A few days after the death of Abdul Aziz, his son Mohiuddin also died. Imdad Hossain, as grandfather of Mohiud-

din, received 2/3rd of the share inherited by Mohiuddin in the properties of his father Abdul Aziz. At that time defendants Nos. 1 to 5, along with Sheikh Mohammad, brother in-law of Abdul Aziz, used to live with Moulvi Imdad Hossain. Sheikh Mohammad also took advantage of the insanity of Maulvi Imdad Hossain and, by procuring recommendation of the local authorities of Chapra for the time being, got a *hibanamah*, dated the 10th March 1912 (Exhibit 16), executed in favour of defendants Nos. 1 and 2 and defendant No. 4, step-children of defendant No. 5, in respect of the share which Imdad Hossain had received by inheritance from Moulvi Abdul Aziz. After the death of Abdul Aziz, defendant No. 1, his son, and defendants Nos. 6 and 7 gained influence for some time over Moulvi Imdad Hossain. Defendant No. 6 got a *hibanamah* (Exhibit 9), dated the 26th April 1912, executed in respect of the properties situate in Patna. Defendant No. 7 got a *mukarrari* dated the 4th July 1912, executed in respect of Mouza Hakam, at a low *jama*. Both the defendants Nos. 6 and 7 got a *taksimnamah* having the force of a *wasiatnamah*, Exhibit 2, dated the 18th January 1913, executed in respect of the entire property which was in the name of Abdul Aziz with the exception of the properties allotted to him by the deed of partition (Exhibit 14), dated the 17th of February 1877. Afterwards, defendant No. 7 got a mortgage-bond (Exhibit 15), dated the 15th June 1913, executed in his favour by Moulvi Imdad Hossain and, finally, they got a *hibanamah*, dated the 11th April 1914, executed in their own favour, but the said deed was not registered as Moulvi Imdad Hossain was not in his senses. The plaintiffs impugn all the aforesaid deeds in favour of Abdul Aziz, or in favour of the defendants, in the case, as having been executed when Imdad Hossain was "insane" and as being "invalid and null and void" in consequence, and assert that by these deeds neither the right nor the possession of Moulvi Imdad Hossain was transferred in the properties mentioned in Schedules 1, 2 and 3 which belonged to him, or in the property of Abdul Aziz mentioned in Schedule 4 to the extent of the share inherited by him therein after the death of Abdul Aziz in 1912. The plaintiffs, therefore, state that after the death of Imdad Hossain, they, being the sons of Imdad Hossain, became entitled to possession of their legal shares in the properties mentioned in the aforesaid Schedules by right of inheritance, but that the defendants were wrongfully in possession of the plaintiffs' share. Hence the plaintiffs seek to recover possession of their share in the said properties by declaring their right and title therein and by invalidating the aforesaid deeds detailed in paragraphs 10 and 15 of the plaint. With respect to their shares in Mouza Madarpur, Pargana Goa, Touzi No. 2569, and Chandpara, Pargana Goa, Touzi No. 2310, they allege that they are in possession and hence they want their possession to be confirmed. They also pray for mesne profits from the date of the institution of the suit up to the date of realisation. They claim that, as Imdad Hossain was insane from 1892 up to his death on the 28th of January 1915, the said period should not be taken into account while considering limitation.

The plaintiffs' claim is resisted mainly by defendants Nos. 1 to 5, the heirs of Abdul Aziz. They plead that the suit was barred by limitation and the rule of estoppel, and that it was bad for misjoinder of parties and causes of action. On the facts, they deny that Moulvi Imdad Hossain was insane or of unsound mind and incapable of managing his affairs. They assert that he was a shrewd man of business, was managing his own properties as well as the properties of his son Abdul Aziz, and that he executed all the deeds in question of his own free will and accord while in full possession of his senses and received good consideration for each and every one of them, and that no fraud or undue influence was ever exercised upon him, and that the deeds were always acted upon and are valid and binding upon the plaintiffs. In short, they say that the plaintiffs are not entitled to any relief.

Defendants Nos. 6 and 7 also put in separate written statements. They support the deeds that were executed by Imdad Hossain in their own favour, but dispute the validity of the deeds in favour of the ancestor of defendants Nos. 1 to 5. In the

Court below the following issues were raised by the parties:—

"1. Whether the suit is maintainable ?"

"2. Whether the plaintiffs have got any cause of action for this suit ?"

"3. Whether the suit is barred by limitation ?"

"4. Whether the suit is barred by the prinsiple of estoppel ?"

"5. Whether the suit is bad for misjoinder of parties and of causes of action ?"

"6. Was Moulvi Imdad Hossain a person of unsound mind as alleged in the plaint and was he not competent to execute the deeds in question ?"

"7. Were the deeds sought to be set aside executed under undue influence and were they brought about by fraud ?"

"8. Were the said deeds executed for consideration and were they acted upon. If not, are they valid and binding ?"

Issues Nos. 1, 2, 4 and 5 are pleas in bar of the plaintiffs' suit. They were decided in their favour and we are no longer concerned with them.

Issues Nos. 6, 7 and 8 were decided by the Court below against the plaintiffs and in favour of the defendants. As a result of his finding on those as well as on Issue No. 3, the learned Subordinate Judge dismissed the plaintiffs' suit. Hence this appeal by the plaintiffs.

With reference to Issue No. 6, the learned Subordinate Judge has recorded the finding that "Imdad Hossain was not of unsound mind and incompetent to execute the deeds sought to be set aside in the suit." He has arrived at this finding upon a thorough review of the evidence and the facts and circumstances of the case. The question of insanity of Imdad Hossain was first raised at the time when he executed a deed of gift in favour of defendants Nos. 6 and 7 in April 1914. The Sub Registrar refused to register the deeds and his order was upheld by the District Registrar (Exhibits 20 and 21). This led to an application being made by Mohammad Ayub, son of plaintiff No. 1, before the District Judge of Saran, under Act IV of 1912, for his appointment as guardian of Moulvi Imdad Hossain on the ground of the latter's insanity. The District Judge refused the application by his order (Exhibit A) dated the 29th June 1914.

The retired Assistant Surgeon, Babu Upendra Narain Rai, who has been examined in this case as P. W. No. 3, and Major F. P. Commer, I.M.S., were examined as witnesses in that case. Their certificates and deposition in that case are Exhibits N, 27, R and 34 respectively. In the opinion of the Assistant Surgeon Imdad Hossain was suffering from "softening of the brain" and was not capable of managing his own estate. This was, according to him, due to senility or old age: *(vide* his certificate, Exhibit 27, and his deposition in the Lunacy Case, Exhibit R, and his deposition as witness No. 3 in this case). On the other hand, the Civil Surgeon and Dr. K. C. Das, after testing his mental powers in several ways, stated in their certificates—"His mental powers are good for a man of his age and his power of reasoning clear and logical." The Civil Surgeon confirmed this opinion by his evidence (Exhibit 34, dated the 23rd of June 1914) in the Lunacy Case. I would quote some passages from his deposition. Says the Civil Surgeon—"He answered questions intelligently and logically without exception. I asked him how he lived, what he ate, the time of year, the time of day. I asked if he had any case. He said a case was pending regarding his property. He wished to leave property to two sons whom he named (Wahab and Yusaf) because his other sons had already had property left them; that he bore them no ill will. I asked other questions too. I should think he would transact business with great difficulty and very badly owing to his infirmity, by which I mean the weakness of his mind and body, due to old age. He is extremely infirm in body and is also infirm in mind, I should call it senile mental infirmity. He would be much more easily influenced by those round him than a man in the prime of life and in good health." In spite of his mental and physical infirmity, the Civil Surgeon in the cross-examination stated that he would consider him "quite insane."

Witnesses on both sides have been examined regarding the state of the mind of Imdad Hossain in the last two decades of his life. The witnesses on behalf of the plaintiffs cite some specific acts of insanity, such as mistak-

ing one person for another, dusting the wall, drinking Ghee from *Khibhdi* and drinking tea from teapot and mistaking grapes for pieces of stone. The learned Subordinate Judge very rightly holds that these instances only prove temporary "aberrations of intellect" or temporary "insane delusions." They are isolated cases, few and far between, and would not necessarily indicate that he was incapable of managing his affairs, and do not constitute such acts on the part of Moulvi Imdad Hossain as an insane person only would have done. They may have been due to loss of memory, absent-mindedness and other circumstances and are not inconsistent with the acts of a sane man. The view taken by the learned Subordinate Judge is supported by standard works on Medical Jurisprudence, such as of Lyon and Gribble. Heaps of documents have been filed in the case which the learned Subordinate Judge has relied upon for showing that Moulvi Imdad Hossain's intelligence was of a high order and that he could transact business rationally. He would add up large sums, make pertinent and careful corrections in draft deeds, keep accounts and could understand intricate questions of fact. He was a *Mutwali* of a mosque and *waqf* properties appertaining thereto and had civil and criminal cases regarding a drain near the mosque as evidenced by Exhibits U-1 and U-2. He was plaintiff in that litigation. The suit terminated with the judgment and the decree, dated the 18th June 1907. Two of the plaintiffs' witnesses, namely, the 2nd and the 8th witnesses, who cite some instances of the acts of insanity such as those referred to above, entered into transactions with him which transactions are still in force. These witnesses would not have entered into such transactions if in fact they knew or believed Imdad Hussain to be a man of unsound mind. Muhammad Ayub, son of plaintiff No. 1, who had applied to the District Judge in 1914 to have Imdad Hussain declared a lunatic, had brought a suit claiming Mouza Hukum on the basis of a verbal gift from Moulvi Imdad Hussain. Moulvi Imdad Hussain denied this gift and the dispute was referred to the arbitration of two Vakils and a Deputy Magistrate. Moulvi Imdad Hossain was examined as a witness in that case. His deposition (Exhibit Q) clearly shows that he was able to give intelligent replies to the questions addressed to him; that he understood the business and that he was fully alive to his own interest. This happened on the 27th of October 1912. Similarly, the Succession Certificate (Exhibit W), dated the 29th April 1912, shows that he took interest in his affairs and applied for Succession Certificate to recover debts due to his deceased son, Abdul Aziz. The learned Subordinate Judge has referred to a number of transactions entered into by Imdad Hossain within two years of his death as showing that "far from being incapable of managing his affairs and protecting his interest.....he was extremely mindful of his own interest." The plaintiffs alleged in paragraph 13 of the plaint that Moulvi Imdad Hossain had become "*fatir-ul aql*" since 1893 and died while in this state of mind in 1915. The word "*fatir ul aql* literally means 'unsoundness of mind or at least imbecility of mind.' This the plaintiffs have failed to establish He was a Pleader and had retired from the profession in the year 1872. He was a shrewd man of business and acquired considerable property by his own self-exertions He himself divided all his properties amongst his sons in 1877 keeping only Mahal Shiva Diara and Mahal Mahaji Barhara in which he had two-annas share, for himself. Even after partition, he seems to have acquired considerable properties by his own exertions. No doubt, as he was growing older he was graudually losing his physical and mental strength, and when the Doctors examined him in 1914, at the age of 97, which is an extreme age for a hot climate like that of India, he suffered from senility and, as the Civil Surgeon states, he must have been managing his business with difficulty and have been liable to be easily influenced by those around him. His infirmity must have been hastened by the death of his youngest son, Abdul Aziz, in 1912, who, after the partition of 1877, always lived with him and to whom he was much attached, but his faculties were not so impaired as would amount to insanity or unsoundness of mind. This is clear from the evidence of the second witness examined by the plaintiffs. The learned Subordinate Judge is, therefore, right in his finding that the plaintiffs have failed to establish that the transactions in question were void on account of Imdad Hossain

being incompetent to enter upon them by reason of his not being a man of sound mind under sections 11 and 12 of the Indian Contract Act. Section 12 says that a person is said to be of a sound mind for the purpose of making a contract if at the time he makes it he is capable of understanding it and forming a rational judgment as to its effect upon his interests; in other words, the test of soundness of mind is that he is capable of understanding the business and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test: *Ball* v. *Warren* (1). Mere weakness of mind is not sufficient as is laid down in the case of *Durga Lakhsh Singh* v. *Muhammad Ali Beg* 2). Although it is not necessary to prove utter mental darkness or congenital idiocy, *Tirumamagal Ammal* v. *Ramasvami Ayyangar* (3), *Ram Sahye* v. *Laljee Sahye* (4), *Drew* v. *Nunn* (5), the plaintiffs must establish that Imdad Hossain was incapable of understanding business and forming rational judgment as to its effect. This the plaintiffs have failed to do.

Assuming that Imdad Hossain was suffering from occasional aberrations of mind, as has been sought to be proved by the plaintiffs, the plaintiffs must further show that the particular transactions in question were entered into when he was subject to those occasional fits. There is no evidence that the documents in question were executed at a time when Imdad Hossain was suffering from any hallucination of his brain. Therefore, the documents in question were not executed when he was 'insane' and that they are consequently not invalid and null and void as is stated in paragraph 17 of the plaint. Issue No. 6 was, therefore, rightly decided by the learned Subordinate Judge against the plaintiffs.

(1) (1804) 9 Ves. (Jun.) 605 at p. 611; 7 R. R. 306; 32 E. R. 738.

(2) 27 A. 167 O. C. 287; 31 I. A. 235; 8 Sar. P. C. J. 725 (P. C.).

(3) 1 M. H. C. R. 224.

(4) 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306; 4 Ind. Dec. (N. s.) 95.

(5) (1879) 4 Q. B. D. 661; 48 L. J. Q. B. 591; 40 L. T. 671; 27 W. R. 810.

The learned Vakil on behalf of the plaintiffs then contended that, although the documents in question were not null and void on the ground of Imdad Hossain being of unsound mind, yet they are liable to be set aside inasmuch as they were executed on account of undue influence and pressure having been brought to bear upon him by the donees under the gift—firstly, by his youngest son, Abdul Aziz, who always used to live with him, and, after the death of Abdul Aziz in 1912, by Sheikh Mohammad, brother-in-law of Abdul Aziz, and, lastly, by defendants Nos. 6 and 7. It is necessary in this connection to place here the history of the general transactions. Imdad Hossain, as already stated, had divided the bulk of his properties among all his seven sons in 1877 under a *Taksimnamah* (Exhibit 14). Under the *Taksimnamah* he gave 4 annas 1 *karant* 5-*masant* share in village Madarpur Goa (Touzi No. 2564) and 1 anna 4-pies share in Chandpura (Touzi No. 2370) to each of his sons Mohammad Yakub and Moulvi Abdul Aziz. Mohammad Yakub dealt in cloth and his business failed. Accordingly he sold his 4-annas 1-*karant* 5-*masant* share in Mouza Madarpur Goa to his father, Moulvi Imdad Hossain, in 1889. This was given in conditional mortgage by Imdad Hussain to his son Abdul Aziz on the 14th of March 1893 per Exhibit 35, to secure a loan of Rs. 7,000. On the 16th of January 1894, the plaintiff, Mohammad Yakub, executed a sale-deed (Exhibit 1) in favour of Abdul Aziz with respect to his 1-anna 4 pies share in another Mouza called Chandpura (Touzi No. 2370), for Rs. 3,500. Previous to this, Moulvi Imdad Hossain had under date the 28th of January 1891 taken out Baibarsana of 6 annas 6 pies share of Shankerpur Harbans for Rs. 7,000 from one Moulvi Abdul Gafar. On the 18th of August 1903, he assigned half of the Baibarsana share in Shankerpur Harbans to Moulvi Abdul Aziz for Rs. 3,500 (Exhibit P-1 or P 2). Subsequently Imdad Hossain acquired 14 annas of Shankerpur Harbans, 14 annas of Shankerpur Aiyaama, about 3 annas 7-pies 5-*karants* in Shankerpur Lila, Pergana Barai, and some other shares in the said villages and also one anna of Hukam, from 2nd October 1905 to 19th October 1907, partly in his own name and partly in the *farzi* name of his

sons Abdul Wahab and Abdul Aziz. This was by means of four sale-deeds and a deed of exchange executed by the owners of the shares referred to above : *vide* Exhibits H, H 1 and 32). The other two deeds do not appear to have been filed in this suit

On the 11th of December 1907, he sold 4 annas 1-*karant* 5-*masant* share of Madarpur, Pergana Goa, which he had acquired from the present plaintiff Mohammad Yakub in the year 1889, and 3-annas 3 pies share in Shankerpur Harbans and Shankerpur Aiyaama, 4 pies 10 *karant* share in Shankerpur Lila, for Rs. 7,500 (per Exhibit 3). He set off the sum of Rs. 7,000 which was due to Abdul Aziz under Baiharsana (Exhibit 35), dated the 14th March 1893, with respect to Madarpur, Pargana Goa. On the 7th December 1907, he executed a deed of exchange in favour of Abdul Aziz, whereby he exchanged 8 annas 2 *karants* 10-*masant* of Madarpur Pargana Goa, belonging to Abdul Aziz, for 7-annas 6 pies share in Shankerpur Harbans and Shankerpur Aiyaama, and 10 pies share in Lila belonging to himself. On the 23rd of December 1907 he exchanged (by deed Exhibit 4) his 3 annas 3 pies share of Shankerpur Harbans and Shankerpur Aiyaama and $1\frac{1}{2}$-pies of Shankerpur Lila for 2-annas 8 pies share of Obardpura belonging to Abdul Aziz (1-anna 4-pies share which Abdul Aziz had purchased per Exhibit 1, in 1894, from the plaintiff No 1, and his 1 anna 4 pies share under the *Taksimnama* Exhibit 14 of 1877). Thus under the aforesaid deeds, Abdul Aziz got the entire share acquired by Imdad Hussain in Shankerpur Harbans, Shankerpur Aiyaama and Shankerpur Lila, called Shakri, and Imdad Hossain got 8 annas odd of Madarpur Goa and 2-annas 8 pies of Chandpur.

Besides the aforesaid documents, Imdad Hossain executed a deed of gift (Exhibit 6, or P 5), dated the 28th April 1910, with respect to 4 annas 6 pies share of Madarpur, Pargana Barai, in favour of Abdul Aziz. On the 7th March 1911, he executed a *mokarrari* deed (Exhibit 7 or P-5) in favour of Abdul Aziz with respect to 3 annas 6-pies in Madarpur Barai. Under this deed a sum of Rs. 400 per mensem was payable to Moulvi Imdad Hossain as landlord's rent and Rs. 300 to Moulvi Wahab (defendant No. 7), one of the sons of Imdad Hossain. On the 14th of August 1911, he made a *waqf* of the Haq Airi or rent reserved of Rs. 400 in favour of Sahebgunj Mosque of which he appointed Moulvi Abdul Aziz as *Mutwali*. Abdul Aziz died in January 1912, and on his death Imdad Hossain conveyed by a deed of gift, dated the 10th March 1912, (Exhibit 5), the one-sixth share of the properties which he had inherited from Abdul Aziz to some of the children of the latter.

On the 25th April 1912, Imdad Hussain, executed a deed of gift (Exhibit 9), with respect to villages Darweshpur Diara and Darweshpur Rasnia in favour of defendant No. 6. On the 8th January 1913 he executed a *Tansikhnamah* (deed of revocation) in which he declared some of the aforesaid transactions to have been *farzi* and that his properties should be inherited by his heirs according to law.

On the 4th of July 1913, he executed a *mokarrari istamrari* in favour of his son Abdul Wahab. On the 15th June 1913, he executed a mortgage-bond in favour of Abdul Wahab. On the 11th April 1914 he executed a *Hibanamah*, in favour of defendants Nos. 6 and 7, but this deed was not registered and we are not concerned with it in this litigation.

The deeds in favour of Abdul Aziz are impugned as having been executed without any consideration and on account of the undue influence of Abdul Aziz and as being merely *farzi*. The earliest document is the conditional sale, Exhibit 35, in favour of Abdul Aziz with respect to Madarpur Goa which Imdad Hossain had acquired by purchase from his son in 1891, for Rs. 7,000. Now, Abdul Aziz was living with his father and the learned Subordinate Judge has held that the properties which he had got under the *Taksimnamah* (Exhibit 14) were managed by the latter. The expenses of Abdul Aziz were borne by Imdad Hossain. Abdul Aziz was the youngest son and was loved by Imdad Hossain more than his other sons. After allotting to them properties by deed of partition of 1877, he helped his other sons also sometimes by giving them money and sometimes purchasing their properties for adequate prices when they were in need of money. He also paid them monthly allowances, and helped them in various other

ways: *vide* the deposition of plaintiff No. 1 himself. There is, therefore, no wonder that he bore all the expenses of Abdul Aziz who was obedient to him and lived with him and also purchased the properties in question sometimes with the income of the properties belonging to Abdul Aziz and which he held in his hands, and sometimes from his own posket. The recitals in the documents clearly prove this. In this view the question whether the consideration of the deeds in question was satisfied out of the money belonging to Abdul Aziz or to his father Imdad Hossain seems to be immaterial. Imdad Hossain has not been shown to be otherwise than a conscientious person and when he states in the documents, such as Exhibits 35, 1, 2 and 3 that the consideration money of those documents was met out of the income of the properties of Abdul Aziz, there is no reason to suspect that these statements are false and fictitious. He has recited the history of the transactions in all the subsequent documents: in other words, he has repeatedly confirmed the transactions in favour of Abdul Aziz.

Now, Exhibit 3 is a sale deed, dated the 11th December 1907, executed in favour of Abdul Aziz with respect to the properties set forth therein. The details of how the consideration passed have been recited in the documents. The consideration of the exchange deeds (Exhibits 4 and 5) are the properties belonging to Abdul Aziz. The stamps of all these documents were purchased through Mohammad Ayub, son of plaintiff No. 1, who also attested Exhibits 4 and 5 and who, as the learned Subordinate Judge says, was looking after the suit on behalf of the plaintiffs in the Court below. The sale deed (Exhibit 3) was attested by Yakub, plaintiff No. 1, and Yusuf, defendant No. 6, and Ishfaq, since deceased. The scribe of Exhibit 4 is Moulvi Yusuf, defendant No. 6. It is, therefore, idle on the part of the plaintiffs to impugn these documents on the ground of want of consideration or undue influence brought to bear upon Imdad Hussain by Abdul Aziz.

It is said that the consideration of the sale deed Exhibit 1 of 1894, with respect to Chandpur, in favour of Abdul Aziz must have been borne out of the money belonging to Imdad Hossain and not that of Abdul Aziz, inasmuch as all the income of Abdul Aziz, which Imdad Hussain had in his hands, was accounted for in the earlier document, the Baiharwara, Exhibit 35, dated the 14th March 1893. We do not attach much importance to this argument. Even if there be any substance in this contention, the document will be valid as a deed of gift on the principle laid down by their Lordships of the Judicial Committee in the case of *Ismail Mussajee* v *Hafiz Boo* (5), *Gostho Behary Ghosh* v. *Rohini Gowalini* (7) inasmuch as the intention of Imdad Hossain was obviously to convey the property to his son Abdul Aziz and this intention is supported by the subsequent conduct of Imdad Hussain in taking the property in exchange for certain shares of his in other properties which he had acquired (*vide* Exhibt 5). The relationship between the parties leads also to the same conclusion. The documents Exhibts 6, 7 and 8, convey to Abdul Aziz the interest held by Imdad Hossain in 4-annas 6 pies by way of gift and *mokarrari* and *waqfnamah*. These transactions, therefore, require no other consideration than that of love and affection entertained by Imdad Hussain towards his son for his obedience and dutifulness towards him. The aforesaid documents are then impugned on the ground that they were brought into existence on account of undue influence exercised by Abdul Aziz over his father. Now, the circumstances urged in support of this plea are that Abdul Aziz was always living with Imdad Hossain and that he took advantage of the weakness of his body and mind and his extreme old age. These in themselves are not sufficient to raise any presumption of Abdul Aziz having really dominated the will of his father in the execution of the document in his favour, as was held in the case of *Ismail Mussajee* v. *Hafiz Boo* (6). There is nothing to show that Abdul Aziz took advantage of the old age of his father. It has been already shown that old though he was, and though he was losing the strength of his mind and body, he was able to exercise an independent and intelligent mind over what he was doing. On the other hand, he

(6) 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 187; 33 C. 773; 33 I. A. 86 (P. C.).

(7) 4 Ind. Cas. 541; 13 C. W. N. 692.

seems to have taken great interest in his affairs, and whatever weakness he might have shown in other directions he showed strength of mind in dealing with his properties and business: *vide* Exhibit Q, deposition of Moulvi Imdad Hossain, dated the 27th October 1912: Exhibit W, Succession Certificate, dated the 29th April 1912: and heaps of documents, such as notes, memoranda, accounts, etc, kept by Imdad Hussain himself and relied upon by the learned Subordinate Judge. There is no evidence of undue influence having been exercised over him by Abdul Aziz. The events subsequent to the death of Abdul Aziz show that he was transacting his business not on account of any undue influence exercised over him by Abdul Aziz, for although that influence ceased, he executed on the 10th of March 1912 a deed of gift with respect to the share inherited by him in the properties of Abdul Aziz in favour of the latter's children. This document was executed after consultation with the District Magistrate, a Deputy Magistrate and a Vakil of Chapra. The document has been attested by them. The object of the document obviously was to make provision for the children of his beloved son, Abdul Aziz. He was not unmindful of the interest of his other sons, for he executed documents in favour of defendants Nos. 6 and 7, such as the deed of gift (Exhibit 9), dated the 26th April 1912, *mokarrari istamrari* dated the 4th July 1912 and mortgage-bond, dated the 15th June 1913. To the Civil Surgeon in June 1914 he said: "He wished to leave property to two sons" whom he named (Wahab and Yusuf) because his other sons had already had property "left them", *vide* Exhibit 34. This was his intention which he seems to have fulfilled by giving properties to Wahab and Yusuf, defendants Nos. 6 and 7, by means of the documents referred to above. In the face of the evidence of the Civil Surgeon it is impossible to contend that he executed these documents on account of any undue influence brought to bear upon him or without his understanding the *pros* and *cons* of the transactions. The declaration of Imdad Hussain to the Civil Surgeon was made without any prompting from anybody. Therefore, it must be held that none of the documents in question was executed on account of undue influence.

Now, the learned Subordinate Judge says that the plea of undue influence is inconsistent with the plea of unsoundness of mind and he relies upon the decision quoted above in *Ismail Mustajee* v. *Hafiz Boo* (6) and in *Durga Bakhsh Singh* v. *Muhammad Ali Beg* (2). In the former case their Lordships say—"the question of undue influence was never properly before the Court at all. No such case was set up in the pleadings..... There was a clear issue as to Khaja Boo having been of unsound mind in 1889, but none with regard to undue influence.' After dealing with the evidence, their Lordships observed —"assuming, however, that undue influence might properly be made a ground of decision ...the evidence is insufficient to establish anything of the kind." In the latter case, the mortgages in question were sought to be set aside on the ground that the mortgagor was of unsound mind at the time of the execution of the deeds and the evidence given sought to establish insanity of a violent type in its crudest and most palpable form. The evidence was disbelieved. Their Lordships held that it was not allowable for the Court to substitute for the case of insanity advanced by the plaintiff a case of weakness of mind and consequent helplessness. Similar was the view taken in the case of *Sayad Muhammad* v. *Fatteh Muhammad* (8). In the present case as to the plea of undue influence, the learned Subordinate Judge observes: "it is not alleged by the plaintiffs that Moulvi Imdad Hussain was stark mad or a lunatic. The plaintiff No. 1 in his cross-examination by the guardian of defendant No. 2 says that Imdad Hossain was neither insane nor mad. The case of the plaintiffs in the plaint is also similar. The sixth paragraph of the plaint, as well as the other paragraphs show that what the plaintiffs complained of is that Moulvi Imdad Hossain was in the last two decades of his life so mentally imbecile and so physically infirm that he was incapable of managing his own affairs or protecting his own interest. In fact, the terms of the plaint are such that it is rather a case of undue influence which the plaintiffs alleged than of insanity."

From the afore-said observation, as well as from the fact that the plea of undue influence and fraud was distinctly raised in Issue

(8) 22 C. 324; 22 I. A. 4; 6 Sar. P. C. J. 515; 11 Ind. Dec. (N. s.) 218.

No. 3, it is contended that it is open to the plaintiffs to show that the documents in question were affected by undue influence and fraud, although they had raised the plea of insanity in the plaint. The question as to whether the plea could or could not properly be taken, however, becomes immaterial inasmuch as upon the facts found the plea has not been substantiated.

The plaintiffs then attacked the transactions as being *benami* and as not having been acted upon. There is nothing to show that the transactions were *farzi* and fictitious in any way. No motive has been suggested for Imdad Hussain to execute these *farzi* documents. It is not said that he was involved in debts and that he executed these documents in order to protect his properties from being seized by his creditor as is usually the case in *farzi* transactions. It has also not been shown that he was ill-disposed towards his other sons and that the documents in question were executed in order to deprive them of their legal shares. No motive has, therefore, been shown for his executing the documents in question *farzi* in the name of Abdul Aziz or the defendants in the case. No doubt, he acquired some properties between the 2nd of October 1905 and the 19th of November 1907 in the *farzi* name of his sons, Abdul Aziz and Abdul Wahab, (*vide* Exhibits F and 11). But this is different from transferring his own properties as *farzi* transactions. Reliance has been placed upon Exhibit 17, dated the 25th of May 1908, an application made by Abdul Aziz for registration and mutation of his name with respect to 10-pies share in Shankerpur Lila based upon Exhibits 3, 5 and 7. The statement relied upon relates only to Exhibit F, dated the 25th September 1907, whereby Imdad Hussain had acquired 1-anna in Shankerpur Harbans and Shankerpur Aiyaama and 1-pie in Shankerpur Lila in the *farzi* name of Abdul Aziz. The other documents (Exhibits 3 and 5) although referred to in the application have not been declared to be *farzi*. Therefore, instead of helping the plaintiffs the documents in question are against them, for when Abdul Aziz stated that Exhibit F was *farzi*, the fact that he does not mention that Exhibits 3, 4 and 5 are also *farzi* goes to show that the latter were not *farzi*.

The next document relied upon is Exhibit 24, the *Tansikhnamah*, or the deed of revocation, dated the 18th January 19.3. This document does not declare Exhibits 3, 4 and 5 as *farzi* but seeks to set aside the exchange of the properties by Exhibits 4 and 5 on the ground that there was breach of covenant, inasmuch as Abdul Aziz had stated that the properties given by him in exchange to Imdad Hossain were free from encumbrance, whereas it was discovered that there was a mortgage on those properties of Rs. 2,000. In this *Tansikhnamah*, no doubt, the documents Exhibits 6, 7, 8 and 16 were declared to be *farzi*. The plaintiffs, however, attack this *Tansikhnamah* also as being *farzi* and executed on account of the undue influence exercised by defendants Nos. 6 and 7 over Imdad Hossain and as being null and void on account of Imdad Hossain being insane: *vide* paragraphs 16 and 17 of the plaint. In the face of the pleadings in the case it is impossible to hold that the documents executed by Imdad Hossain previous to the *Tansikhnamah* were *farzi*.

It appears that the documents in question were acted upon, inasmuch as the Chalans filed by the defendants show that Mohammad Yakub paid revenue of the three Shankerpurs briefly called Shakri on behalf of Abdul Aziz. The Shakri properties admittedly belonged to Imdad Hossain. Unless these properties came to be held by means of Exhibits 3, 4 and 5, there is no reason why the Government revenue should have been paid by Abdul Aziz. Madarpur Goa, the property which Abdul Aziz gave to Imdad Hossain in exchange under Exhibit 4 in 1907 was in lease with Marhaura Factory per *patta* executed by Moulvi Abdul Aziz, at an annual rental of Rs. ,000 or Rs. 1,100. Witness No. 6 for the plaintiff states that Abdul Aziz received the rent of it up to 1911 and after Moulvi Imdad Hossain received the rent till his death in 1915, and after the death of Imdad Hossain his four sons, namely, the two plaintiffs and defendants Nos. 6 and 7 received the rent and that the plaintiffs had mortgaged their share to the Marhaura Estate. This evidence clearly shows that Imdad Hossain came to be in possession of these properties and after his death his four sons received their shares therein by inheritance. The properties belonged to Abdul Aziz and unless the exchange per

Exhibit 4 was given effect to, the plaintiffs would not have received any share in those properties. The plaintiffs admit in their plaint (paragraph 20) that they have got their names registered in respect of Madarpur Goa and Chandpura in accordance with the shares that Imdad Hossain got by exchange and which after him they received by inheritance. There is, therefore, nothing to show that the documents were *benami*. On the other hand, the learned Subordinate Judge upon the evidence in the case has held that they were acted upon. The deeds of gift in favour of Abdul Aziz and his sons seem to have been acted upon. Therefore, Issues Nos. 7 and 8 were properly decided by the Court below against the plaintiffs.

The learned Subordinate Judge also held that the suit was barred by limitation. The plaintiffs' case is that the documents were null and void inasmuch as Imdad Hossain was of unsound mind. They claim their right in the property by inheritance as heirs of Imdad Hossain who is said to have died on the 26th of January 1915. The suit is said to have been instituted on the 15th of July 1915. So, if the documents were null and void on account of insanity of Imdad Hossain, they could not stand in the way of the plaintiff's succeeding to the properties as heirs of their father. The same result would have happened if the documents were held to be *benami* or fictitious. The plaintiffs need not in that case have the documents set aside, and the suit would not be barred by limitation, in accordance with the principle enunciated in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (9).

It is, however, urged that the suit of the plaintiffs is barred by the rule of three years' limitation under Art. 91 of the Limitation Act in so far as the deeds are impugned on the ground of undue influence or fraud. The question becomes only of an academic interest in view of our findings on the merits of the case and does not call for any serious consideration.

Agreeing with the view taken by the Court below we dismiss the appeal with costs.

ADAMI, J.—I agree.

W. C. A. & N. H. *Appeal dismissed.*

(9) 34 C. 329 11 C. W. N. 424 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 11 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 435 OF 1921.

July 10, 1922.

Present:—Mr. Hallifax, A. J. C.

RAMBILAS AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

LAXMI NARAYAN AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS 4 AND 5—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 63—Mortgage—Sums expended for repairs or improvements—Agreement to pay at time of redemption—Agreement, whether compulsorily registrable—Admissibility of document for collateral purpose.

An agreement to pay "at the time of redemption" all sums expended by the mortgagee on the repair or improvement of the mortgaged property, could not, in view of the provisions of section 63 of the Transfer of Property Act, be considered to be a transaction creating an interest in immoveable property so as to be compulsorily registrable But even if it were so held to be compulsorily registrable, the agreement would, even though unregistered, be admissible in evidence for the collateral purpose of proving the mortgagor's assent. [p. 383, col 1.]

Gangabisan v. *Tukaram*, 2 Ind. Cas. 244; 5 N. L. R. 70 at p. 74, followed.

Appeal from a decree of the District Judge, Bhandara, dated the 16th June 1921, in Civil Appeal No. 31 of 1921.

Mr. *Erachshah*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—It is, perhaps, fortunate that the appellant has removed what is called the "iron lattice", though it has been held to be incapable of separate possession and enjoyment, from the mortgaged premises, and that the opposite party has agreed to abandon all claim to it. Otherwise, it would have been necessary to discover what manner of thing it is, which it is quite impossible to do from the record at present. The mortgagee's only other complaint is, that the increased rent payable by him on account of the costs of the additions and improvements to the house has been assumed to be equal to the interest of all the money he spent on the house. As a certain amount was spent on repairs which were not improvements or additions this is obviously not right. It is admitted that the increase of rent may fairly be taken as equal to the interest on the money spent on improvements and additions. But the mortgagee is entitled to interest on the sums which he as tenant lent to his landlord for repairs which did not enhance the letting

value of the house but merely kept that value at its former level. For the appellant it was stated that he spent Rs. 105 10·0 in four different sums on such repairs and that the interest on them calculated from the dates of expenditure to the date of suit amounts to Rs. 68 8·0. The learned Pleader for the respondents-purchasers admits that, if we assume that the expenditure alleged has been proved at all, which he denies, these details are correct.

2. The cross objection attacks the findings of facts that Exhibit D-2 was executed on the day on which it purports to have been executed and is a genuine document, and that the Rs. 371-0 9 mentioned in that document and a further sum of Rs. 75.8.0 were actually spent on the repairs and improvements of the property. No single valid reason was, however, advanced in argument to support either contention and the two findings must stand. The main contention on behalf of the respondents, however, is that Exhibit D-2 is a document which purports or operates to create, or at least declares, a right to immoveable property of the value of more than Rs. 100 and, therefore, required registration. In its terms it is no more than an agreement to pay "at the time of redemption" all sums expended by the mortgagee on the repair or improvement of the mortgaged property. It neither creates nor declares any right to add those sums to the price of redemption. That right is created and declared by section 63 of the Transfer of Property Act. The assent of which that section speaks may be oral or even tacit, which would be impossible if it could be said to be a transaction creating an interest in immoveable property. In any case, even if the document was compulsorily registrable it could be used for the collateral purpose of proving the mortgagor's assent as was held in *Gangabisan* v. *Tukaram* (1).

3. The learned Pleader for the respondents further urged that as the agreement embodied in Exhibit D 2 was between the mortgagor and mortgagee it cannot bind the purchaser of the equity of redemption. As no reason that I could understand was put forward in support of this somewhat startling proposition I am unable to discuss the matter. The decree of the lower Appellate Court will be modified by the addition of Rs. 68·8 0 to the price of redemption stated in it. The plaintiffs-respondents will pay all the costs of their cross-objection and thirteen fifteenths of the total costs of the appeal, the remaining two-fifteenths being paid by the appellants. Costs in both Courts below will be paid as already ordered and the amount payable by the plaintiff respondent to the appellants will be added to the price of redemption. The date for redemption will be the 5th of January 1923.

W. C. A. & N. H.

Decree modified.

(1) 2 Ind. Cas. 248; 5 N. L. R. 70 at p. 74.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 143 OF 1919.

July 7, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

Babu BAIJNATH SINGH AND OTHERS—APPELLANTS

versus

Musammat BRIJRAJ KUER AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 123—Attestation, mode of—Document, proof of, waived—Effect of waiver.

The attestation of a document to be valid under section 123, Transfer of Property Act, must be an attestation of the execution of the document seen by the attestor, and not merely attestation of the executant's acknowledgment or admission of its execution. [p. 392, col. 2.]

Formal proof of a document when it is required to be proved in a certain way may be waived by any of the parties whose interests it may affect, but such waiver would not affect the legal character of the document. [p. 392, col. 1.]

Appeal from a decision of the Officiating Subordinate Judge, Second Court, Shahabad, dated the 7th April 1919.

BAIJNATH SINGH v. BRIJRAJ KUER.

Messrs. *S. M. Mullick M. Prasad, L. K. Jha* and *S. Dayal*, for the Appellants.

Messrs. *S. O. Mitter* and *S. Saran*, for the Respondents.

JUDGMENT.

MILLER, O. J.—This is an appeal by some of the defendants from a decree of the Officiating Subordinate Judge of Shahabad pronouncing in favour of the plaintiffs' title under a deed dated the 14th March 1917 executed by their mother *Musammat* Bhagela Kuer, conveying a half share in her property to the plaintiffs and declaring an earlier gift by Bhagela Kuer under an instrument dated the 7th January 1908, conveying the bulk of her property to her grandsons, null and void.

The plaintiffs, who are the respondents in this appeal, are the two younger daughters of the late Babu Raghunath Charan Singh and his widow Bhagela Kuer. The principal defendants in the suit are *Musammat* Dharamraj Kuer and *Musammat* Chhabi Raj Kuer (defendants Nos. 1 and 2) who are sisters of the plaintiffs, Mahadeo Singh, Inderdeo Singh and Tilakdhari Singh (defendants Nos. 3 to 5) who are sons of Dharamraj Kuer, and Baijnath Singh, (defendant No. 10) the husband of Dharamraj and Chhabi Raj.

The defendants Nos. 6 to 9 are other sons of Baijnath Singh. The defendant No. 11, *Musammat* Kowla Kuer, is the sister-in-law of the plaintiffs and the first two defendants, being the widow of their deceased brother, Bachu Singh. The defendants Nos. 12 to 18 are transferees of some of the property in suit from the defendants Nos. 3 to 5 and the defendant No. 19 *Musammat* Bhagela Kuer is the mother of the plaintiffs and the first two defendants.

The plaintiffs do not deny that the earlier gift of 1908 was executed by their mother, Bhagela Kuer, but contend that she signed the same under the impression that it was a gift of her property in favour of her four daughters in equal shares, and that her signature was obtained by the fraud of Baij Nath Singh, the husband of their sister Dharamraj, who falsely represented that the document was a gift in favour of her four daughters in equal shares in accordance with her expressed intention, whereas in fact it was a gift of the bulk of the property to the three sons of Baijnath Singh and Dharamraj, his wife, a small portion only being conveyed to the other three daughters and to the daughter-in-law, Kowla Kuer. They claim that the gift of January 1908 be declared void and inoperative and that they may be given possession over a half share of the property in accordance with the instrument of the 14th March 1917.

The appellants deny the alleged fraud and contend that the instrument of 1908 in fact carried out the expressed wishes of their mother and was read over to and understood by her before execution. They further contend that in any case the gift of 1908 was not void, even if it did not express the intentions of the donor, but voidable only, and that the plaintiffs cannot maintain an action on the later deed until the earlier one is set aside, and as the donor, Bhagela Kuer, was not a plaintiff and had not sued to have it set aside, the suit should be dismissed. They have raised a further point in this appeal which does not appear to have been specifically raised before the Trial Court, namely, that the instrument of the 14th March 1917, relied on by the plaintiffs, was a gift, requiring attestation by two witnesses, and is not admissible in evidence as none of the alleged attesting witnesses had been called to prove it as required by section 68 of the Evidence Act, and further that even if admitted as evidence the document itself did not purport to be and was not properly attested. They further raised a question of estoppel.

The learned Officiating Subordinate Judge before whom the case came for trial held that, if the facts alleged in the plaint were proved, the gift of 1908 would be void *ab initio* and that it would not be necessary in such circumstances to have it set aside before the plaintiffs could assert their title under the later instrument. He further found that the signature of Bhagela Kuer was obtained by the fraud of her son-in-law, Baijnath Singh, and did not express her intentions and that she never consented thereto. He further found that *Musammat* Bhagela Kuer between 1908 and 1917 had no knowledge of the real contents of the earlier document, and that no circumstances had been made out which would operate as a bar to the suit by way of estoppel

arising from the conduct of Bhagela Kuer. He accordingly found in favour of the plaintiffs and awarded them possession of a half share in the property under the deed of 1917 together with mesne profits subject to certain maintenance charges and subject to a conveyance of Mouza Ghanti to the defendants Nos. 12 to 18 under a deed of sale dated the 29th March 1914 which was found to be for legal necessity.

From this decision Baijnath Singh, his wife Dharamraj, his sons Iderdeo and Tilakdhari and his grandson Rajeswar Prasad, the son of the defendant Mahadeo Singh, deceased, have appealed.

Babu Raghunath Charan Singh, the husband of *Musammat* Bhagela Kuer, died in the month of July 1907 leaving property in some 20 villages the income from which is alleged to about Rs. 8,000 per annum. He also left debts amounting to over Rs. 30,000. His only son Bachu Singh had died some 18 months before his father but in addition to his widow he left surviving him the four daughters already referred to. Raghunath Charan Singh was greatly afflicted and suffered much mental distress by the death of his only son and there can be no doubt that his death was hastened if not directly due to his bereavement. His widow says that it was the cause of his death. The deceased son left a widow *Musammat* Kowla Kuer who has been added as one of the defendants in the suit. Bhagela Kuer, as next heir to her husband, succeeded to his property taking a Hindu widow's estate. The eldest daughter, Dharamraj, was at the time of her father's death the only married daughter, her husband being Baijnath Singh, the defendant No. 10. She and Baijnath had at that time three sons Mahadeo Singh deceased, Inderdeo and Tilakdhari, but other sons were born to them before the institution of this suit and were made defendants. On the death of Raghunath Charan Singh, Baijnath Singh with his wife and three children left their home in the United Provinces and went to live with the widow Bhagela Kuer at Barauna, and at her request, Baijnath took over the management of the estate and transacted all business on her behalf, she being a *pardanashin* lady. Before this, however, it appears that Dharamraj did from time to time after her brother Bachu's death live with her children in her father's house at Barauna and her third son Tilakhdari was born there in 1907 during her father's lifetime.

It is the appellants' case that Raghunath Singh had a great affection for his grandsons and after his sons's death frequently expressed a desire to make over his property to them after making some provision by way of maintenance for his three younger daughters and his daughter-in law. He was anxious that his debts should be discharged before his death but was not in a fit condition to attend to business and the grandsons were to be charged with the liquidation of his debts out of the estate in their hands, and thus he would be relieved from the burden of debt which unless discharged would militate against his happiness in the next world. It is also suggested that Raghunath was not on good terms with his *gotias* and was afraid that they might endeavour to obtain the property and involve the estate in litigation after his death if no settlement was made, which was another reason for wishing his property to be settled upon his male descendants. Raghunath himself had made this suggestion to Baijnath about three months after his son's death and had sent his nephew Bhuneshwar Singh to take him and his family to Barauna. His wife and his two sons did in fact go to Barauna at that time and the third son Tilakdhari was, as stated, born there. Baijnath himself went there three or four months later. Raghunath made no secret of his desire that the property should be given to the three grandsons and according to the appellants he named the *Mouzas* to be given to each daughter for their maintenance and expressed a desire also that something should be given to the daughter in law but no document was executed in his lifetime. In January 1908, about six months after Raghunath's death, a draft deed was prepared by a Pleader named Narsingh Sahai who went to Barauna to take instructions from the widow for that purpose. According to the appellants, both the draft and the fair copy prepared by the scribe, Shyam Charan Lal, were read over and explained to Bhagela Kuer who approved them and the document was executed in the presence of four attesting witnesses on the 7th January 1908. The document recites that the disposition made therein was in

accordance with the wishes of the donor's deceased husband who, during his lifetime, had expressed a wish that property yielding an annual income of Rs. 300 should be given to his daughter in law, *Musammat* Kowla Kuer, for her maintenance during her life, and that property yielding an annual income of Rs. 600 should be given to each of his three unmarried daughters and the remainder to his three grandsons Mahadeo, Inderdeo and Tilakdhari and adds "that as my husband Babu Raghunath Charan Singh died without executing any deed in the above terms as desired by him, he at the time of his death instructed me to execute a deed in the terms desired by him." It further recites that the donor is confident that her said grandsons and daughters will properly serve and maintain her and remain obedient to her during her lifetime and at her death will perform her funeral ceremony in a fitting manner. It then gives a life interest in Mouza Ismailpore, Kalan II, to her daughter-in-law, *Musammat* Kowla Kuer, and to her daughter Chhabiraj a life interest in Muza Parbatpur with remainder to her sons and grandsons, if any, to her daughter Brij Raj a similar interest in Mouza Ismailpore, Kalan I, and to her daughter Girj Raj a similar interest in Mouzas Kota and Jagdispore. The balance of the estate is given to her eldest daughter Dharamraj and her three sons Mahadeo, Inderdeo and Tilakdhari Singh. The grandsons are charged with the obligation to pay up immediately all debts which are at present standing or which would be contracted hereafter, by sale or by any other transaction or by any other possible means so that the whole of the estate left by her husband may after liquidation of the debts remain free and unencumbered. They are also charged with the expenses connected with the marriages of the three younger daughters which are to be paid out of the income of all the *elaqas*. They are further charged with the maintenance of the widow and the expenses of her funeral ceremony and the performance of the Gaya Saradh of her husband in a fitting manner. They are further charged with the completion of a temple which her husband had begun to build at Barauna and with the installation of the image of the deity Sri Sri Sheoji Maharaj and the performance of the *puja* etc., Bhagela Kuer was illiterate but at her request her name was written by an old servant of the family, Pradhan Ajodhya Prasad, since deceased. It is witnessed by four witnesses, three of whom were called at the trial and is certified by the scribe who was also called as a witness, to have been read out and explained to the executant. It was registered at the residence of Bhagela Kuer on the 12th January in the presence of the Sub-Registrar before the executant who admitted execution and who was identified by her nephew Bhuneshwar Singh, her sister's son. On that occasion her signature was also made by the pen of Ajodhya Prasad and Bhagela Kuer made her thumb impression on the document. On the 26th January an application was made to enter the names of the donees in Register D in the Land Registration Department. An objection was filed by one Rajinder Narain Singh, a *gotia* of Raghunath Charan Singh, on the 12th March 1908 claiming that he had been adopted by the deceased in January 1907 after the death of his only son and was entitled to have his name registered as the owner of the property. Witnesses were called both on behalf of the applicants and on behalf of the objector in these proceedings. On that occasion the deed of gift was put in evidence and proved by two of the attesting witnesses and by Ajodhya Prasad and the execution of the deed was in fact admitted by the objector. His claim to have been adopted by Raghunath Charan Singh was not supported by any credible evidence and his objection was dismissed and the petitioners' names were entered in the Register. In August 1908 *Musammat* Bhagela Kuer executed a *mukhtarnama* constituting Baijnath Singh her general agent. This document recites the gift previously made in January that year to her grandsons and daughters. In September 1910 upon a petition to the District Judge of Arrah *Musammat* Bhagela Kuer was appointed guardian of her three grandsons Mahadeo, Inderdeo and Tilakdhari, and the properties in the possession of the minors under the deed of gift are therein referred to and set out in detail in the Schedule. In March 1913 Mauza Ghanti Bargawan, one of the properties transferred to the grandsons under the deed of gift, was sold for a sum of Rs. 17,600 in order to pay off certain existing debts. This document was executed

by Bhagela Kuer as guardian of her three minor grandsons, she having previously obtained sanction from the District Judge of Arrah to sell the property. In May 1915 the District Judge, not being satisfied with the manner in which the property was being managed by the guardian, deputed Mr. H. T Christian, the Sub-Divisional Officer of Bhabua, to proceed to Barauna and make enquiries and report as to the appointment of another guardian of the minors' properties. Mr. Christian, who has been called as a witness on behalf of the appellants, proceeded to Barauna, his instructions being to enquire into the accounts and to recommend a manager in consultation with Bhagela Kuer. He had an interview with that lady and also with Baijnath Singh. He discussed with Bhagela Kuer the question of appointing a manager of the minors' property and she expressed a desire to have Baijnath Singh appointed manager adding "*Yih log ka chiz hai*" from which I think it may reasonably be inferred if this evidence is accepted, and I see no reason for rejecting it, that Bhagela Kuer at that time considered the property as belonging to Baijnath's family. Mr. Christian made a report that the income of the estate was about Rs. 4,300 a year exclusive of the rents of villages already assigned to debtors under usufructuary mortgages and made certain suggestions as to reducing expenses and providing for paying off the debts. He states that the late guardian Bhagela Kuer had given a very low estimate of the income from the lands and it seems obvious from this that she must have discussed the income of the property of her grandsons of whom she was the guardian.

It is quite obvious from the facts which I have just stated that if Baijnath Singh wilfully deceived his mother-in-law into making a gift of her property to the grandsons he, at all events, took no measures to conceal the fact. Everything was done openly, the document was registered, servants and members of the family were parties to it including the nephew of Bhagela Kuer. She herself was also appointed guardian of the minor grand-children, and when some of the property was sold to pay off the debts, it was she who had to execute the conveyance in which a recital of the gift appears. It is not disputed by Bhagela Kuer that she executed the documents but she contends that she was entirely ignorant of the contents of any of them. The names of the grandsons were also entered in the register in the Land Registration Department, a fact which could not well be concealed from the *gotias* and the other members of her family, and indeed this registration was objected to by Rajinder Narain Singh who claimed to have been adopted by Bhagela Kuer's deceased husband and preferred his claim in open Court. When a Hindu landowner dies without male issue and his widow makes a disposition of the property followed by a mutation of names in the Land Registration Department the fact very soon becomes known to the *gotias* and other kinsman of the deceased, as in fact happened in the present case, and it would appear that if Bhagela Kuer's evidence is true she alone of all her kinsmen and servants was ignorant of the real nature of the transaction. The learned Subordinate Judge, however, has come to the conclusion that a fraud was perpetrated upon her and that she was not aware, until many years afterwards, in 1917 of the contents of the instrument executed by her in 1908 and it will be necessary to consider his reasons for arriving at this conclusion. Before doing so, however, it would be convenient to state how it was that Bhagela Kuer came to make a different disposition of her property in the year 1917. In 1913 Baijnath Singh took as his second wife Chhabi Raj, the sister of his first wife. The two younger girls were at that time unmarried but in 1916 they were married to two brothers, the sons of Babu Raghuraj Singh residing at Narkhoria not far from Barauna where Bhagela Kuer lived. One would expect that before the marriage of his sons Raghuraj Singh would make enquiries as to the property or prospects of his future daughters-in law whose father had died without male issue. Nothing of the sort, however, according to Raghuraj's evidence, appears to have been done, and the marriage of his sons took place in July 1916. The negotiations for the marriage took two or three months before completion and he says that his elder brother conducted the negotiations on his behalf and he knew nothing about them. He further says that he knew no details about the property and

its management and did not even know that *Musammat* Bhagela Kuer had any properties. In February or March 1917 he went on a visit to Bhagela Kuer at her house and was informed by that lady that half the property belonged to her two younger daughters and the other half to the wives of Baijnath. He then asked Baijnath, under whose management the estate was, to partition the properties and explain the accounts, but he refused to do so. Bhagela Kuer also asked him to divide the properties, but upon his refusal a copy of the *hibanama* of 1908 was sent for, whereupon the *Musammat* learnt for the first time that the major portion had been given to the sons of Baijnath. She thereupon sent for a Pleader and executed the *bainama* transferring one-half of her property to her younger daughters Brij Raj and Girj Raj This document is dated the 14th March 1917 and is the foundation of the plaintiffs' title in this suit. It purports to sell and convey the half of the entire estate of her deceased husband in which she has a life-interest and which is said to be worth Rs. 12,000 to her daughters Brij Raj Kuer and Girj Raj Kuer as well as the right of instituting a suit for the cancellation of the previous gift. It then states "whereas in consideration of service and of obedience of the aforesaid daughters as well as in view of their being the reversioners I gave up and remitted the consideration of it, and made them owners in my place and put them in possession of the vended property". It is signed by *Musammat* Bhagela Kuer by the pen of Babu Rampati Singh and purports to be attested by four witnesses on admission by the executant. It was registered on the 29th March 1917.

The case for the plaintiffs (respondents) rests mainly upon the evidence of Raghuraj Singh, the father in-law of the plaintiffs, and Bhagela Kuer, their mother, and I may say at once that the evidence on both sides is unsatisfactory and open to serious criticism. I have already referred shortly to the evidence of Raghuraj Singh and have pointed out how he professed to be completely ignorant as to the prospects of his daughters-in-law before their marriage. He admits, however, that before he went to see Bhagela Kuer after their marriage, that lady had told him that she had made a gift of the property and he states that he did not ask her anything about possession of it. He says he came to know after the *bainama* in favour of his daughters in law was executed that the village Ghanti already referred to as having been sold to pay off some of the debts, had been disposed of, but he did not enquire from anybody who was in possession of it before filing the plaint which was verified by himself. The plaint nevertheless impleads as defendants the purchasers of that village. Moreover, after obtaining a copy of the deed of gift of 1908, he says that although he saw the names of the attesting witnesses thereon, he never made any enquiries from them or anybody else as to its execution, nor did he endeavour, as one might expect he would, to verify the story of Bhagela Kuer from those persons. He was asked in cross examination as to the witnesses to the document of 1917 relied on by him, and on being asked whether they had come to give evidence replied that they had not. Bhagela Kuer in her evidence states that her husband did not say anything to her during his lifetime in connection with the disposal of the property. After his death she wanted to give it to all her four daughters and asked Baijnath Singh to get a document prepared. She did not express her desire to anybody else. She states she did not have the document read out to her. She does not in terms say that Baijnath Singh or anybody else ever represented to her what was in the document or that it carried out her wishes, but signed it without having it read out, and, apparenly, without making any enquiries. She denies all knowledge of Pradhan Ajodhya Prasad who wrote her name for her on the document or of the witnesses who signed it although it appears to be clear from the evidence of other witnesses that they were servants or members of her household. She says she does not recollect if the Sub-Registrar questioned her as to whether she had got the *hibanama* read out to her but she put her thumb impression on it. She admits that Bunnesh war Singh, her nephew, who identified her was present on the occasion, and, although he lived in her house until his death in 1914, she never asked him or apparently anybody else as to what was written in the document. She further says that she

does not know she was appointed guardian of her minor grand-children by the District Judge and that Mr. Christian, the Sub-Dvisional Officer, never came to her house or asked her anythibg in connection with the management of the estate. It is impossible to accept this last statement in the face of Mr. Christain's evidence and his report to the District Judge after his visit. She further says that she does not recollect whether the Pleader Narsingh Sahai came to her house in connection with the drafting of the document. After some pressing she admitted that she knew about the sale of Monza Ghanti. There are so many improbabilities in the story of these two witnesses that I cannot but feel great hesitation in accepting the truth of their story. The evidence of the appellant's witnesses, however, is also in many respects open to serious criticism. One reason assigned for questioning the *bona-fides* of Baijnath Singh is that in the management of the property he seems to have neglected the interests of the plaintiffs and given preference to those of his wives and children. Although the *Mouzas* transferred to the plaintiffs under the deed of gift were entered in their names, and suits, when necessary, were instituted in their names, no separate accounts were kept and some of the proceeds of the property sold were used in paying off the charge upon Parbatpur, the property of Obhabi Rai, whilst that of the plaintiffs was left encumbered. It also appears that in the list of debts due from the estate entered in the Schedule, when the certificate of guardianship was applied for in 1910 there is an item of Rs. 1,600 due to Rajdari Singh, one of the younger sons of Baijnath. This is said to be due under an unregistered hand-note dated the 22nd March 1906. Baijnath explains this by saying that it was a debt due to his wife, Dharamraj, but stood in the name of his son who could scarcely have been a year old in 1310 and was not born in 1906. It is difficult, however, to believe that Raghunath Charan Singh in 1906 would borrow money from his daughter, Dharamraj, on a hand-note. It is just possible that the money borrowed was really that of Baijnath, her husband, and that the transaction took place in her name. Unfortunately, however, the matter was not further enquired into in cross examination and, although it may be capable of explanation, it is a matter of some suspicion. It also appears that the properties given to the plaintiffs under the *hibanama* were mortgaged before the document was executed and a further sum of Rs. 700 was subsequently raised under a *zarpeshgi* of *Mouza* Jagdishpur belonging to Brij Raj, the money being used to pay the costs of survey not only of that village but of other villages awarded by the deed of gift to the appellants. I think it may fairly be assumed that the whole of the property was dealt with by Baijnath indiscriminately as if the parties were a joint family and not entitled to separate possession. This in itself, however, would be no ground for treating the deed of gift as procured by deliberate fraud on the part of Baijnath, nor do I think it necessarily follows from the unsatisfactory state in which the evidence was left, that the debt of Rs. 1,600 said to be due to his wife was a fictitious transaction. These matters greatly influenced the learned Judge in coming to a conclusion in favour of the respondents. Another matter, and one about which the learned Judge appears to have been in error, also influenced him in arriving at his conclusions. It appears that a copy of Register D showing the transmutation of names in respect of all the villages of the estate was put in evidence at the trial. From this the learned Judge considered that the villages granted to the plaintiffs had been entered in the names of Baijnath's sons. This does not appear to be the case, however, upon reference to the document in question. Another reason which influenced the learned Judge in arriving at his conclusion was, that some of the appellants' witnesses in giving details of the wish expressed by Raghunath during his life-time to divide his property amongst his grandsons had mentioned the name of Tilakdhari as one of them. The learned Judge appears to have been under the impression that Tilakdhari was not born until after Raghunath's death. In this respect, however, the learned Judge was in error, as Tilakdhari was born in February 1907, some five months before,

his grandfather's death as appears from Exhibit 9, the petition for obtaining certificate of guardianship, and he was born in his grandfather's house. The learned Judge's mistake arises apparently from a passage in Baijnath's evidence in which he stated that he did not recollect the month or year of Tilakdhari's birth but that it was about a year after Asrar (June) in which his wife and children came to Barauna. As a matter of fact it was about 8 months later, assuming that his wife and children went there in June.

Three of the attesting witnesses to the document of 1903 as well as the scribe were called. Lachman Lal, one of the witnesses, who was a *mutsaddi* in the family, deposed that the draft was prepared by the Pleader Narsingh Sahai after consulting Bhagela Kuer, and that the draft was read out to and approved by her, that a fair copy was afterwards made by the scribe and was also read out and explained to Bhagela Kuer in his presence and that he and other witnesses attested it at Bhagela Kuer's request. This witness also gave some evidence as to what happened before the Sub-Registrar when the deed was executed. He also states that Bhagela Kuer told the Pleader what her husband's wishes had been and that the draft was prepared accordingly. He deposed in detail to various facts to which I have referred earlier and upon which the appellants rely. He was confronted with an account-book of his own from which it would appear that he was not at Baranna on the day the document was registered and in stating what took place before the Sub-Registrar he must have been drawing on his imagination. The account book in question shows that certain fees were paid to Narsingh Sahai, the Pleader who drafted the *hibanama*, and to this extent it corroborates the appellants' story as to Narsing Sahai's part in the matter. This witness like many others of his class appears to have been prepared to give evidence beyond that which his recollection justified. Mahadeo Sahu, a *Deorhi* servant of the family and an attesting witness, also speak to the execution of the document and the reading out and explanation of it to the executant. His impression was that no property had been given under the *hibanama* to Dharamraj Kuer and he says that if she acquired anything it would not be in accordance with the directions of Raghunath, her father. He also says that at the time of reading over the document, paragraph 6 which related to the gift to Dharamraj and her children was not explained in his hearing but that both the draft and the fair copy were read out in his presence. Deoki Tewari, another witness, says he became a witness to the document on the day it was registered and when the Sub-Registrar was present, and that the other witnesses were also present but he does not say that they signed it at that time Sham Saran Lal, the scribe, says he read and explained the contents to the executant. He says he read out the document to her on two occasions, once before copying it fair, and the second time at the time of registration, and that the witnesses put their signatures on the document the day he copied it fair. He further says that the *Musammat's* name was written on it by Pradhan Ajodhya Prasad on the day the document was registered and on being asked by the Court he stated positively that Pradhanji wrote the name of the *Musammat* on the margin inside the document on the day of registration before the Sub-Registrar, that he did not write the name anywhere else on that day before the Sub-Registrar. From the document itself it appears that the name of Bhagela Kuer was written three times by the pen of Pradhan Ajodhya Prasad, once at the alleged time of execution on the 7th January where the name appears in the margin and twice on the back at the time of registration on the 12th January. The first of the latter signatures is apparently to show that it was presented by her at her residence for registration and the second one to show that execution was admitted by her after identification by Bhuneshwar Singh. It also contains her thumb impression at the back. The fourth attesting witness was not called.

From this evidence it seems clear that Deoki Tewari, one of the witnesses, did not sign until the day of registration and it is not unlikely that Ambika Prasad Tewari who has not been called also signed the document on that day. It is obvious from

the document itself that a good deal of the scribe's evidence cannot be accepted as the document appears to have been signed by Adjodhya Prasad twice at the time of registration on the back, although the scribe himself says that on that day Ajodhya Prasad wrote the name of the *Musammat* on the margin inside the document and nowhere else. The fact that one, at all events, and perhaps two, of the attesting witnesses did not sign it until the day of registration would account for his evidence where he says that the witness signed it on that day. From the evidence of Lachman Lal and Mahadeo Sahu, the other two attesting witnesses, it would appear that they did sign it before the *Musammat* at the time of execution on the 7th January and this is the conclusion at which I have arrived after considering the evidence. The learned Subordinate Judge does not appear to have dealt with this aspect of the case and probably it was not forcibly drawn to his attention but he rejected the evidence of these witnesses as to the document being read over and explained to Bhagela Kuer. His reasons for arriving at this conclusion and discarding the whole of the appellants' evidence were, as I have already pointed out, based to some extent upon a misapprehension of the effect of the evidence, and although the appellants' witnesses gave evidence, which might not have commended itself to the learned Subordinate Judge, the evidence on behalf of the respondents seems equally open to criticism. There can be no doubt that witnesses of this class frequently attempt to bolster up their case, even when it would appear unnecessary to do so, by deposing to facts which happened many years ago by drawing upon their imagination and what they have learnt from others. But having regard to all the probabilities of the case I feel utterly unable to believe that *Musammat* Bhagela Kuer was unaware of the contents of the document which she executed in 1908. What was done by Baijnath Singh on that occasion was done without any attempt at concealment so far as the other persons were concerned. The document was registered and the names of the transferees were entered in the Registration Department. Bhagela Kuer herself was constituted the guardian of the property of her minor grandsons under the control of the District Judge. Apparently within a very short time everybody, except the lady herself, was well aware of how the property had been disposed of and a few months after the transaction we find one of the *gotias* objecting to the registration and endeavouring to obtain possession of the estate on the ground that he was an adopted son of Raghunath. On that occasion the transfer in favour of the appellants was produced and proved in open Court and when everybody else must have known about it it is impossible to believe that Bhagela Kuer alone remained in ignorance. I am further satisfied by Mr. Christian's evidence that she was aware of her grandson's interest in the property and if in fact the gift of 1908 was properly attested by two witnesses and I think it was, it follows that the later disposition of the property in 1917 must fail.

There is another matter which is not without significance in assisting one to come to a conclusion as to the knowledge of Bhagela Kuer of the contents of the earlier gift. The Pleader Narsingh Sahai, who was alleged by the appellants to have prepared the draft on her instructions, was briefed in the case on behalf of the respondents, although he was not the Senior Pleader and does not appear to have taken a leading part at the trial. As he had been engaged on behalf of the respondents, the appellants not unnaturally refrained from calling him as a witness. His evidence as to the instructions he received from Bhagela Kuer and the preparation of the draft would have been of the greatest assistance to the Court and would practically have settled the dispute as to Bhagela Kuer's knowledge of the contents of the deed. I cannot help regretting that the learned Subordinate Judge did not insist upon this witness being called to give evidence. There was perhaps some excuse for the appellants' failure to call him but I can see no reason why the respondents should not have put him in the witness-box if his evidence could support their case. It is impossible to believe that they did not ask him about it and their failure to call him as a witness is not without significance.

There is, however, a further point taken by the appellants before us in this appeal which is fatal to the respondents' case. The document of 1917 relied upon by them, although it purports to be a sale, is, in my opinion

undoubtedly a gift as no consideration passed or was ever intended to. It, therefore, required to be attested by at least two witnesses under section 123 of the Transfer of Property Act. Such attestation can only be effectually performed by those who are actually present at the execution of the document, and an attestation made merely on the acknowledgment of the executant is not a compliance with the section. After some difference of opinion in the Courts in India upon this question it was finally set at rest by the decision of the Privy Council in *Shamu Patter* v. *Abdul Kadir* (1), in the sense which I have just indicated. Again in *Ganga Pershad Singh* v. *Ishri Pershad Singh* (2) the actual witnessing of the signature of the executant was insisted on. In the document relied on by the respondents the attestation by each of the attesting witnesses is said to be on admission by the executant and none of the attesting witnesses was called to prove the document as required by section 68 of the Indian Evidence Act. It appears, however, that this document was admitted without objection at the trial. It was contended on behalf of the appellants that, even so, it could not be received in evidence unless one at least of the attesting witnesses was called to prove it, and the recent case of *Shib Chandra Singha* [*Sudhanya Kumar Singha*] v. *Gour Chandra Pal* (3) was relied on in support of this contention. I am not prepared, however, to go to the length of that case. It seems to me that, formal proof of a document even when it is required to be proved in a certain way may be waived by any of the parties whose interests it may affect, and this seems to me to be in accordance with section 58 of the Evidence Act. But, although proof of the document may be waived this does not affect the legal character of the document or its validity as a gift. As in the case of the mortgages under section 59 of the Transfer of Property Act so in the case of gifts of immoveable property, under section 123 of that Act, they can only be effected by a registered instrument signed by the mortgagor or the donor and attested by at least two witnesses. As already pointed out, their Lordships of the Privy Council have decided that under section 59 which in this respect is couched in similar terms to section 123, attestation, to be valid, must be an attestation of the execution of the document seen by the attestor and not merely an attestation of the executant's acknowledgment or admission of its execution. The attestation in the present case is merely of the executant's admission of its execution and there is no evidence on the record that any of the witnesses were present and saw the execution of the document. It is true that no direct issue upon this point was specifically taken in the written statement or framed at the trial and no argument appears from the judgment of the learned Subordinate Judge to have been addressed to him upon this question. It was, therefore, urged that we should not allow the point to be taken at this late stage or at least that we should remand the case for a finding upon an issue specially framed giving leave to the parties to call evidence as to whether the witnesses were actually present and witnessed the execution. In *Shamu Patter* v. *Abdul Kadir* (1), already referred to, a somewhat similar situation arose. The question for decision there was under section 59 of the Transfer of Property Act. No direct issue upon the point was taken in the pleadings nor was the issue raised at the trial but the Trial Judge after the evidence had been taken and after the arguments were concluded framed a special issue and decided the case upon it. Their Lordships held that this was permissible under section 149 of the Civil Procedure Code of 1882 corresponding to O. XIV, r. 5 of the present Code, and further stated that even had there been no such express provision in the Code every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties. In *Ganga Pershad Singh* v. *Ishri Pershad Singh* (2) again the precise point was not raised in the pleadings nor in the issues framed at the trial but arose incidentally in connection with an issue framed relating to limitation. In both those cases an application to

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C. W.N. 1009; 23 M. L. J. 821; 12 M. L. T. 388; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(2) 45 Ind Cas. 1; 45 C. 748; 4 P. L. W. 349; 16 A. L. J. 409; 34 M. L. J. 545; 27 C. L. J. 548; 22 C. W. N. 697; 20 Bom. L. R. 587; 23 M. L. T. 388; (1918) M. W. N. 382; 8 L. W. 176; 45 I. A. 94 (P. C.).

(3) 68 Ind. Cas. 86; 35 C. L. J. 473.

remand the case for further evidence was rejected. In the present case both in the pleadings and in the issues framed before the trial the validity of the document of 1917 was challenged and it was for the respondents, as plaintiffs, to satisfy the Court as to its validity. At an early stage of the trial during the cross-examination of the plaintiffs' father-in law, who was their first witness, questions were asked as to whether the attesting witnesses were present to give evidence. It was admitted that they were not and no attempt was afterwards made to procure their attendance. After the evidence closed it would certainly have been open to the appellants' Pleader to have argued that the document was not properly attested and, therefore, invalid. It is true there was no argument on the question before the Trial Court but neither was there in *Shamu Patter's case* (1) and the mere fact that the Trial Court did not itself decide this point does not preclude us from doing so. I had some doubt during the argument as to whether we should remand the case to the Court of the Subordinate Judge framing an issue for him to determine upon further evidence. In my opinion it would be useless for us to do so. The attestation of the witnesses purports to be on the admission of the executant and even should one or more of the attesting witnesses be called and depose that the document was executed in their presence such evidence would be open to the gravest suspicion in face of the document itself. The attestation of a witness on the acknowledgment or admission of the executant of the document is permissible in the case of Wills and the expression is well understood in this country. It is hardly conceivable that those whose interest it is to get the document attested would take the signatures of witnesses upon the acknowledgment of the executant only if the witnesses had in fact been present at its execution. The respondents, whose attention was called to the absence of the attesting witnesses, had every opportunity of proving, if they could have proved it, that the document which purported to be attested merely on the admission of the executant was in fact signed by the executant in the presence of the witnesses. They have refrained from giving evidence upon this essential point in the case and, in my opinion, should not now be allowed to endeavour to prove a case which is in conflict with the document itself.

A further point was taken on behalf of the appellants which, in view of the findings arrived at, it is not necessary to decide, *viz*, that the deed of gift of 1908 was not void but voidable only and must be treated as valid until set aside in a suit properly framed for that purpose. If the gift were merely voidable it could only be set aside at the option of Bhagela Kuer and she could not transfer her right to sue for this purpose. The point was argued before us and I may state my opinion upon it shortly. Section 19 of the Contract Act was relied on. That section provides that when consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is a contract voidable at the option of the party whose consent was so caused and by section 126 of the Transfer of Property Act it is provided that a gift may also be revoked in any of the cases "save one of failure of consideration" in which, if it were a contract, it might be rescinded. I agree that if this were a voidable contract and not void *ab initio* it would have to be set aside before a suit for possession could be maintained, and further that Bhagela Kuer could not transfer the mere right to sue but the answer to the appellants' argument appears to me to be that, if the facts alleged by the respondents should be made out, there was never any consent at all to the gift within the meaning of section 19 of the Indian Contract Act, and although Bhagela Kuer may have permitted her signature to be written on the document in question she never in fact consented thereto. This, I think, is the effect of the well known rule laid down in *Foster* v. *Mackinnon* (4).

Although, in my opinion, this point should be decided against the appellants it follows on the earlier findings arrived at that the appeal should be allowed, the judgment and decree of the Officiating Subordinate Judge should be set aside, and the suit dismissed with costs, here and in the Court below.

MULLICK, J.—I agree.

W. C. A. *Appeal dismissed.*

(4) (1869) 4 C. P. 704, 38 L. J. C. P. 310; 20 L. T. 887; 17 W. R. 1105.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 573 OF 1921.

July 31, 1922.

Present:—Mr Battan, J. C.

Lala BEHARI LAL—PLAINTIFF—APPELLANT

versus

Musammat ACHRAJ KUNWAR—DEFENDANT—RESPONDENT.

Hindu Law—Concubine—Right of residence—Maintenance.

Under the Hindu Law, the concubine of a deceased Hindu has no right of residence in a co-parcenary house, but the person who succeeds to the house is bound to maintain her, the amount of the maintenance being a charge upon the house.

Appeal against a decree of the District Judge, Hoshangabad, dated the 29th July 1921 in Civil Appeal No. 54 of 1921.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *J. Sen*, for the Respondent.

JUDGMENT.—In this case the plaintiff has succeeded as heir to a house that was purchased by his cousin, the deceased Ramcharanlal. At the time of Ramcharanlal's death the defendant-respondent, *Musammat* Achraj Kunwar, was living in the house. She is not the widow of Ramcharanlal but his concubine, and it has been found that she has been for many years his concubine and was his permanent concubine at the time of his death.

The plaintiff sues to eject the defendant from the house. The First Court decreed that the plaintiff was entitled to inherit the house but could not eject the defendant during her lifetime as she was entitled to maintenance and residence in the house. This decree was confirmed in appeal by the District Judge.

The plaintiff in appeal does not deny the defendant's right to maintenance to the extent of the property inherited by him from Rameharanlal, so that the question as to whether or not, in these Provinces, the defendant, as a permanent concubine, is entitled to maintenance does not arise in this appeal. The appellant, however, disputes the right of the defendant to be kept as the sole resident or resident of the house. No case has been shown to me by the learned Pleader for the respondent in which a concubine has been given the full rights of residence which are allowed to a Hindu widow in a co-parcenary to

reside in the family house. The case appears to be on all fours with the case reported in *Ningareddi* v. *Lakshmawa* (1) and *Vrandavandas Ramdas* v. *Yamuna Bai* (2). It was held there that a concubine has no right of residence in the house, as the person who had succeeded to the house was bound to maintain the woman to the extent of the property he received by inheritance it was ordered that, before he was given possession, provision should be made for her maintenance. A similar course may be adopted in this case. During Rameharanlal's lifetime his concubine could not have occupied the whole of his house and it cannot, therefore, be said that her right of maintenance corresponds to the full value of the house. There is no finding and there has been no inquiry as to what amount of maintenance she is entitled to. This inquiry should now be made, the amount of her maintenance should be fixed and should be made a charge upon the house. On this being done, the plaintiff should be given a decree for possession of the house subject to the above charge. The parties will bear their own costs in this Court.

W. C. A. *Order accordingly.*

(1) 26 B. 163: 3 Bom. L. R. 647.
(2) 12 B. H. C. R. 229.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 232 AND 233 OF 1919.

August 3, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

Maharaja KESHO PRASAD SINGH BAHADUR—PLAINTIFF—APPELLANT

versus

CHANDRIKA PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Alienation, validity of—Reversionary heir, rights of—Consent of immediate reversioner—More remote reversioners, right of, to impugn alienation—Inaction of reversioner, effect of—Gift by Hindu widow, validity of, against reversioner—Zarpeshgi—Lease or mortgage.

A sale or mortgage by a Hindu widow which purports to pass or hypothecate the absolute title is valid against everyone except the reversioners and unless the reversioners elect to treat it as a

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nullity it subsists as against every one else. [p. 398, col. 2.]

A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may, at his pleasure, treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. [p. 398, col. 2; p. 399, col. 1.]

The consent of the immediate reversioner to a gift by a Hindu widow does not bar the right of a more remote reversioner to challenge the transaction. [p. 399, cols. 1 & 2.]

Bakhtawar v. *Bhagwana*, 5 Ind. Cas. 270; 32 A. 176; 7 A. L. J. 125, *Ramphal Rai* v. *Tula Kuari*, 6 A. 116; A. W. N. (1883) 243; 3 Ind. Dec. (N. s.) 707, *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*, 30 A. 1; 9 Bom. L. R. 1348; 12 C. W. N. 74; 17 M. L. J. 605; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 3 M. L. T. 1; 11 O. C. 78 (P. C.), referred to.

A gift of the whole of her husband's property made by a Hindu widow, not challenged by the reversioners during her lifetime and acquiesced in by those who would take a vested interest after her death, can be challenged by the reversioners alone and by no one else. If they choose not to challenge it, and the donee remains in possession under a claim of right for 12 years, he will acquire an indefeasible title even against the reversioners. [p. 399, col. 2; p. 400, col. 1.]

In considering the validity, as against the reversioner, of a gift by a Hindu widow, the true view is that it is not binding upon him and he can elect to treat it as a nullity and sue for possession at any time within 12 years of his interest becoming vested without first suing to have the gift set aside, notwithstanding Art. 91 of the Limitation Act. He may, on the other hand, elect to treat it as valid but no third person can claim this option or set up the plea that such a gift is void merely because it may have been but was not so treated by the reversioner [p. 400, col. 1.]

In determining whether a *zarpeshgi* is a lease or a mortgage, the test is whether there is a secured debt and a right to redeem, if there is, the transaction has the essential characteristics of a mortgage, otherwise it is a lease. [p. 400, col. 2.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *K. Sahai* and *N. N. Sinha*, for the Appellant.

Messrs. *S. M. Mullick*, *H. Sahai*, *S. Saran* and *S. S. Lal*, for the Respondents.

JUDGMENT.

MILLER, C. J.—These appeals arise out of two suits, numbered 3 and 8 of 1914, which were tried before the Subordinate Judge of Shahabad. They were instituted by the appellant, as plaintiff, claiming to redeem two *zarpeshgi* mortgages or leases of Mauzas Singhanpura and Magazpura respectively of which he claims to be proprietor to the extent of two-thirds of the interest. The proprietors of the other one third share are some of the defendants in the suit. Amongst the defendants are also the representatives of the original *zarpeshgidars* who have acquired their interest either by survivorship or purchase from those interested. The villages in question formerly belonged to Sheo Dayal Singh who died childless many years ago leaving two widows who succeeded to his estate. The elder of the two died in 1872 leaving the younger, Bahuria Rikeba Kuer, in sole possession of the estate. On the 11th October 1875 Rikeba Kuer executed a deed of gift of the two villages in question, together with other property formerly belonging to her husband, in favour of Sheo Lochan Singh, a relative of her deceased husband who had lived with, and been brought up by her since infancy. The plaintiff's interest in the two-thirds share of the two villages in question is derived by purchase from Sheo Lochan Singh under a deed of sale dated the 11th April 1890. The gift by Rikeba Kuer to Sheo Lochan appears to have been made with the sanction and approval of most, if not all, of the members of the family. It is further stated in the plaint and in the verbal evidence that two of the three reversioners of Sheo Dayal Singh, namely, Thakur Dayal Singh and Raj Nath Singh, executed a deed of relinquishment of their shares of the inheritance in favour of Sheo Lochan in the year 1877 during the widow's lifetime. This deed, however, was not produced and was not strictly proved. However that may be, it is not disputed that from the time when Rikeba made the gift in 1877 up to the present moment, neither of the two reversioners named whose interest vested on Rikeba Kuer's death in 1880 has made any attempt to dispossess Sheo Lochan or the plaintiff who claims through him, and it is too late now to question the validity of the gift to Sheo Lochan to the extent of the two-thirds share in the estate.

The third reversioners, however, Saheb Singh, insisted upon enforcing his right to a third share in the property and for this purpose brought a suit against Sheo Lochan for possession of his third share

together with mesne profits which was finally determined in his favour on appeal to His Majesty in Council. The decree so obtained by Saheb Singh was eventually executed by his grandsons, Lachmi Prasad Singh and Chandrika Prasad Singh, after his death and they obtained possession of the respective properties awarded to them under the decree. The two villages mentioned were, however, subject to the *zarpeshgi* mortgages or leases, the subject of this suit. These *zarpeshgis* had in fact been in existance since 1873, that is before the gift of 1875 to Sheo Lochan, and were granted by Rikeba Kuer to the *zarpeshgidars*. Accordingly the gift to Sheo Lochan in 1875 was subject to these *zerpeshgis* as also is the plaintiff's interest derived from Sheo Lochan. That relating to Singhanpura is dated the 8th July 1873 and was granted to Lal Biswesswar Dayal, Jaiprakash Lal and Beni Prasad whose grandsons now represent them, being the defendants Nos. 5 to 9 in Suit No. 2 of 1919, one of those now under appeal. It recites that the executant has let out in *ijara* to the *zarpeshgidars* at the annual rental of Rs. 483 the entire 16 annas of Mauza Singhaunura for a term of 9 years from 1281 to 1289 F. (corresponding to 1873 to 1882) and that she has taken from the lessees Rs. 3,701 bearing interest at 1 per cent. per month, and it provides that the *zarpeshgidars* should deduct from the annual rent Rs. 444 on account of interest on the *zarpeshgi* and pay the balance, Rs. 39, to the executant her heirs and representatives. It provides also that the executant shall not pay off the *zarpeshgi* for 9 years, the terms fixed for the lease, and if she fails to pay the *zarpeshgi* in one lump sum by the end of the terms the *ijara* settlement shall stand good and remain in force as it is and when she shall pay off the *zarpeshgi* by the end of Joyth in any year the *ijara* shall be cancelled.

That relating to Magazpura was of similar import. It is dated the 30th June 1873 and related to Magazpura and one other village called Gharbair. The rental in this case was Rs. 852 and the term was for 15 years from 1281 to 1295 F. The *zerpeshgi* money advanced was Rs. 6,750 and the interest at 1 per cent. per month amounting to Rs. 810 was to be deducted from the rent by the *zarpeshgidars* and the balance of Rs. 42 was to be paid annually to the executant. The *zarpeshgidars* in this case were Thakur Singh, Dabi Dayal Singh and Sham Behari Singh, who are now represented by their descendants, the defendants Nos. 4 to 11 in Suit No. 3 of 1919, the defendants Nos. 1 to 3 in that suit being purchasers from the other defendants.

After obtaining their decree in the Privy Council and after the death of Saheb Singh his grandsons, Lachmi Prasad and Chandrika Prasad Singh, also instituted suits against the *zarpeshgidars* of both villages for a declaration that the *zarpeshgis* were not binding upon their grandfather, Saheb Singh, to the extent of his one-third share and for possession and mesne profits. In these suits they were successful and got the *zarpeshgis* annulled as to their third share and obtained possession in or about the year 1894. In 1898 they also acquired the remaining two-thirds interest in the *zarpeshgi* of Magazpura at a sale in execution of a decree against the *zarpeshgidars*. It is further the case of the plaintiff that Lachmi and Chandrika also acquired out of the remaining two-thirds share in the *zarpeshgi* of Singhanpura the interest of Beni Prasad, one of the *zarpeshgidars*, from his grandson and representative Ambika Prasad, the defendant No. 9 in Suit No. 3. This is denied by the defendants Nos. 1 to 3. Lachmi Prasad Singh died before the present suits were instituted but Chandrika, the defendant No. 1 in both suits and the defendants Nos. 2 and 3 in both suits, with whom he was joint in estate, are his legal representatives. It would appear, therefore, that the whole body of *zarpeshgidars* are represented as defendants in the suits whether the interest of Beni Prasad Singh was transferred to Lachmi and Chandrika or not, the representatives of the other *zarpeshgidars*, Lal Biswesswar Dayal and Lal Jaiprakash Lalla being the defendants Nos. 4 to 7 in Suit No. 3. It was contended, however, by the defendants Nos. 1 to 3 that Beni Prasad's interest in Singhanpura was purchased by one Janki Prasad Singh and that as he is not a party the suit for redemption is bad for non-joinder. Janki is admittedly a near relation of Chandrika, the first defendant, and it is suggested that if Beni Prasad's share was purchased in the name of Janki it was a *benami* transaction on behalf of

Chandrika and his co sharers. The only point about which we can be certain is that Chandrika has been in possession all along. No document has been produced showing the alleged sale. Verbal evidence as to the sale is conflicting and unsatisactory on both sides and it is impossible to say whether Beni Parasad's interest has been transferred at all. The probabilities point in favour of the plaintiff's version as the defendant Chandrika has been in possession. It is unnecessary to decide this point because it is clear that for much more than 12 years before the suit was instituted the defendants Nos. 1 to 3 have been in possession of Beni Prasad's interest which was that of a *zarpeshgidar* and have acquired an indefeasible title thereto. They must accordingly be regarded as such.

The learned Subordinate Judge who tried the suit dismissed it upon various grounds. He considered that the *zarpeshgi* deeds having been declared, by a Court of competent jurisdiction, invalid as against the reversioner, Saheb Singh, as they were executed by Rikeba Kuer without legal necessity, they must be considered invalid for all purposes. He further held, by a chain of reasoning, which I am unable to follow, that the conveyance to the plaintiff by Sheo Lochan in 1890 of the two-thirds interest in the *Mauzas* did not convey the right to redeem the mortgages. The deed purports to transfer "all *zemindari* rights appertaining to the said *mahals*, save and except those prohibited by Government, and all arrears due from tenants and *ticcadars* of the said *mahals* up to this day, together with the decrees passed by the Court, the *kasht* lands, orchards and houses purchased at auction-sale by me (the vendor) in satisfaction of my decrees, as also the houses and orchards situate in the said *mahals*, etc. etc., as per boundaries given below." The learned Judge apparently interpreted the words "and all arrears due from tenants and *ticcadars* of the said *mahals* up to this day" as being governed by the words "save and except" which from the context would not appear to be justified, but even assuming the arrears of rent, etc., from tenants and *ticcadars* up to the date of sale were excluded I am unable to follow his reason for holding that the right of redemption would not pass with the proprietary interest to the purchaser. The learned Judge said that the words quoted were a clear indication that the right now claimed was never meant to be conveyed. He further considered that the conveyance to the plaintiff by Sheo Lochan was a sham transaction. He based this conclusion upon certain remarks appearing in a judgment of the District Judge of Shahabad in 1895 in which the present plaintiff was appellant and one Nand Lal Sahu, a creditor of Sheo Lochan, who held a decree against the latter at the date of the sale, was the respondent. The question for decision was apparently whether the sale to the Maharaja who had undertaken to pay off Sheo Lochan's creditors out of the purchase money, the bulk of which was retained for that purpose, had undertaken to pay Nand Lal Sahu, and, if not, whether the sale was made to defeat Sheo Lochan's creditors. It was found in that case that Nand Lal had an express promise from the Maharaja to pay off his debt and apparently had taken no steps to execute his decree at the time of the purchase and further that the purchase was not made in good faith. If I have rightly appreciated that judgment it was based upon an estoppel arising from the conduct of the Maharaja which induced Nand Lal to forego the enforcement of his decree against the estate of Sheo Lochan in course of transfer, with an alternative finding that if the creditors were defeated the purchase was not in good faith. There are no facts proved, however, in the present case upon which such a finding can be arrived at, nor would it be open to the respondents to raise such a plea. These matters, however, need not be discussed further, as the learned Vakil for the respondents admits that he cannot support the judgment on the ground that the sale by Sheo Lochan to the appellant was to defeat creditors or that the conveyance did not pass the right of redemption of the *zarpeshgi*. It is contended, however, that the gift to Sheo Lochan himself by Rikeba Kuer passed no interest continuing beyond the lifetime of that lady. This question will be considered presently.

The learned Judge also found that the *zarpeshgis* were not mortgages but leases and that the most that could be claimed against the lessees would be three years' rent,

He did not consider the terms upon which the leases could be redeemed but his previous findings made this unnecessary. He also thought that Suit No. 3 relating to Singhanpura was bad for non-joinder of Janki, to whom reference has already been made. He fell into an extraordinary error in this respect. He said "Exhibit E shows that one Janki purchased certain *zarpeshgi* interest in 1898. The plaintiff cannot under the law (section 66, Civil Procedure Code) be allowed to assert that this Court-sale was *farzi* and the real beneficiaries were the defendants Nos. 1 to 3." Exhibit E. is a certified copy of a sale certificate of the *zarpeshgi* interest not in Singhanpura but in Magazpura which was purchased by Chandrika Prasad Singh, the defendant No. 1 in execution of a decree held by him against the deceedants of the original *zarpeshgidar*. In addition to the signature of the Subordinate Judge the certificate also bears the signature of the *sherestadar* of the Court which granted it and his name happens to be Janki Sinha. The learned Judge apparently mistook this for the name of the purchaser. He seems to have misapprehended at the same time both the meaning of the certificate and the scope of section 66 of the Civil Procedure Code.

The respondents place little or no reliance upon the reasons given by the learned Subordinate Judge for his findings but contend that the conclusions arrived at can be supported upon other grounds. Their first contention is that Suit No. 3 of 1919 relating to Singhanpura is bad for defect of parties. They contend that the defendants Nos. 1 to 3 never purchased the interest of Beni Prasad, one of the *zarpeshgidars*, from his grandson, the defendant No. 9 in that suit, but that one Janki Singh, not the *sherishtadar* of the Subordinate Judge of Arrab, but another person of the same or a similar name, was the real purchaser. The evidence of this transaction is altogether unsatisfactory and cannot be accepted and, in my opinion, does not prove that Janki was the purchaser. It is admitted, however, that Janki, if indeed he purchased, never got possession of the purchased property but that Chandrika, the first defendant, and his co-sharer, the second and third defendants, took and retained possession of this share. They were well aware of the *zarpeshgi*, as they themselves had it set aside as to the third share of which they were proprietors through their ancestor, Sahab Singh. They have admittedly collected the rents ever since in the capacity of *zarpeshgidars*. It was faintly suggested in the course of argument that their possession was adverse to that of the plaintiff but there is nothing to show that they ever asserted a right as proprietors which would be adverse to that of the plaintiff and the right they have acquired either by purchase or long possession must be treated as that of *zarpeshgidars*. I have already stated that, in my opinion, the defendants Nos. 1 to 3 have acquired the *zarpeshgi* rights in Beni Prasad's share and the suit is, therefore, not bad for defect of parties.

It is next contended by the respondents that the interest of the plaintiff's vendor, Sheo Lochan, although valid during the lifetime of Rikeba Kuer, terminated on the death of that lady, notwithstanding that the reversioners of the two thirds share have never, from the year 1880 when Rikeba Kuer died up to the present, elected to treat the transfer as void. It is not disputed that a sale or mortgage by Hindu widow which purports to pass or hypothecate the absolute title is valid against every one except the reversioners and that unless the reversioners elect to treat it as a nullity it subsists as against everyone else. In the present case the gift as to the two-third share was never challenged by the reversioners interested in that share. It is argued, however, that a gift stands on a different footing from a sale or mortgage and certain authorities have been relied on in support of this contention. The general rule is clearly laid down by Lord Davey in delivering the judgment of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1). A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its

(1) 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 502; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 323; 34 I. A. 87 (P. C.).

devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may, at his pleasure, treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. The alienation in question in that case was an *ijara* lease but there is nothing in the judgment to suggest that any other form of alienation would not come within the doctrine applied, and it is difficult to see upon what principle a distinction can be drawn between a gift and any other form of transfer.

In *Bakhtawar* v. *Bhagwana* (2), which was relied on by the respondents, the question for decision was whether a gift made by a Hindu widow with the consent of the immediate reversioner could be impeached by a more remote reversioner. The High Court at Allahabad held that it could. They drew a distinction between a gift and other forms of alienation and held that the earlier decision of the Full Bench of the Allahabad High Court in *Ramphal Rai* v. *Tula Kuari* (3), had not been overruled by the decision of the Judicial Committee in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4). The restrictions on alienation laid down by the Full Bench of the Allahabad High Court in *Ramphal Rai* v. *Tula Kuari* (3), had been dissented from by their Lordships in the case last mentioned. It is unnecessary, however, to express an opinion upon the authority of the two cases decided by the Allahabad High Court, for, assuming that they were rightly decided, they go no further than this that the consent of the immediate reversioner to a gift by a Hindu widow does not bar the right of a more remote reversioner to challenge the transaction. They do not afford any authority for the proposition now contended for that such a gift is void beyond the lifetime of the widow even if it remains unchallenged by any of the reversioners during her lifetime or after her death. In the later case of *Abdulla* v. *Ram Lal* (5) decided in 1911 the ruling in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4), was again discussed by the Allahabad High Court. The view there taken was that the consent of the immediate reversioners to an alienation by a Hindu widow was merely evidence from which legal necessity could be presumed, and unless rebutted it would bind the more remote reversioners. The consent raising such a presumption must necessarily be limited to transfers for consideration. It could not be extended to gifts where there was no room for the theory of legal necessity. This also was the view expressed by the Bombay High Court in 1909 in the case of *Pilu Appa Nalwade* v. *Babaji Naru Mang* (6). The whole subject of the powers of a Hindu widow to deal with her deceased husband's property was discussed by their Lordships of the Judicial Committee in 1918 in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (7), and the result of the decided cases was there summarised. A distinction is drawn between a surrender of the widow's interest in the whole estate in favour of the nearest reversioner, where the question of necessity does not fall to be considered, and the case of an alienation of the whole or a part of the estate where the consent of such reversioners as might fairly be expected to be interested to dispute the transaction will afford presumptive proof of its validity. None of these cases, however, in my opinion, form a guide to the determination of the exact question we are now called upon to decide. It is not a question between presumptive and remote reversioners. The question is, whether a gift of the whole of her husband's property made by a Hindu widow, not challenged by the reversioners during her lifetime and acquiesced in by those who would take a vested interest after her death

(2) 5 Ind. Cas. 270; 32 A. 176; 7 A. L. J. 121.
(3) 6 A. 116; A. W. N. (1883) 243; 3 Ind. Dec. (N. S.) 707.
(4) 30 A. 1; 9 Rom L. R. 1348; 12 C. W. N. 74; 17 M. L. J. 605; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 8 M. L. T. 1; 11 O. C. 78, (P. C.).

(5) 12 Ind. Cas. 601; 34 A. 129; 8 A. L. J. 1318.
(6) 4 Ind. Cas. 584; 11 Bom. L. R. 1291; 34 B. 165.
(7) 50 Ind. Cas. 493; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536 29 C. L. J. 539 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

can be challenged by any one else. In my opinion, there can be only one answer to this question. It is the reversioners and the reversioners alone who can dispute the gift. If they choose to allow the property to which they are entitled, to remain in the possession of the donee that is their affair and no one else can object. If the donee remains in possession under a claim of a right for 12 years he will acquire an indefeasible title even against the reversioner. There are certain cases, however, which have been drawn to our attention where expressions have been used to the effect that a gift by a Hindu widow is void and not merely voidable on her death. *Nabakrishna Roy* v. *Hem Lal Roy* (8), is an instance amongst others which need not be discussed in detail in which such expressions occur. In all those cases the question was one of the rights of reversioners and in most of them the point arose in connection with limitation where it was contended that the alienation must first be set aside before the reversioner could sue for possession. Such expressions must be regarded in connection with the context and the subject-matter of the suit. It is, in a sense, permissible, though perhaps not strictly accurate, to say that the gift is void when considering its validity as against the reversioner. He may treat it as a nullity and need not sue to have it set aside before claiming possession. The true view appears to be that it is not binding upon him and he can elect to treat it as a nullity and sue for possession at any time within 12 years of his interest becoming vested without first suing to have it set aside notwithstanding Art. 91 of the Limitation Act. He may, on the other hand, elect to treat it as valid but no third person can claim this option or set up the plea that such a gift is void merely because it may have been but was not so treated by the reversioner. The judgment of the Calcutta High Court in *Kishori Pal* v. *Bhushai Bhuiya* (9) is, I think, an authority for this view. In my opinion the respondents' plea that the gift was void cannot be supported.

The next question to be determined is, whether the *zarpeshgis* which it is sought to redeem are mortgages or leases. Certain cases have been cited during the argument upon this question. I do not propose to go through them in detail. I think the result of the authorities as well as of the text books is that the test in such cases must be whether there is a secured debt and a right of redemption. In a *zarpeshgi* lease properly so called there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may re-enter as on the termination on any other lease. The re-entry does not depend upon the re-payment of the advance nor can the property be held after the determination of the lease to secure re payment as there is nothing to re pay. The transaction is really one in which rent is paid in a lump sum in advance instead of by instalments during the term. Where, however, the interest created in the lessee continues after the expiration of the term until the advance, which is essentially a loan and not an advance of rent, is re-paid, the transaction, in my opinion, has the essential characteristics of a mortgage. It is the mortgage of a leasehold interest in the land and can be redeemed by the mortgagee upon re-payment of the advance with interest, if any is due, upon the termination of the lease, or at any time thereafter within the limitation period, just as in the case of any other mortgage, the leasehold interest in such a case being held as security for re-payment.

In my opinion, the appeals should be allowed with costs here and in the Trial Court and a decree should be passed in favour of the appellant declaring him entitled to redeem the two-thirds share of the properties in suit upon payment of whatever may be found due upon an account being taken between the parties. The suits will be remitted to the Court of the Subordinate Judge of Arrah for the taking of the account.

MULLICK, J.—I agree.

W. C. A. *Appeals allowed.*

(8) 2 C. L. J. 144.
(9) 3 Ind. Cas. 78; 14 C. W. N. 106.

LAHORE HIGH COURT.
CRIMINAL APPEAL No. 279 OF 1921.
June 17, 1921.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Harrison.
HAYAT AND ANOTHER—CONVICTS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Confession by co-accused, value of—Co-accused not intending to implicate himself.

A confession made by one of several accused persons by which he does not intend to implicate himself, although he actually does so, may be taken into account as against the accused making the confession, but should not be taken into account as against his co-accused. [p. 402, col. 1.]

Appeal from an order of the Sessions Judge, Jhelum, dated the 31st March 1921.

Dr. *Nand Lal*, for the Appellants.

Diwan *Khalindi Ram*, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—Four men, Hayat, Habib, Nawab and Jafar, have been convicted of murdering Hazar on the night of the 29th November 1920 and sentenced to death. They appeal and the sentences are also before us for confirmation under section 374, Criminal Procedure Code.

The story told is that the principal accused, Hayat, was betrothed to a girl *Musammat* Jehan Begam, daughter of Muhammad, *Lohar*, (P. W. No. 7), she being about 15 years of age and he 35. He saw her in a most compromising situation with Hazar, a young man of 18, and instead of taking action at once he took counsel with his friends and on the 28th November he collected Fatta, approver, Jafar, Nawab and Habib at the house of Jafar, his brother; and arranged that Hazar was to be murdered at the Khajurwala well. On the following night Hayat left his house saying that he was going to see Muhammad, *Lohar*, who was ill. He arrived at Muhammad's house with Hazar and left it shortly afterwards still with Hazar. They then called Fatta and went on to the Khajurwala well where they found the other three conspirators already assembled. All five then fell upon Hazar, and Hayat cut his throat and neck with a knife so that it hung to the body by two small pieces of skin only. He then gashed Hazar's nose and cut off his penis, and the body was then thrown into the well.

On the following morning *Musammat* Sharfan (P. W. No. 6), the widow of Hazar, told *Musammat* Sardaran (P. W. No. 8) that he had not returned, and they both went to enquire at Muhammad's house. They were told that he had come the previous night with Hayat and had left the house with him. They searched the village without success and soon afterwards Jafar called them to the well where Hazar's shoe and *pagri* were seen floating in the water. The ground near the well was stained with blood and showed signs of a body having been dragged to the well. The mutilated body was then recovered. A report was made the same day by one Nadar, in which four barbers were named as being suspected of the murder. The fact that Hayat was the last man who had been seen with Hazar and that Jafar, his brother, had found the body turned the attention of the Police to those accused, and in the course of the investigation Hayat produced a knife, Exhibit P. 4, from his house, and a *chadar* was taken from his person. A *chadar* and a *kurta* were taken from Fatta and a *chadar* from Habib. These with the knife and the parings of the finger nails of the three men were all sent to the Imperial Seralogist. All the clothes and nails of Habib were found to be stained with human blood. A pardon was given to Fatta and he has been produced as an approver.

It is fully established by the evidence of *Musammat* Sardaran and *Musammat* Sharfan that the conduct of Hazar and *Musammat* Jehan Begam was highly suspicious and that Hayat knew of it, and the motive for this brutal murder is, therefore, clearly established. The statement of the approver has been attacked on several grounds. It is true there are small discrepancies but we do not consider these of any importance, and it is also both true and unfortunate that a whole month was allowed to elapse between his offering to make a confession and a pardon being given to him, and this because the Superintendent of Police was awaiting a report from the Imperial Serologist. In spite of the discrepancies, which are mainly due to the approver's trying to remember too much, and to his confusing what he had heard with what he had actually seen, we think that his statement is worthy of belief, and so far as it is corroborated in material

particulars against the individual accused, it may be treated as valuable evidence against them.

So far as Hayat is concerned, in addition to the approver's statement there are the damning facts that the last time Hazar was seen alive he was in company with Hayat and that they came together to Muhammad's house and left it together on the night of the murder. Though it is true that Muhammad tried to withdraw a part of this statement in the Sessions Court, he subsequently corrected himself and adhered to what he had originally said before the Committing Magistrate. It is proved that Hayat produced a knife, Exhibit P. 4, from his own house, that his *chadar* was found to be stained with human blood, and that he had strongest motive for avenging himself on Hazar.

Taking all these facts together, which strongly corroborate the approver's statement, we are of opinion that it is proved beyond all manner of doubt that Hayat was one of the actual murderers.

As regards Habib, not only his *chadar* but also the parings from his finger-nails were found to be stained with human blood. There is the statement of Barkhurdar (P. W. No. 5) that he saw Habib going towards the Khajurwala well on the night of the murder. We attach no importance to this statement as this witness was only discovered at a very late stage of the investigation. There is, however, a very strong additional piece of corroboration in the shape of a confession made by Habib on the 7th of December and subsequently retracted. In this he carefully avoided saying that he took any actual hand in the murder but he did not state that he was one of the original conspirators and that he was present and saw the murder being committed without attempting to interfere. We have not taken this confession into account against any of the co accused, inasmuch as Habib certainly did not intend to implicate himself though he actually did so. Against him, however, the confession which we believe to have been voluntarily made may certainly be taken into account, and in our opinion, it provides further valuable corroboration of the story told by the approver. We find that it is fully proved that Habib also was one of the actual murderers.

So far as Jafar and Nawab are concerned, apart from this retracted confession of Habib, which is of practically no value as against them, there is no corroboration beyond the statement of the witness Barkhurdar. As explained above, we attach no value to it and the approver's statement, therefore, stands uncorroborated in any material particular as against these two accused and we, therefore, accept their appeals and acquit them.

We dismiss the appeals of Hayat and Habib and confirm the sentences of death passed on them.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 251 OF 1922.

May 23, 1922.

Present :—Mr. Justice Adami

RAMKUMAR LAL—APPLICANT

versus

THAKUR OJHA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Attachment of property by Deputy Magistrate—District Magistrate, jurisdiction of, to interfere—Procedure

An order passed by a Deputy Magistrate in a proceeding under section 145 of the Criminal Procedure Code cannot be upset by the District Magistrate; the remedy is to move the High Court in revision, or to go to the Civil Court for a decision of the claims of the parties. [p. 403, col. 1.]

Criminal revision against an order of the Deputy Commissioner, Hazaribagh, dated the 10th of March 1922.

Mr. *B. C. De*, for the Applicant.

Mr. *A. K. Roy*, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the learned Deputy Commissioner of Hazaribagh, stating that unless a civil suit has been instituted by a certain date, the land which had been attached in proceedings under section 145 would be released from attachment and made over to the second party in the proceedings.

There was a dispute between the proprietors of two neighbouring villages as to the possession of certain forest and jungle lands, and, as a breach of the peace was likely, proceedings under section 145 of the Criminal Procedure Code were drawn up. The result of those proceedings was that the disputed jungle and forest lands were attached: that was on the 13th June 1921. There is nothing on the record to show how the matter came to the notice of the Deputy Commissioner, but, on the 27th January 1922, he directed that notices should issue to the parties to the effect that the property would be released from attachment and made over to the second party in accordance with the entry in the Settlement record. It seems that the Deputy Commissioner found that neither party was going to the Civil Court for a determination of the dispute and he found that in the Survey and Settlement operations, there was a dispute as to this same land under the provisions of section 40 of the Bengal Survey Act in the form of a village boundary dispute, and the Assistant Superintendent of Surveys found that the land lay in the village of the second party. This decision had not been appealed against and the orders were made final under section 62 of the Survey Act. It is on the fact of that decision that the Deputy Commissioner proposes to release the property from attachment in favour of the second party. Now, I am afraid that the Deputy Commissioner has no jurisdiction to pass the order he contemplates passing It may be that the application has been made a little too early to the Court but it might just as well be dealt with at once to save further trouble. An order passed in proceedings under section 145 cannot be upset by the Magistrate of a District; the remedy is to move this Court in revision or to go to the Civil Court for a decision of the claims of the parties. The proceedings under section 145 were not taken by the Deputy Commissioner and even if he himself had originally passed the order for attachment, he would not be able to review his order in the manner in which he proposes to pass an order now. It is not necessary to say more than that. The notice issued by the Deputy Commissioner stating that, unless a civil suit be brought within a certain period, the lands would be released from attachment, cannot stand and should be cancelled.

W. C. A.

Order accordingly.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 141 OF 1920.

March 11, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

KADIR BAKHSH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 300, Excep. (1)—Grave and sudden provocation—Continuing under influence of provocation—Act, whether must immediately follow provocation.

Accused suspected his wife of being intimate with one *M.* and frequently remonstrated with, and warned her: one night accused and his wife were sleeping in the courtyard of their *haveli* when, after some little time, accused awoke and found his wife's bed unoccupied: his suspicious being aroused, he immediately proceeded to the *khola* adjoining the *haveli*, where he found his wife and *M.* together: he attacked *M.* and killed him, and then attacked his wife and killed her also: he was placed upon his trial for the offence of murder and was sentenced to death, the Sessions Judge holding that the accused did not receive such grave and sudden provocation as to deprive him of the power of self-control. On appeal:

Held, that the provocation received by the accused was grave and sudden, and he continued to be under the influence of provocation until he had killed his wife, and that he was entitled to the mitigation provided in Exception (1) to section 300 of the Penal Code, as that exception does not contemplate that, in order to entitle an accused person to earn the mitigation, the act must immediately follow the provocation. [p. 406, c. 1, 2.]

Said Ali v. *Empress*, 8 P. R. 1890 Cr., *Fazal* v *Queen-Empress*, 3 P. R. 1899 Cr., *Abalu Das* v. *King-Emperor*, 28 C. 571; 5 C. W. N 708, referred to,

KADIR BAKHSH v. EMPEROR.

Appeal from an order of the Sessions Judge, Dera Ghazi Khan, dated the 20th January 1920,

Mr. *Noad*, for the Appellant.

Lala *Jai Lal*, R. B., Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant, Kadir Bakhsh, was charged under section 302, Indian Penal Code, with the offence of murdering *Musammat* Nurai, his wife, and one Muhammad, *Mammar*, on the night between the 5th and 6th of June 1919. He has been found guilty and has been sentenced to death. Khuda Bakhsh, Allah Bakhsh and Mubarak were charged under section 302 read with section 109 with the offence of having abetted and aided the said Kadir Bakhsh in murdering either of the two deceased or one of them. The charge was not established against either of the three last mentioned accused and they have consequently been acquitted. Kadir Bakhsh has come up in appeal to this Court and his case has also been referred to us under section 374 of the Code of Criminal Procedure for the confirmation of the sentence of death.

The facts of the case are somewhat peculiar and beyond the fact of the murder of the two unfortunate victims nothing definite has come out of the evidence to establish the circumstances under which the deed was committed. According to the evidence of *Musammat* Bakht Sawai, widow of Muhammad, Kariman, nephew of Muhammad and Wahid Bakhsh, a *Kureshi*, who are alleged to be the eye-witnesses, on the night in question a hue and cry of thieves was heard upon which these three witnesses along with Muhammad deceased went inside the *haveli* of Ranjah, father of *Musammat* Nurai deceased, and Khuda Bakhsh accused. Muhammad was going in front. He was caught by the four accused and taken inside the *khola* belonging to Ranjah. They accused him of being a thief and of casting eyes on their womenfolk. Inside the *khola* they saw Muhammad on the ground overpowered by Kadir Bakhsh who had taken hold of his testicles. The other three accused were seen assisting Kadir Bakhsh in various ways. Khuda Bakhsh is said to have held the arms of the victim; Allah Bakhsh was holding his hair and Mubarak was seen beating him with fists and kicks. *Musammat* Bakht Sawai's cries brought on the scene Ilahi Bakhsh, Khuda Bakhsh and Allah Bakhsh, *Kureshis*, from Chunjanwala well. On arriving there these three *Kureshis* saw Kadir Bakhsh sitting on the neck of Muhammad who was probably dead. Karima was sent to fetch Sonhara *Arain* from his eastern well Jhariwala. According to *Musammat* Bakht Sawai, *Musammat* Nurai was sitting on her bed from where she was pulled off by Kadir Bakhsh and was dragged to a spot near the *khola* where she was struck with an axe on the head and face. The witness *Musammat* Bakht Sawai actually saw two blows being given to the unfortunate woman. Accused Kadir Bakhsh is stated to have then gone to the *khola* and to have delivered four blows on the body of the unfortunate Muhammad. The axe with which the victims were struck is said to have been brought by Kadir Bakhsh from a *kotha* belonging to Ranjah. Accused Kadir Bakhsh with his wife *Musammat* Nurai lived with Ranjah, her father, in the same house. Kariman and Wahid Bakhsh substantially corroborate *Musammat* Bakht Sawai in almost all the details of her evidence. It is not necessary to discuss in greater detail the evidence of these three witnesses inasmuch as the learned Sessions Judge has practically disbelieved them and has discarded their evidence. The gist of their evidence is that a false alarm was raised by the womenfolk of the family of Kadir Bakhsh accused in order to entice Muhammad, *Mammar*, into the courtyard of their *haveli* and then to catch him and accuse him of being a thief. Enmity on account of certain dispute relating to land was alleged as the motive for the offence. This on the face of it was wholly inadequate and we do not think that the evidence of the so-called eye-witnesses can be safely relied upon.

The second group of witnesses included Ilahi Bakhsh (P. W. No. 5), Khuda Bakhsh (P. W. No. 6) and Sonhara (P. W. No. 10). They on hearing an alarm, as mentioned above, proceeded in the direction of the *khola* in the *haveli* of the accused from which the cries came. They on their arrival on the spot saw Kadir Bakhsh standing on the deceased and kicking him. The other three witnesses were seen standing by. Neither of

them saw *Musammat* Nurai alive or dead at night, but later on in day time on being called to the spot they saw the dead body of *Musammat* Nurai lying outside the *khola*. Ilahi Bakhsh and Khuda Bakhsh then proceeded to the *Thana* to make the first information report. It is translated and printed at page 5 of the paper-book. It was recorded on the 6th of June 1919 at 10 A. M., the *Thana* being six miles from the scene of occurrence. In this report *Musammat* Nurai was said to have hidden herself somewhere when they had caught hold of Muhammad, *Kammar*, and had begun to beat him on the night of the 5th and 6th June. The report brought the Police on the spot and it was then that the real facts relating to the capture and murder of Muhammad and *Musammat* Nurai were discovered. Muhammad Ali, Sub-Inspector, after writing the report at once went to the spot and arrived there at 12 noon. Malik Gaman, Zaildar, was present at the spot and also the four accused, Kadir Bakhsh and others. The Zaildar produced the axe P-3. The body of *Musammat* Nurai was found lying in the courtyard outside the *khola*. The body of Muhammad, deceased, was discovered lying inside the *khola* some five *karams* from that of *Musammat* Nurai. *Naqsha i-surat hal* and statement of injuries in respect of both these deceased was prepared by the Sub-Inspector. Near the body of Muhammad were found two *kachi* bricks, a rope, a *topi* and a turban. A pair of shoes (Exhibit P. 7) was found on the roof of Ranjah's house. They were identified as belonging to the deceased Muhammad. The Sub-Inspector got the *Patwari* to prepare the plan (Exhibit P-B). On the back of this plan the Sub Inspector made a note to the effect that marks were observed on the wall in the corner between the northern wall of the *khola* and a wall of the house of Ranjah. The shoes were found at the edge of the roof towards the *khola*. According to the Sub-Inspector the shoes had evidently been placed there by the deceased Muhammad. As to the fact of the presence of Muhammad inside the *khola* and his murder, of course there can be no possible doubt. The only question is whether he was caught hold by the accused person on going into the *haveli* after hearing the alarm or that he had stealthily gone into the *khola* by getting on the top of Ranjah's house and climbing down the wall into the *khola*. The circumstantial evidence as to the discovery of the shoes on the roof of the house and the marks on the wall below establishes beyond any reasonable doubt the latter theory. There is evidence on the record to show that there was illegal intimacy between Muhammad and Kadir Bakhsh's wife, *Musammat* Nurai deceased. According to Ranjah, father of *Musammat* Nurai, Kadir Bakhsh accused her of being intimate with Muhammad deceased and kept warning her He himself had not seen anything personally, except that he had seen the deceased Muhammad and *Musammat* Nurai talking together several times. Besides the evidence of Ranjah, there is other evidence also on the record from which it appears that the deceased Muhammad and *Musammat* Nurai had been intimate for some time. On the night in question the appellant Kadir Bakhsh says he found the *charpoy* of his wife unoccupied. His children alone were found there crying. Naturally suspicions were directed towards Muhammad and the appellant at once proceeded to the *khola* where he found them together.

As regards general facts relating to the occurrence, there is also the evidence of a third group of witnesses, namely, *Musammat* Aishan, sister of Kadir Bakhsh and *Musammat* Sabhai, wife of Ranjah, which more or less goes to corroborate in certain parts the evidence given by the previous witnesses already mentioned. The most important piece of evidence, however, against the appellant is his own confession. He first confessed his guilt before a Magistrate on the 7th of June. In this confession the appellant made the following statement:—"My honour has been spoiled and ruined. I killed my wife, *Musammat* Nurai, and Muhammad, son of Lal. Both of them were in the act of sexual intercourse on the ground when I killed them. I at first caught Muhammad by his hair. I caught hold of his testicles. He fell down. I struck him with *kacha* bricks. At this he fell on the ground. I struck a second brick and he became unconscious. He lay there. The bedstead of Nurai, my wife, was close by. She left the ground and lay on the *charpoy*. She was then seated when I struck her the axe which struck in her

head. I dealt out three or four blows of the axe. I then returned to see whether or not Muhammad had expired. I found him dead. Thinking lest he be alive he was really dead. I struck one more blow of the axe at his (Muhammad's) head." He adhered to his confession and made practically the same statement before the Committing Magistrate. He maintained the same attitude in the Sessions Court and confessed his guilt, but pleaded grave and sudden provocation. Whether the accused saw Muhammad and *Musammat* Nurai actually committing adultery or whether he simply found them together in the *khola* there cannot be the least doubt that grave and sudden provocation must have been caused. The learned Sessions Judge, however, did not accept the plea and dismissed it with the following somewhat remarkable observation:—"There was no grave and sudden provocation, but, assuming that both the deceased were committing adultery and were caught in the act by Kadir Bakhsh, do his acts, as stated by himself or brought out by the evidence, show that he was deprived of the power of self control? I do not think so." We entirely dissent from the opinion of the learned Sessions Judge. This is not a case of the first impression. Under circumstances similar to those established in this case sudden and grave provocation has been held to have been established [*vide Said Ali* v. *Empress* (1), *Fazal* v. *Queen-Empress* (2)]. The learned Sessions Judge further made the following striking observation in his judgment:—"Angered no doubt he must have been, but his anger was not, in my opinion, such a violent and ungovernable passion as to deprive him of all self-control. I do not find it possible to connect any of the blows with the violent agitation alleged to have been aroused in the mind of accused by what he alleges he witnessed." This, in our opinion, is not an accurate estimate of the situation. Further, the learned Judge held:—"Assuming this to be the case, however, in respect of the death of Muhammad, there is absolutely nothing to support this contention in the case of the murder of *Musammat* Nurai. She was undoubtedly murdered a little later when accused must have re-gained his self-control even if he had lost it before." That there was sudden and grave provocation cannot be denied. How long that provocation continued to prey on the mind of the appellant is the only question to be determined. In our opinion the rule contained in section 300, Exception (1) of the Indian Penal Code, does not contemplate that in order to entitle an accused to earn the mitigation provided for, the act must immediately follow the provocation. In the case of *Abalu Das* v. *King-Emperor* (3) the learned Judges who decided the case thought that the provocation was of a nature that would continue to influence the feelings of the accused for a considerable period after the culprit was found in the company of the wife of Abalu Das. In this case, however, it is not necessary for us to go to that extent, for in this case the evidence does not justify us to hold that any considerable period intervened between the murders of Muhammad and *Musammat* Nurai. All that happened was that *Musammat* Nurai escaped while the appellant was grappling with the deceased Muhammad. Having finished him he proceeded to deal with his wife whom he dragged from her bed and killed her. In the circumstances we are justified in holding that the appellant continued to be under the influence of provocation until he had killed *Musammat* Nurai. The case comes under Exception (1) to section 300, Indian Penal Code.

We accordingly set aside the conviction under section 302 and in lieu thereof convict the appellant under section 304, Indian Penal Code, and sentence him to five years' rigorous imprisonment. To this extent the appeal is accepted.

W. C. A. *Appeal partly accepted.*

(1) 8 P. R. 1890 Cr.
(2) 8 P. R. 1899 Cr.

(3) 28 C. 571; 5 C. W. N. 708.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 143 OF 1922.

August 18, 1922.

Present:—Mr. Prideaux, A. J. C.

DHUMA *alias* ATMARAM—APPLICANT

versus

EMPEROR—NON APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Dispute about land—Complainant out of possession—Proceedings justified under s. 145—Opposite party, whether may be bound over under s. 107.

A dispute about land which would justify proceedings under section 145 of the Code of Criminal Procedure does not bar proceedings under section 107 of that Code. But if the complainant is out of possession of the land in dispute, and there is no danger of a breach of the peace unless he resumes possession, he should be referred to his remedies under section 145 of the Code of Criminal Procedure or in the Civil Courts, and the facts that his attempting to resume possession may cause a breach of the peace and that his dispossession was illegal are not sufficient grounds for binding over the opposite party to keep the peace.

Hira Singh v. *Mohan Singh*, 3 Ind. Cas. 64; 5 N. L. R. 94; 10 Cr. L. J. 221, followed.

Application against an order of the Magistrate, First Class, Wardha, dated the 28th February 1922, in Criminal Case No. 27 of 1921.

Mr. *W. H. Dhabe*, for the Applicant.

Mr. *G. P. Dick*, Standing Counsel, for the Crown.

JUDGMENT.—The applicant Dhuma, *alias* Atmaram, has been bound over under section 107 of the Criminal Procedure Code. It is contended for him here that the evidence on record does not justify the order passed, because it does not show that the applicant is likely to commit a breach of the peace or to disturb the public tranquillity. It seems that there is some dispute between the applicant and one Dada Patel of Wadgaon over a field. Applicant was prosecuted for criminal trespass said to have been committed on 18th July 1922 in this field but in that case he was acquitted. It has been held by this Court that, a dispute about land which would justify proceedings under section 145 of the Code of Criminal Procedure, does not bar proceedings under section 107 of that Code. But if the complainant is out of possession of the land in dispute, and there is no danger of a breach of the peace unless he attempts to resume possession, he should be referred to his remedies under section 145 of the Code of Criminal Procedure or in the Civil Courts, and the facts that his attempting to resume possession may cause a breach of the peace and that his dispossession was *prima facie* illegal are not sufficient grounds for binding over the opposite party to keep the peace: see *Hira Singh* v. *Mohan Singh* (1).

The applicant seems to have now left the village and to have gone to reside in Berar. It is only a Chief Presidency or a District Magistrate who can take these proceedings when either the person informed against or the place where a breach of the peace or disturbance is apprehended is not within the local limits of the Magistrate's local jurisdiction.

Taking this case as a whole, I think the order complained against is wrong, and that if any disturbance is anticipated owing to the quarrel between the applicant and Dada Patel over the field, proceedings under section 145 of the Code of Criminal Procedure is the appropriate remedy. I cancel the order directing applicant to execute a bond to keep the peace.

G. R. D. *Order accordingly.*

(1) 3 Ind. Cas. 64; 5 N. L. R. 94; 10 Cr. L. J. 221.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 1 OF 1922 AND APPEAL No. 148 OF 1922.

April 28, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

EMPEROR—PROSECUTOR

versus

DURGA CHARAN BEPARI *alias* DURGA CHARAN MANDAL AND OTHERS—ACCUSED.

Jury trial—Judge's charge to Jury—Judge, duty of, in stating law—Judge giving his own opinion—

EMPEROR v. DURGA CHARAN BEPARI.

Misdirection—Murder—Jury, method of charging—Language of charge to Jury—Misinterpretation of words by Jury.

Where in a trial by Jury the Judge wishes to inform the Jury as to what are the terms of a particular provision of the law, it is necessary for him to read the actual words of the section containing that provision to the Jury, and, if necessary, to explain what is meant by the section; if, instead of doing this, the Judge gives his own opinion of the meaning of the section, that would amount to a misdirection.[p. 409, cols. 1 & 2.]

In charging a Jury in a trial for murder, and in directing them as to what constitutes murder, the Judge should refer to the sections of the Penal Code which relate to culpable homicide, and direct the Jury as to what is culpable homicide, and in what circumstances culpable homicide amounts to murder. To direct the Jury that "murder is the intentional killing of another human being with malice aforethought," although a comprehensive way of describing what the meaning of murder is, is not the way in which a Jury ought to be charged, and amounts to a misdirection. [p. 409, col. 2.]

Where, in dealing with one of the charges against the accused, the Judge in charging the Jury uses words which the Jury might misinterpret, and might thereby be induced to come to the conclusion that there was nothing more to be said about the matter, that would amount to a misdirection. [p. 409, col. 2.]

Criminal reference and appeal against the order of the First Additional Sessions Judge, Bakerganj.

FACTS appear from the judgment.

Babu *Suresh Chandra Talukdar* (with him Babus *Mahendra Kumar Ghose* and *Sachindra Kumar Roy*), for the Accused.—This a reference under section 374, Criminal Procedure Code. The three accused have been found guilty of murder and sentenced to death. The first and the third accused were found guilty of murder by the unanimous verdict of the Jury under sections 302, 34, Indian Penal Code, and the second accused under sections 302 and 149, Indian Penal Code. They were also found guilty under section 364, Indian Penal Code. My points in this appeal are that the charge of the learned Sessions Judge is seriously open to criticism. The common interpretation of section 34, Indian Penal Code, which is followed by the learned Judge is entirely wrong. He says that section 34 provides "that where it is doubtful which of several persons has taken the chief part in any given crime committed in furtherance of a common intention of all of them, each of such persons is severally liable as if he alone had done the deed." I submit this is a mistaken construction of the section. The true view has been enunciated in *Emperor* v. *Nirmal Kanta Roy* (1). Sir Henry Stephen developed the view further in an article in the Calcutta Weekly Notes, 18 C. W. N. 222 (Notes); see also *Nibaran Chandra Roy* v. *King-Emperor* (2). The direction of "murder" in the charge is also open to serious comment. It is no direction in law to describe it as the intentional killing of another human being with malice aforethought. My next grievance is that the Judge has not referred to the salient points in favour of the accused. It was the clear duty of the Judge to direct the attention of the Jury to the case of each individual accused. Lastly, I submit the Judge's charge on sections 148, 364, Indian Penal Code are all erroneous and wrong.

Mr. *Orr*, Deputy Legal Remembrancer (with him Babu *Manindra Nath Banerjee*), for the Crown.—I submit the "Heads of the Charge to the Jury" does not contain everything actually said by the Judge. The directions complained of are quite proper and they have not occasioned failure of justice. The learned Judge has not discussed the evidence in detail in the heads of charge. There having been no failure of justice, the case should not be sent back.

Babu *Suresh Chandra Talukdar* replied in brief.

JUDGMENT.

SANDERSON, C. J.—This is a reference under section 374 of the Code of Criminal Procedure, in a case which was tried by the learned First Additional Sessions Judge of Bakerganj and a Jury, and in which the three accused were found guilty of murder and were sentenced to death. There is also an appeal by the three accused. Two of the accused, Durga Charan Bepari and Hasan Dewan, were found guilty of murder by the unanimous verdict of the Jury under sections 302 and 34 of the Indian Penal Code, and the other, Alimuddi Mistry, was found guilty of murder under sections 302 and 149 of the Indian Penal Code. All three were found guilty on the remaining two charges, namely, under section 364, which is the section dealing with abduction with intent that the person abducted may be murdered or may be so disposed of as to be put in danger of being murdered, and under section 148,

(1) 24 Ind. Cas. 340; 41 C. 1072; 18 C. W. N. 723; 15 Cr. L. J. 460.
(2) 21 C. W. N. 1035; 6 Cr. L. J. 304.

which is the section which deals with rioting by a person or persons armed with deadly weapons.

The first ground—or rather, the ground, upon which the learned Vakil, who argued the case on behalf of the accused, mainly relied, was, that the direction of the learned Judge to the Jury was open to criticism. In my judgment, the direction by the learned Judge to the Jury is open to certain criticisms and I have come to the conclusion that there are material matters which, as far as I can ascertain from the heads of charge to the Jury which are now before us, were not brought to the attention of the Jury. Before I deal with those matters attention should be drawn to the way in which the learned Judge dealt with section 34 of the Indian Penal Code. I am quite aware that the document which we have before us is not more than "heads of charge to the Jury," and I cannot accept the suggestion which was made by the learned Vakil for the accused, that the learned Judge said no more to the Jury than what appears in the heads of charge. The case lasted, (if my recollection serves me right) for six days, and the seventh day of the trial was reserved for the learned Judge's summing up; it was not until about 3 o'clock in the afternoon that the Jury retired to consider their verdict. I, therefore, regard this document as no more than "heads of charge to the Jury." But, even so, I may say that there are certain matters in the heads of charge which are open to criticism. In the first place, the learned Judge has stated as follows:—"Section 34 provides that where it is doubtful which of several persons has taken the chief part in any given crime committed in furtherance of the common intention of all of them, *each* of such persons is severally liable as if he alone had done the deed." If the learned Judge intended thereby to be informing the Jury as to what were the provisions of section 34, no one can deny that it is a misdirection, because the provisions of section 34 are not as stated by the learned Judge.

But I take it that the learned Judge was giving his own view of the meaning of the section. In my judgment, it is necessary for a learned Judge to read the very words of the section itself to the Jury, if he purports to give them what are the provisions of the section and then, if necessary, to explain what is the meaning of the section. The learned Judge did go on to say: "In other words, it provides for those cases in which all help to commit, *e. g.*, a murder, but in which it is, in the nature of things, difficult to say exactly whose hand actually caused the death of the murdered person." It seems to me that, in that sentence, the learned Judge was on sounder ground; but, even then, having regard to the first part of the direction, I regret to say that I cannot regard it as a satisfactory direction with regard to the provisions of section 34.

Then, his only direction as to what constitutes murder is contained in one sentence "Murder is the intentional killing of another human being with malice aforethought." That may be a comprehensive way of describing what the meaning of murder is but it is not the way in which learned Judges ought to charge the Jury in this country. It is usual to refer to the sections which relate to culpable homicide and to direct the Jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder: I should not, however, reject this direction to the Jury by the learned Judge on this ground alone, if I felt quite clear that the misdirection had not occasioned a failure of justice. Further, I do not approve of the last paragraph but one at page 40 of the paper-book where the learned Judge was dealing with sections 302 and 149, *viz.*: "This charge is to some extent redundant, and strictly applies only to Alimuddi, for Hasan and Durgh Charan are supposed to have been the actual murderers. By section 149 Alimuddi becomes a constructive murderer and liable for the substantive offence, just as by section 34 all these accused are equally liable for the murder, as though each of them had committed it single-handed." In my judgment, if the charge was, in fact, delivered to the Jury in those words or in words which would convey that meaning, in my opinion, the Jury might misinterpret it and they might have been thereby induced to come to the conclusion that there was no more to be said about the matter. In my opinion, this amounts to a misdirection.

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The next paragraph is material in another respect. The learned Judge was dealing with section 148 and said: "Similarly, though all three are charged with rioting armed with deadly weapons under section 148, Indian Penal Code, it appears from the evidence that the charge will only apply to Alimuddi who was armed with a spear, the other two being unarmed." In spite of that direction by the learned Judge the Jury found all three of the accused guilty under section 148. This goes to show that apparently the Jury had not appreciated the learned Judge's direction. In effect, he directed the Jury that only one could be convicted under section 148 and yet the Jury found all three of them guilty under that section?

It is difficult to believe that all that the learned Judge said about the evidence is represented in his heads of charge: If it be a full and correct representation of his charge with regard to the evidence, then it appears that the learned Judge did not draw the attention of the Jury to the fact that many of the witnesses who were called on behalf of the prosecution were related to Ananda, who was alleged to be the prime-mover in the prosecution, or to each other: nor did he draw the attention of the Jury to the discrepancies in the evidence of some of the witnesses—discrepancies which certainly did occur.

Again, the learned Judge said: "The plot was apparently hatched on Wednesday and carried into effect on Thursday." I have read the evidence carefully. I do not know what evidence is supposed to support the suggestion that a plot was hatched on Wednesday. The learned Counsel and the learned Vakil were not able to assist me on this point. There is the evidence of Iswar Charan Bepari who proved that at Sabdar's house there was a feast and that Alimuddi, Biraj Ali Jemader, Kuti Mollah and Jabbar Ali were invited to it. Hasan Dewan is the son-in-law of Alimuddi and he lived in that house. The feast took place on Thursday and not on Wednesday, and I do not find anything in that evidence which would justify the suggestion that any plot was then hatched.

Towards the end of the learned Judge's summing up, he said: "The evidence is that Durga Charan had tied the cloth round the poor woman's neck at the time of the capture, and that so they dragged her away." It is true that Swarna, the woman who is alleged to have been present at the time the abduction took place, used the words "tied a cloth round her neck." On the other hand, the first witness for the Prosecution, Nagarbasi, said: "Durga Charan had put the upper part of her cloth round her neck and so had caught her," which may mean that he tied it or it may mean that he had merely wrapped it round her neck for the purpose of dragging her away. That by itself would not be so important but for the sentence which follows it; because the learned Judge says: "long before she got to the river she must have been half-choked, and it would require little more pressure to complete the suffocation." That depends to some extent upon how the cloth was tied, and the learned Judge did not draw the attention of the Jury to this question.

The learned Judge further said: "The Jury must also take into consideration the admitted hatred that existed between the deceased and her husband's relatives and must ask themselves whether in their experience such hatred does not, in nine cases out of ten, at any rate in Bakarganj District, furnish a powerful motive for such a crime."

In my judgment, the learned Judge ought to have drawn the attention of the Jury to the evidence of Nagarbashi with regard to this point. Nagarbashi said that as between Kalidas and the deceased there was a settlement of the dispute and it was called an amicable settlement, and he went so far as to say: "there was no quarrel between them after the case between them was amicably settled last Assarh." In view of this statement I fail to see how the Judge was justified in telling the Jury that there was existing "admitted hatred." Finally, the learned Judge directed the Jury as follows:—"As I have already said, which of those abductors actually applied the pressure that ended her life, if this was how she died, is immaterial."

There were three men involved in the charge of murder. It seems to me that the attention of the Jury should have been directed to the individual cases of the three men. As for instance, it may be that Alimuddi had no intention of murdering Nandarani, though he may have been willing to take part in the abduction of the woman. There

is no evidence that he laid his hand upon the deceased, though there is evidence that he assisted the actual abduction by holding back and threatening the would-be rescuers. For these reasons, in my judgment, it would not be right to allow the verdict of murder to stand in respect of the three accused. Consequently, in our judgment, the verdict of murder and the sentences of death passed upon the three accused must be set aside

That, however, does not dispose of the case.

The learned Vakil for the accused pressed us to remit the case for a fresh trial, but with regard to the charge under section 364 the learned Vakil frankly admitted that he could not say that there was a misdirection as regards that charge, at all events, so far as the two accused, Durga Charan Bepari and Hasan Dewan, are concerned. In my judgment, there was ample evidence in this case to justify the Jury in coming to the conclusion that these two men did abduct the woman and that they abducted her either with the intention of murdering her or with the intention that she might be so disposed of as to be put in danger of being murdered. The Jury unanimously accepted the evidence in this respect, and there being no misdirection in respect of this charge as regards these two accused it is not necessary to send this case back for a fresh trial, and, in our judgment, this Court should uphold the convictions of Durga Charan and Hasan Dewan in respect of the charge under section 364 of the Indian Penal Code.

With regard to Alimuddi I have considerable doubt whether the conviction under section 364 ought to be upheld. As I have already said, it is possible that this man may have taken part in the abduction without any intention of murdering the woman or putting her in danger of being murdered. The object of the abduction, so far as he was concerned, may have been something quite different. In this connection it is to be remembered that the evidence of Abdul was to the effect that he had seen two men only near the place where the body was found, and, in our judgment, it would be safer in the interests of justice to hold that in the case of Alimuddi, the conviction under section 364 should be set aside.

There remain the convictions under section 148. With regard to Durga Charan and Hasan Dewan, I agree with the learned Judge that there is no evidence that these two men were armed with any deadly weapon, or with any such weapon as is mentioned in section 148. Consequently, the convictions of those two men under section 148 must be set aside. The conviction of Alimuddi, however, under section 148 ought, in our judgment, to stand. He was armed with a deadly weapon and he was guilty of rioting. There was an assembly of five or more persons and on the evidence, which has been accepted by the Jury, there is no doubt that the common object of that unlawful assembly was to abduct the woman, and by means of criminal force, or show of criminal force, to compel the deceased woman to do what she was not legally bound to do. In other words, the case would come within the meaning of section 141, sub-clause (3) or sub-clause (5) of the Indian Penal Code. In our judgment, therefore, the conviction of Alimuddi under section 148 must stand.

The result of our judgment is that the convictions of all the three accused, namely, Durga Charan Bepari, Hasan Dewan and Alimuddi Mistri, for murder, and the sentences of death passed upon them are set aside. The conviction of Alimuddi Mistri under section 364 of the Indian Penal Code and the convictions of Durga Charan Bepari and Hasan Dewan under section 148 of the Indian Penal Code are also set aside. But the convictions of Durga Charan Bepari and Hasan Dewan under section 364 of the Indian Penal Code are upheld and the conviction of Alimuddi Mistri under section 148 is upheld. Under these circumstances, we do not think it necessary to direct a new trial.

Now, there remains the question of sentence. My learned brother and I regard this as a very serious case and it is such a serious case that we have had considerable hesitation whether we ought not to remit the case in order that there should be a further trial on the charge of murder, but after due consideration we have decided not to take that course.

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Having regard to the facts of the case, the sentence we pass upon each of the accused, Durga Charan Bepari and Hasan Dewan, is ten years' rigorous imprisonment under section 364; and the sentence on the accused Alimuddi Mistry is three years' rigorous imprisonment under section 148 of the Indian Penal Code.

PANTON, J.—I agree.

W. C. A.

Conviction partly set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1355 OF 1919.

June 22, 1920.

Present:—Mr. Justice Wilberforce.

Musammat JIWANI AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 407 (2)—Sanction to prosecute, refusal of—Magistrate specially empowered to hear appeals, if can grant sanction.

A Magistrate of the First Class upon whom special powers of appeal have been conferred by the provisions of section 407 (2) of the Code of Criminal Procedure, is not a Court to which an appeal "ordinarily" lies under section 195 (7) of the Code from the orders of a Magistrate exercising Second Class powers.

Sadhu Lall v. *Ram Churn Pasi*, 30 C. 394 and *Ramdayal* v. *Ramprasad*, 3 N. L. R. 50; 5 Cr. L. J. 432, relied upon.

Accordingly, where sanction to prosecute under section 195 of the Code is refused by a Magistrate of the Second Class it is not open to a Magistrate specially empowered under section 407 (2) of the Code to hear appeals to grant the sanction on appeal.

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the Magistrate, First Class, with appellate powers at Moga, District Ferozepore, dated the 24th June 1919, reversing that of the Magistrate, Second Class, Moga, District Ferozepore, dated the 18th March 1919.

Dr. *Nand Lal*, for the Petitioners.

Mr. *S. A. Razaq*, for the Respondent.

JUDGMENT.—In this case an application was made to a Tahsildar, Magistrate of the Second Class, for sanction to prosecute *Musammat* Jiwani, the complainant, and her chief witness, Tilok Singh, for making false statements. This application was rejected. It was renewed before a Magistrate with appellate powers who has granted the sanction, and *Musammat* Jiwani and Tilok Singh have applied on revision for the cancellation of this sanction.

This petition must be accepted for many reasons. In the first place the Magistrate who granted the sanction is not the ordinary Appellate Court from the decisions of a Second Class Magistrate. He has merely been granted special powers under section 407 (2), Criminal Procedure Code. The conferring of such powers do not constitute a Magistrate the Court to which an appeal ordinarily lies under section 195 (7) from a Magistrate exercising Second Class powers, see *Sadhu Lall* v. *Ram Churn Pasi* (1) and *Ramdayal* v. *Ramprasad* (2). In the second place the Magistrate failed to specify what the false statements were on account of which he granted sanction and the Court before which and the occasion on which the offence complained of was committed. In this respect he disregarded the provisions of section 195 (4), Criminal Procedure Code.

Finally, on the merits there was every reason for refusing sanction. The case first came up before Pandit Maharaj Kishen who considered the prosecution evidence reliable and framed a charge. On the transfer of this officer the evidence was recorded *de novo*, and the Second Magistrate again considered the evidence sufficiently reliable to frame a charge. Again, the same Magistrate on a consideration merely of discrepancies in the prosecution evidence and on account of enmity which was abundantly clear from this evidence acquitted the persons accused in the case. From the above facts it is clear that two trying Magistrates did not consider the case *prima facie* false.

For the foregoing reasons I accept the petition for revision and set aside the order of the Magistrate.

R. K. *Revision accepted.*

(1) 30 C. 394.

(2) 3 N. L. R. 50; 5 Cr. L. J. 432.

CALCUTTA HIGH COURT.
CRIMINAL REVISION CASE No. 426 of 1921.
June 29, 1921.
Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.
ASHOTOSH DUTT—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 24—"Person in authority," if include the prosecutor—Confession suspected to be obtained by inducement—Prosecution to show that confession freely made.

The words "person in authority" in section 24 of the Evidence Act include the prosecutor.

If, in the circumstances of a case, it appears to the Court that there is reason to suspect that a confession was obtained by inducement so as to bring it under the provisions of section 24 of the Evidence Act, the prosecution, to make the confession admissible in evidence against the accused, must show that it was freely made.

Reg. v. *Thompson*, (1893) 2 Q. B. 12; 62 L. J. M. C. 93; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P. 312 and *Reg.* v. *Warringham*, (1851) 2 Den. C. C. 447*n*; 15 Jur. 318, referred to.

Rule against the order of the Magistrate, Alipore.

Mr. *C. J. Hazara*, Babu *Probodh Chandra Chatterjee*, for the Petitioner.

Babu *Promode Kumar Ghose*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the Magistrate of Alipore convicting the petitioner, Ashotosh Dutt, under section 379, Indian Penal Code.

The point in this Rule is whether a certain statement made by the appellant was admissible in evidence having regard to the provisions of section 24 of the Evidence Act. The complainant's story is that after the theft he went home and told his brothers what had happened and they decided that the best chance to get back the money was to get hold of the appellant soon and make him give it up so that they did not inform the Police. When they found the appellant, he told them that if they did not beat him he would tell them where the money was and eventually gave them certain information. The learned Sessions Judge held that section 24 was not admissible, because the persons to whom the statement was made had no authority over the appellant. But it is settled law that the words "person in authority" in section 24 include the prosecutor.

As regards the question whether the making of the confession was caused by any inducement, the evidence on the record does not clearly show exactly what was said. But in the case of *Reg.* v. *Thompson* (1) the Court of Crown Case Reserved held that it was the duty of the prosecution to prove in a case of doubt that the prisoner's statement was free and voluntary, and the following dictum in the case of *Reg.* v. *Warringham* (2) was cited with approval that the Judge will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of improper inducement and in the event of any doubt subsisting on this head will reject the confession. On this authority we hold that if in the circumstances of the case it appears to the Court that there is reason to suspect that if the confession was obtained by inducement so as to bring it under the provisions of section 24, the prosecution must show that the confession was freely made. In this case having regard to the admission of the complainant that he was willing to drop the Police proceedings if he got his money back we are bound to suspect that some such offer was made to the accused and that it was this that induced him to confess. We also find that in cross-examination the complainant said, we spoke to him, that is, the appellant, in flattering terms, so he said he would realize the money after dawn. Having regard to the state of the evidence we think that the admission made by the appellant ought not to be proved as it was inadmissible under section 24 of the Evidence Act. The case against the appellant depends mainly on the evidence of the complainant. Whether his evidence should be believed without strong corroboration or whether there is other evidence sufficient to corroborate him apart from this admission we express no opinion.

We set aside the conviction and sentence passed on the petitioner and direct that he be re-tried.

B. N. *Conviction set aside.*

(1) (1893) 2 Q. B. 12; 62 L. J, M. C. 93; 5 R. 392; 69 L. T. 22; 41 W. R. 525; 17 Cox C. C. 641; 57 J. P 312.

(2) (1851) 2 Den. C. C. 447*n*; 15 Jur. 318.

In re, MAHADEV RAMKRISHNA KARKARE.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 92 OF 1922.

June 14, 1922.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

In re MAHADEV RAMKRISHNA KARKARE—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 250 (Prov.)—Compensation to accused—Duty of Magistrate to hear complainant—Absence of complainant on days of hearing—Effect.

A Magistrate is bound to hear the complainant before making any order against him under proviso to section 250 of the Criminal Procedure Code.

No inference can be drawn against the complainant from the mere fact that he has been absenting himself on the appointed days of hearing.

Criminal application for revision against an order passed by the First Class Magistrate at Rajapur.

Mr. *Jinnah* (with him Mr. *Ratanlal Kanchhoddas*), for the Applicant.

JUDGMENT.

SHAH, ACTG. C. J.—In this case the Magistrate has made the order under section 250 of the Code of Crimical Prosedure without giving to the complainant an opportunity of putting forward his objections to the order. The reason given by the Magistrate for adopting that ecurse is that in his view the complainant had been absenting himself on the appointed days of hearing, and, as he conjectured, probably fearing that he would be called upon to pay compensation. It is difficult to understand how any inferenos could be drawn against the complainant from his absence. He was not bound to be present at those dates of hearing, or at any rate, on the day on which the order was made. There is nothing to show that he was bound to be present, and in fact he was absent. The Magistrate has read the proviso to sub-section (1) of section 250 as though it contained the words " if the complainant be present." But those words are not there and it is difficult to read words in the proviso which are not there. It is clear that under the proviso the Magistrate was bound to hear the complainant before making the order which in the present case he failed to do. It appears from the judgment that the complainant's Pleader was there, but he was

unable to urge any objection on behalf of the complainant as he had no instructions from the complainant on the point. Under the circumstances the presence of the Pleader on that date could not be treated as dispensing with the necessity of the Magistrate's calling upon the complainant to state his objections to any order that he might propose to make under section 250. On this ground alone the order in the present case ought to be set aside.

I, therefore, make the Rule absolute, and direct the amount, if paid, to be refunded to the complainant.

The accused in this case, though served, has not appeared to support the order.

CRUMP, J.—I agree.

N. H.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 158 OF 1921.

November 22, 1921.

Present:—Mr. Lyle, A. J. C.

NAZIR HASAN—ACCUSED—APPLICANT

versus

MOHAMMAD YAMIN—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195 ( ), 439—"Any sanction given or refused, meaning of—Order of Sessions Judge passed on application against order of Subordinate Court—High Court's power of interference—Inveterate enmity between parties—Sanction, whether should be given.

The words "any sanction given or refused" under section 195 6) of the Criminal Procedure Code are applicable only to a sanction given or refused upon an original application, and sub-section 6 does not provide for interference by a third Court. Consequently, the High Court has no power to interfere under that section with an order granting or refusing sanction passed by a Sessions Judge on an application against the order of a Subordinate Court. [p. 415, col. 2.]

Musaji v. *Mohammed Walayatullah Khan*, 8 O. C. 216, *Kanhai Lal* v. *Chadami Lal*, 1 Ind. Cas. 5; 6 A. L. J. 1; 31 A. 45; 5 M. L. T. 55; 9 Cr. L. J. 63; A. W. N. (1908) 290 and *Baran Barai* v. *Mata Prasad*, 25 Ind. Cas. 528; 12 A. L. J. 821; 36 A. 469; 15 Cr. L. J. 616, followed.

A High Court has, however, power to interfere with such an order of the Sessions Judge in the exercise of its revisional jurisdiction under section 439 of the Criminal Procedure Code. [p. 415, col. 2.]

NAZIR HASAN v. MOHAMMAD YAMIN.

Where there is inveterate enmity between parties, it is neither desirable nor in the interests of justice that sanction to prosecute should be granted. [p. 416, col. 1.]

Revision against an order of the Sessions Judge, Lucknow, dated the 20th August 1921, setting aside that of the Magistrate, First Class, Barabanki, dated the 30th June 1920.

Mr. *Haider Husain*, for the Applicant.

Mr. *R. D. Sinha*, for the Opposite Party.

JUDGMENT.—Nazir Hasan brought a complaint against Mohammad Yamin and a number of other persons under section 147, Indian Penal Code, in which he charged Mohammad Yamin as having been present and instigated the riot which was said to have occurred on the 5th of October 1920. Mohammad Yamin and Nazir Hasan are Zemindars living in the same village and the quarrel which resulted in the charge under section 147, Indian Penal Code, arose out of an irrigation dispute. Nazir Hasan himself gave evidence before the Magistrate who tried the case under section 147, Indian Penal Code, in support of the charge on the 16th of October 1920. The learned Magistrate acquitted Mohammad Yamin and convicted certain other persons who had been charged along with him. All these persons were, however, acquitted in appeal by the Sessions Court. The Magistrate held it proved that Mohammad Yamin was not present at the time when the riot occurred. The judgment of the Sessions Court is dated the 10th of January 1921. On the 30th of January, Mohammad Yamin applied to the Magistrate for permission to prosecute Nazir Hasan under sections 193 and 211 of the Indian Penal Code. The Magistrate by his order of the 30th of June 1921 refused to grant the sanction applied for. In that order he stated that there had been an inveterate enmity of long standing between Nazir Hasan and Mohammad Yamin who are rival Zamindars and there was no doubt that Nazir Hasan had been beaten by Mohammad Yamin's party on account of that enmity. He refused sanction on the ground that the application was clearly made to satisfy a private grudge and for the purpose of coercing Nazir Hasan and that the interest of justice would not be served by granting it. This order has been reversed by the learned Sessions Judge who has granted Mohammad Yamin permission to prosecute Nazir Hasan. In his order he has not discussed the reasons given by the learned Magistrate for refusing sanction but has merely stated that he sees no reason why Mohammad Yamin should be refused permission to prosecute Nazir Hasan for having brought a complaint against him which was false and which he must have known to be false. Nazir Hasan has now applied to this Court to have the order of the Sessions Judge set aside and the sanction granted by him revoked.

The application is headed as an application under sub-section 6 of section 195 of the Code of Criminal Procedure. It is clear that this Court is not given power under that section to interfere with the order of the learned Sessions Judge. Sub section 6 of section 195 provides that any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate. The words "any sanction given or refused under this section" are clearly applicable only to a sanction given or refused upon an original application and this sub-section does not provide for interference by Third Court. This is the view taken in *Musoji* v. *Mohamed Walayatullah Khan* (1) and the same view has been expressed in *Kanhai Lal* v. *Chadami Lal* (2) and *Baran Barai* v. *Mata Prasad* (3). But this Court has clearly power to interfere with the order of the learned Sessions Judge in exercise of its revisional jurisdiction under section 439 of the Code of Criminal Procedure, as that section expressly provides that in any case which has come to its knowledge the High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by section 195. The case before us is one in which that discretion should, in our opinion, be exercised and the sanction revoked. Sanction was refused by the learned Magistrate who saw the parties and heard the evidence and he was clearly of opinion that the interests of justice would not be served by granting sanction. Nazir Hasan is about 70 years of age and there can be no doubt that the riot in the course of

(1) 6 O. C. 216.

(2) 1 Ind. Cas. 5; 6 A. L. J. 1; 31 A. 48; 5 M. L. T. 55; 9 Cr. L. J. 63; A. W. N. (1903) 290.

(3) 5 Ind Cas. 528; 12 A. L. J. 821; 36 A. 439; 15 Cr. L. J. 616.

In re BADIUDDIN SARFUDDIN.

which he was very severely beaten was engineered by his enemy, Mohammad Yamin, although the latter was not actually present. The affair occurred more than 14 months ago and the statement on which it is proposed to charge him with having given false evidence was made so far back as the 16th of October 1920. Had the learned Sessions Judge thought it desirable that Nazir Hasan should be prosecuted for bringing a false charge or giving false evidence against Mohammad Yamin he should have taken action himself and directed his prosecution, but in view of the inveterate enmity between the parties it is certainly not desirable nor in the interests of justice, that such a powerful lever should be placed in the hands of his enemy, Mohammad Yamin.

I allow the application, set aside the order of the learned Sessions Judge and revoke the sanction.

N. K.

Revision accepted.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 84 OF 1922.

June 28, 1922.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

In re BADIUDDIN SARFUDDIN —APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (a)—Public servant, order of, disobeyed—Public servant also Court—Sanction to prosecute—Subordination for purposes of sanction.

Under clause (*a*), sub-section (1), of section 195, if a public servant making the order is a Court, in respect of that order, the Court to which that Court would be subordinate would be the Court to which appeals would ordinarily lie.

Arunachalam Pillai v. *Ponnuswami Pillai*, 48 Ind. Cas. 878; 42 M. 64; (1918) M. W. N. 824; 35 M. L. J. 454; 8 L. W. 422; 24 M. L. T. 396; 20 Cr. L. J. 78, followed.

Criminal application for revision against an order passed by the District Magistrate, Ahmedabad.

Mr. *G. N. Thakor* (with him Mr. *R. J. Thakor*), for the Applicant.

Mr. *Coyajee* (with him Mr. *J. G. Rele*), for the Opponents.

JUDGMENT.

SHAH, ACTG. C. J.—In this case the original order which is said to have been disobeyed was made by the First Class Magistrate, Mr. Date. It appears that the present petitioner made an application to the District Magistrate for sanction under section 195, Criminal Procedure Code, as an authority to which Mr. Date would be subordinate. The District Magistrate was of opinion that as Mr. Date made his order as a First Class Magistrate and that the Court to which he would be subordinate in that capacity would be the Sessions Court to which appeals from his decisions as a First Class Magistrate would ordinarily lie. On that ground the District Magistrate refused to entertain the application. We are not concerned with the application which the complainant subsequently made to the Sessions Court, nor with the result of that application. The present application is against the order of the District Magistrate; and it is urged on his behalf that Mr. Date must be taken to have made his order as a public servant within the meaning of clause (*a*), sub-section (1) of section 195, Criminal Procedure Code, and that though he was a First Class Magistrate, as a public servant he must be taken to be subordinate to the District Magistrate, though as a Court he may not be subordinate to the Court of the District Magistrate within the meaning of section 195. On the construction of the section, I do not feel any difficulty in disallowing this contention, but the point has been decided by the Madras High Court in the case of *Arunachalam Pillai* v *Ponnuswami Pillai* (1) and it is needless to deal with it at any length. I accept the view taken in that case and hold that under clause (*a*), sub-section (1) of section 195, if a public servant making the order is a Court, in respect of that order, the Court to which that Court would be subordinate would be the Court to which appeals would ordinarily lie, that is, in the present case, the Sessions Court and not the District Magistrate. I am of opinion that the order of the District Magistrate is right.

I would discharge the Rule.

CRUMP, J.—I concur.

N. H.

Rule discharged.

(1) 48 Ind. Cas. 878; 42 M. 64; (1918) M. W. N. 824; 35 M. L. J. 454; 8 L. W. 422; 24 M. L. T. 396; 20 Cr. L. J. 78.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 47-B 1922.

August 17, 1922.

Present :—Mr. Predeaux A. J. C.

GANULAL—PLAINTIFF—APPLICANT

versus

KASHIRAM—DEFENDANT—NON APPLICANT.

Hindu Law—Succession—Illegitimate son—Succession Certificate Act (VII of 1889)—Illegitimate son of Sudra—Succession by survivorship—Succession Certificate, whether necessary.

Under the Hindu Law an illegitimate son in the three high classes never takes by inheritance but is only entitled to maintenance from the estate of the father. The illegitimate son of a *Sudra* might, under certain circumstances, inherit either jointly or separately.

The illegitimate son of a *Sudra* can be a co-parcener with his father, when he would be competent to sue to recover a debt due to his father without the production of a Succession Certificate.

Sadu v. *Baiza*, 4 B. 37; 2 Ind. Dec. (N. s.) 535, (F. B.), *Jogendro Bhuputi* v. *Nittyanund Man Singh*, 11 C. 702; 10 Ind. Jur. 144; 5 Ind. Dec. (N. s.) 1227, *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nittyanand Man Sing*, 18 C. 151; 17 I. A. 128, 5 Sar. P. C. J. 596, 9 Ind. Dec. (N. s) 101 (P. C.) and *Mukund Balkrishna Buti* v. *Purnia*, 9 C. P. L. R. 65, relied on.

Revision against an order of the Additional Subordinate Judge, Akola, dated the 13th February 1922, in Civil Suit No. 226 of 1921.

Mr. *D. W. Kathalay*, for the Applicant.

JUDGMENT.—The plaintiff-applicant in this case is an illegitimate son of one Ramlal in whose favour the defendant in suit executed a bond. It was pleaded *inter alia* that a Succession Certificate was required before plaintiff was entitled to a decree and that Ramlal, being a *Khatri* and not a *Sudra*, plaintiff could not form a co parcenary with him. For the plaintiff it was stated that Ramlal was a *Sudra* by caste and hence plaintiff could be a co parcener.

Now, it is a settled law that the illegitimate sons in the three high classes never take by inheritance but are only entitled to maintenance from the estate of the father. The illegitimate son of a *Sudra* might, however, under certain circumstances, inherit either jointly or severally.

The lower Court has directed the plaintiff-applicant to produce a Succession Certificate but the first question to decide in the case is whether Ramlal was a *Sudra* or a *Khatri*. If he was the latter, even the Succession Certificate would not enable the

plaintiff to sue, but if the former, the plaintiff would be a co-parcener with his father: *Sadu* v. *Baiza* (1), *Jogendro Bhuputi* v. *Nittyanund Man Singh* (2) and confirmed by their Lordships of the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nittyanand Man Sing* (3). Therefore, if plaintiff is the illegitimate son of a *Sudra* a Succession Certificate is not necessary: see *Mukund Balkrishna Buti* v. *Purnia* (4).

I set aside the order directing the plaintiff to obtain a Succession Certificate and remand the case to the Trial Court with advertence to the above remarks. I fix Pleader's fee at Rs. 15 and costs will follow the event.

G. R. D. & N. H.

Order set aside.

(1) 4 B. 37; 2 Ind. Dec. (N. s.) 535 (F. B.).
(2) 11 C. 702; 10 Ind. Jur. 144; 5 Ind. Dec. (N. s.) 1227.
(3) 18 C. 151; 17 I. A. 123; 5 Sar. P. C. J. 598; 9 Ind. Dec. (N. s.) 101 (P. C.).
(4) 9 C. P. L. R. 65.

CALCUTTA HIGH COURT.

CIVIL SUIT No. 1468 OF 1921.

July 5, 1921.

Present :—Mr. Justice Ghose.

Kumar MANMOTHA NATH MITTER—PLAINTIFF

versus

WALTER LOCKE AND CO., AND ANOTHER—DEFENDANTS.

Calcutta Rent Act (III B. C. of 1920), s. 11, scope of—Lease for term of years—Tenant informing landlord of his intention to quit after expiry of lease—Landlord entering into agreement to lease to another—Act, coming into operation of, before expiry of lease—Tenant, right of, to take advantage of Act.

The Legislature in enumerating, in the proviso to section 11 of the Calcutta Rent Act, the grounds upon which a landlord can successfully claim an order for possession did not intend to limit the claim to these grounds but merely enumerated these grounds for the purpose of indicating the grounds upon which a landlord would be entitled to possession as of right, leaving it open to the Court to exercise a discretion in his favour upon any other grounds which might appear to the Court to be satisfactory. [p. 423, col. 1.]

Certain premises in Calcutta were demised to defendant No. 1 for a term of twenty years beginning from the 1st April 1901; on the 7th January 1920, defendant No. 1 intimated to the plaintiff landlord that he would not remain in occupation of the

MANMOTHA NATH v. WALTER LOCKE & CO.

premises after the expiration of the lease. Thereupon on the 16th January 1920 the plaintiff entered into an agreement with *E.* for letting out the premises to him for a term of 10 years from the 1st of April 1921 or as soon as the defendant No. 1 vacated the premises. The defendant, however, refused to vacate the premises on the strength of his supposed rights under the Calcutta Rent Act which came into operation in March 1920. Whereupon the plaintiff instituted the present suit to eject the defendant from the premises:

Held, that the arrangement between the plaintiff and *E.* being not conditional if possession was not given to *E.* the plaintiff would be exposed to the consequences of a breach of his agreement with *E.* Consequently, it was just and proper that protection should be afforded to the plaintiff and that the latter had shown cause which ought to be deemed satisfactory by the Court for the purpose of coming to the conclusion that he was entitled to the order he sought *vide* proviso to sub-clause ', sub-section 1, section 11 of the Calcutta Rent Act. [p. 424, col. 1.]

Mr. *L. P. E. Pugh* (with him Mr. *T. Ameer Ali*), for the Defendants.

Mr. *N. Sircar* (with him Mr. *B. K. Ghose*), for the Plaintiff.

JUDGMENT.—The plaintiff, who is the owner of premises No. 4, Esplanade East, has instituted this suit against the defendants, (1) Walter Locke & Co. Ltd., being a Company registered under the English Companies Act; (2) Walter Locke & Co. Ltd. being a Company registered under the Indian Companies Act; (3) H. Hobbs & Co., a firm carrying on business in partnership at 4, Esplanade East; and three persons named (4) J. B. Fulton; (5) G. R. Stanley; (6) P. R. Dunckley residing at 4 Esplanade East, and described as Merchants' Assistants, praying for the recovery of possession of the premises. The suit against the defendant No. 5 (G. R. Stanley) has been withdrawn as the plaintiff was informed that he was not in possession of any portion of the premises. The defendants J. B. Fulton and P. R. Dunckley, although served with the writ, have not appeared in this suit.

The circumstances under which this litigation has arisen are as follows:—On the 25th July 1901 the premises in question were demised to Walter Locke & Co., Ltd., (hereinafter described as the defendant English Company) for a term of twenty years beginning from the 1st April 1901 at the monthly rentals of Rs. 1,875, Rs. 1,925 and Rs. 2,025 for the first six years, the second period of seven years, and the third period of seven years respectively. By the Indenture of Lease the defendant English Company, *inter alia*, covenanted with the lessor not to assign, transfer or part with the possession of the entirety of the said premises without the previous consent in writing of the plaintiff, so that the defendant English Company should be at liberty, without such consent, to sub-let the upper flats of the said premises or any part thereof respectively. The said Indenture also contained a proviso for the entry by the plaintiff in case of failure or neglect of observance of any of the covenants, conditions or agreements on the part of the defendant English Company to be performed and observed. The plaintiff alleges that, in or about the month of March 1920, Walter Locke & Co. Ltd., was registered in India to acquire and take over as a going concern the undertakings, assets and liabilities of the defendant English Company, and that the former Company thereafter carried on business at premises No. 4, Esplanade East, and that by reason thereof, there was a breach of the covenant hereinbefore referred to, and that thereupon the plaintiff became entitled to re-enter upon the premises. The plaintiff further alleges that on the defendant English Company's attention being drawn to the last mentioned fact, the defendant English Company informed the plaintiff that there had been no transfer of the business of the English Company to the Indian Company. The plaintiff on the faith of this assurance received the rents which had accrued previous thereto and which had not been received by him and also the subsequent rents up to December 1920. He states, however, that he has ascertained that a transfer to the Indian Company has been effected and that on account of the breach of covenant on the part of the defendant English Company, he has not accepted the rents from January to March 1921, and has also not received any portion of the monies due for the use and occupation by the defendant English Company of the premises in question after March 1921. The plaintiff further states that before the lease of the 25th July 1901 came to an end, the defendant English Company definitely informed the plaintiff early in January 1920 that they were not going to occupy the premises after the expiration of

the term of the lease of 25th July 1901, and that thereupon the plaintiff entered into an agreement on the 15th January 1920 with one B.N. Elias for letting out the premises in question to the latter for a period of 10 years from the 1st April 1921 or as soon as the English Company vacated the premises in question. In these circumstances, the present suit has been instituted by the plaintiff for ejectment of the defendants from the premises in question.

The ground of forfeiture alleged in the plaint is not now relied upon and I do not propose to refer any further to the defendant Indian Company. The defendant firm of H. Hobbs & Co., occupy the first floor of the premises which was sub let to them by the defendant English Company under a sub lease expiring on the 31st March 1921. The defendants Nos. 4 and 6 are occupiers of the remaining portion of the premises under the English Company.

The English Company in their written statement deny that their undertakings, assets and liabilities have been transferred to the Indian Company; or that there was any breach of covenant on their part as alleged in plaint. They say further that they duly tendered the rents in respect of the months of January to March 1921 to the plaintiff, but owing to the refusal of the latter to accept the same, the said rents as also the rents for the months subsequent to March 1921 have been duly deposited in the office of the Controller of Rents. They go on to add that some time prior to the expiration of the lease there were negotiations between the defendant English Company and the plaintiff for a fresh lease of the premises: that those negotiations did not mature owing to the plaintiff having insisted on a rent of Rs 5,000 per month besides the payment by the tenant of the owner's and occupier's shares of the rates and taxes: that, although the defendant English Company had intimated to the plaintiff sometime in January 1920 that they were not prepared to accept the terms which had been proposed by him, they notified to him on the 17th May 1920 that, having regard to the fact that the Rent Act had come into operation, they proposed to remain on in the premises and to avail themselves of the benefits conferred by the Rent Act. They also state in their written statement that they had made all possible endeavours to secure accomodation elsewhere but had failed, and that, unless they are allowed to remain in occupation of the premises, their business will suffer grave and irreparable injury. The defendant firm of Hobbs & Co, in their written statement adopted the statement made by the defendant English Company and maintained that, having regard to the provisions of the Calcutta Rent Act, they were entitled to remain in occupation of the first floor of the premises.

On these pleadings the following issues were settled between the parties:—

(1) Is the plaintiff entitled to eject the defendant Nos. 1 and 3 from the premises No. 4, Esplanade East?

(2) Is he entitled to the mesne profits claimed?

On behalf of the plaintiff one Jacob Ruben Jacob has been called. He describes himself as the constituted attorney of one B N. Elias and states that on the 16th January 1920 an agreement was arrived at between the plaintiff and Elias under which the latter was entitled to the grant of a lease of the premises in question for a period of 10 years at a monthly rent of Rs. 5,000 Under the agreement of 16th January 1920 the lessee would be required to pay the whole of the rates and taxes, to put the property in thorough repairs, to insure it for the benefit of the lessor in a sum of not less than Rs. 3,00,000 against accident, fire and earthquake and to deposit with the lessor a sum of rupees one *lakh* in cash or proper securities to be approved of in writing by the lessor. On the lessee fulfilling these terms he would have an option at the end of the period of 10 years to the renewal of the lease for a further term of 10 years at the enhanced rent of Rs. 5,500 a month.

The witness Jacob stated that the above terms were proposed by the plaintiff in his letter of the 16th January 1920 and that they were accepted on the same day by Mr. Elias and that thereupon a cheque for rupees one *lakh* was handed to the plaintiff. That cheque, the witness believed, had been cashed by the plaintiff; at any rate, no portion of the amount of the cheque has been returned by the plaintiff to Elias. The witness further stated that Elias had all along been and was

still willing to carry out his part of the agreement of the 16th January; that he considered himself tied to the plaintiff; and that he wanted possession to be given to him within a reasonable time. It appears that, pursuant to the agreement of the 16th January 1920, a formal lease of the premises has been drawn up and has been executed by the plaintiff and by Eliar, the date of the execution of the lease by Elias being the 5th January 1921. The leate was tendered in evidence, but it appearing it was not registered, it was not admitted in evidense as a lease; but portions of the document have been tendered in evidence for the purpose of showing that the agreement between the plaintiff and Elias was to the effect that Elias should have possession of the premises in question on the determination of the existing leate to Walter Locke & Co. Ltd. and as soon as the landlord gave vacant possession of the same. In cross-examination the witness stated to Mr. Pugh that Elias has, since the execution of the lease, raised the question as to whether, in place of the clause in the document which I have just read out, a clause to the effect that possession of the premise in question should be given by the plaintiff to Elias within a reasonable time after the expiration of the lease to Walter Locke & Co. Ltd, should not be substituted. The witness further stated in cross-examination that he had been advised by his Solicitors that the words now occuring in the lease were "all right"; but that owing to the absence of a clause to the effect that possession of the premises in question should be given to Elias within a reasonable time after the expiration of the lease to Walter Locke & Co. Ltd. Elias had not yet registered the lease granted by the plaintiff.

On behalf of the defendant English Company Mr. Brandshaw, their Director and General Manager in India, has been examined before me. He stated that there were negotiations between the plaintiff and the Company in 1919 for a new lease of the premises after the expiration of the old lease but no agreement was arrived at; that he interviewed the plaintiff on the 5th January 1920 when the latter told him that he had an offer of Rs. 5,000 per month *plus* all rates and taxes *plus* the cost of repairs and insurance. The witness considered the demand excessive and accordingly refused the same. Thereupon the witness wrote to the plaintiff a letter on the 7th January 1920 in these terms:—

"With further reference to my interview yesterday afternoon with your son and Mr. Ghosh, your Solicitor, *re* the terms on which you were willing to renew our lease, I write to say that upon mature consideration I regret we are unable to accept the terms offered. As the building cannot now be termed modern and has not the convenience of present day buildings, it would be impossible to get any thing like the same rent for the residential flats, and it would be impossible to saddle the business with a rent out of all proportion to its value. We are sorry, therefore, to have to decline your offer especially after the long and pleasant relations we have had during our tenancy of the last 20 years."

He admitted that after he had written the above letter, he was informed by the plaintiff on or about the 17th April 1920 that the plaintiff had contracted with one Elias on the 18th January 1920 for granting him a lease of the premises with effect from the 1st April 1921, *i. e.*, on the determination of the tenancy under the lease of the 25th July 1901. He stated that on the 17th May 1920 he had informed the plaintiff that the defendant English Company desired to remain in occupation of the premises after the expiration of their lease and that if the plaintiff was unwilling to grant them a further lease they proposed to seek the protection of the Rent Act. He said he had endeavoured to secure premises No. 2, Chowringhee, for the Company but the negotiations in respect of No. 2, Chowringhee had not matured, and added that after the expiration of the lease of the 25th July 1901, he had taken steps to move the Rent Controller for fixing a fair rent of the premises in question from April 1921, and that those proceedings were still pending before the Controller of Rents. In cross-examination the witness very frankly stated that he did not wish to suggest that Elias had no rights whatsoever under the agreement arrived at between him and the plaintiff on the 16th January 1920; his point was that he had never refused to pay proper rent in respect of the premises and that owing to the difficulty of getting suitable accomodation elsewhere he

had been obliged to seek relief under the Rent Act.

This is practicatly all the oral evidence in the case, (the defendant H. Hobbs & Co. have not given any evidence) and I now propose to turn to the documentary evidence which has been put in. I need not refer to the letter of 7th January 1920 as I have already set out the same; nor to the letters which passed between the plaintiff and Elias on the 16th January 1920 because I have set out the substance thereof. As I have said, on the 17th April 1920 the defendant English Company were apprised of the fact that the plaintiff had entered into an agreement on the 16th January 1920 with Elias for granting him a lease of the premises in question for a period of 10 years after the expiration of the then existing lease to the English Company. The defendant English Company did not reply to the letter of 17th April 1920 till the 17th May 1920, *i. e.*, not till the Rent Act had come into operation. On the 17th May 1920 they informed the plaintiff that they desired to remain in occupation of the premises and proposed to seek the protection of the Rent Act. On the 20th July 1920 the defendant English Company stated that, although they had given notice to the plaintiff, that they proposed to remain on after the expiration of their lease "under the protection of the Rent Act," they were, however, negotiating to take other premises and that they hoped to give the plaintiff vacant possession of the premises in suit on the 31st March 1921. On the 8th February 1921 the defendant English Company wrote to say that, owing to the failure in obtaining possession of premises No. 2, Chowringhee, they would be unable to give vacant possession of 4, Esplanade East, on the expiration of their lease on the 31st March 1921. On the 11th February 1921 the plaintiff stated in reply that the defendant English Company had given him definitely to understand that they would not remain on after the expiration of the lease on his terms and that thereupon he had entered in January 1920 into a binding agreement with another party for the lease of the premises which was to commence from the termination of the then existing lease in favour of the defendant English Company, and that he could not help stating that the defendant English Company were going back upon their promise. On the 14th February 1921 the defendant English Company explained to the plaintiff the position and stated that owing to their failure in securing accomadation in premises No. 2, Chowringhee, they had been obliged to seek the protection of the Rent Act in respect of premises No. 4, Esplanade East. On the 16th February 1921 there is a letter in which the position taken up by the defendant English Company is contested in great detail on behalf of the plaintiff. On the 22nd February 1921 there is letter from the defendant English Company in which the position of the Company is reviewed at great length. Then there is a letter of the 2nd March to which no reference need be made, having regard to the fact that the ground of forfeiture referred to above has now been abandoned by the plaintiff. Lastly, the defendant Company have produced before me the receipts which had been granted by the Controller of Rents in respects of the rents of the premises from January 1921 which were deposited in his office under the provisions of the Calcutta Rent Act.

In this state of the evidence, oral and documentary, it has been contended before me on behalf of the plaintiff that he is entitled to the relief he seeks on two grounds: (1) that the defendant English Company have not observed the provisions of subsections 4 and 5 of section 11 of the Rent Act and (2) that inasmuch as the defendant English Company had definitely refused to accept the terms which had been proposed by the plaintiff in respect of a fresh lease of premises No. 4, Esplanade East, so far back as on the 7th January 1920, *i. e.*, long before the Rent Act came into existence, the plaintiff was free to let out the premises to any one he liked and that he did in fact let out the premises to Elias on the 16th January 1920 long before the Rent Act had been thought of and that I ought not to pass such an order as will result in the plaintiff being exposed to the consequences of a breach of his agreement with Elias.

On behalf of the defendant English Company the contention has been advanced that there was at no time any definite refusal on their part to take a lease of the premises in question from the plaintiff on terms

which were fair and equitable. It was true that the defendant English Company had not accepted the plaintiff's terms as they thought they were extravagant; but the policy of the Rent Act was to prevent the tenant from having his rent raised against him, or from being turned out, though his tenancy by agreement had expired, so long as he was willing to pay the rent authorised by Statute. In other words, the defendant English Company became statutory tenants of the premises in question on the expiration of the term of the old lease and that, so long as they observed the terms of the Statute, they and the other defendants as well were entitled to remain in the premises in question. Lastly, it was argued, having regard to the nature of the business which the defendant English Company carried on in these premises, it was extremely inconvenient to and hard on them that they should be asked to move out of the premises at a month's notice, especially as no suitable accommodation was to be found elsewhere.

So far as the plaintiff's first contention is concerned, I do not think that there is any substance in it. The rents up to March 1921 were due to the plaintiff under the lease of the 25th July 1901. Those rents as they became due had been tendered to the plaintiff in due and proper time. The ground of forfeiture alleged in the plaint has been given up, and, that being so, I am unable to hold that there was any valid reason whatsoever on the part of the plaintiff which justified him in refusing to accept the rents which has been tendered by the defendant English Company in respect of January to March 1921. Be that as it may, on the refusal of the plaintiff to accept the rents so tendered, the defendant English Company deposited them in the office of the Controller of Rents on the 1st April 1921, *i. e.*, on the first available date on which he could deposit the rents under the Statute. As regards the rents for the months subsequent to March 1921, I am satisfied, on the evidence produced before me, that the defendant English Company deposited those rents in proper time in the office of the Controller of Rents. That being so, I hold against the plaintiff's first contention, and I am of opinion that the defendant English Company have duly observed the provisions of sub-sections 4 and 5 of section 11 of the Rent Act.

The second question raised by the plaintiff raises, however, a difficult point. Undoubtedly, the policy of the Rent Act is as has been contended for on behalf of the defendant English Company. In other words, the objects which the Legislature had in passing the Rent Act included restriction on increasing rents, restriction or right to possession and restriction on premises. In the case of rent, a standard is fixed and any rent in excess of that standard is declared by the Statute to be irrecoverable from the tenant, notwithstanding any agreement to the contrary. In the case of the restriction on the right to possession, section 11 provides as follows:—"Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872, no order or decree for the recovery of possession of any premises shall be made so long as the tenant pays rent to the full extent allowable by this Act, and performs the conditions of the tenancy: Provided that nothing in this sub section shall apply where the tenant has done any act contrary to the provisions of clause (*m*), clause (*o*), or clause (*p*) of section 108 of the Transfer of Property Act, 1882, or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighbouring occupiers, or where the premises are *bona fide* required by the landlord either for purposes of building or re building, or for his own occupation, or for the occupation of any person for whose benefit the premises are held, or where the landlord can show any cause which may be deemed satisfactory by the Court." It is further provided that the fact that the period of the lease has expired or that the interest of the landlord in the premises has been transferred, shall not, of itself, be deemed to be a satisfactory cause within the meaning of the last mentioned proviso, provided the tenant is ready and willing to pay rent to the full extent allowable by the Act. I need not refer to the case of restriction on premiums, because nothing turns upon it so far as this case is concerned.

The question now is whether in this case the plaintiff landlord has shown any cause which can be deemed satisfactory by the Court

for coming to the conclusion that the defendant English Company are disentitled to relief under the provisions of the Rent Act. I think the Legislature in enumerating in the proviso to section 11 the grounds upon which a landlord can successfully claim an order for possession did not intend to limit the claim to those grounds but merely enumerated those grounds for the purpose of indicating the grounds upon which a landlord would be entitled to possession as of right, leaving it open to the Court to exercise a discretion in his favour upon any other grounds which might appear to the Court to be satisfactory.

What are the facts here? As I read the correspondence between the plaintiff and defendant English Company, it is reasonably clear that on the 7th January 1920 the defendant English Company intimated to the plaintiff, in pefectly clear and unambiguous language, that they would not remain in occupation of the premises in question after the expiration of the terms of their lease on the 31st March 1921. They, therefore, suggested to the plaintiff that he should look for a new tenant in respect of the premises in question. Within 9 days of the date of the letter of the defendant English Company, the plaintiff succeeded in securing a tenant who was agreeable to accept his terms, and who gave ample evidence of his solvency and of his *bona fides* by immediately depositing with him a sum of rupees one *lakh*. All this took place long before the Rent Act came into operation. I do not think it can be suggested on the evidence before me that there is not at the present moment a definite and binding agreement between the plaintiff and Elias. The whole evidence points to the conclusion that the plaintiff and Elias consider themselves tied to each other. It is said that Elias is a speculator. For the purposes of this case, this question is, to my mind, irrelevant. It is next argued that the lease taken by Elias from the plaintiff in respect of the premises was conditional on Elias getting vacant possession of the premises from Walter Locke & Co. Ltd., and considerable stress has been laid on the words in Exhibit H to which I have already drawn attention. It is argued that where the landlord has secured a lessee on condition that possession should be given to him on the defendant English Company vacating the premises there was no chance whatsoever of the landlord being exposed to the consequences of the breach of any agreement which he might have arrived at between himself and Elias if he failed to give possession. In support of this contention, my attention has been drawn to the case of *Hunt* v. *Bliss* (1). It has been pointed out on the other hand, on behalf of the plaintiff that *Hunt* v. *Bliss* (1) has no application whatsoever to the facts of this case and that the case to which reference may usefully be made for the purpose of deciding the matters in controversy between the parties, is of *Green-Price* v. *Webb* (2). It is perfectly true that on the expiration of a lease the lessee, if he chooses to remain in the premises becomes a statutory tenant under the provisions of the Rent Act. The Legislature presents him with a statutory tenancy at the will of the tenant for so long as he liked and no longer. Now, if no other circumstances were present in this case, I should have unhesitatingly come to the conclusion that the defendant English Company were entitled to remain in the premises in question for so long as they liked and that no order for recovery of possession could be made in favour of the plaintiff; but in this case the tenant suggested to the plaintiff long before the expiration of the term of the lease of the 25th July 1901, that the plaintiff was free to negotiate with other people for letting out the premises in question On the faith of that representation the plaintiff has entered into a binding agreement with Elias. And is there any reason why that agreement should not be carried out? I do not think the arrangement between the plaintiff and Elias is conditional. The landlord, in my opinion, has undertaken to give possession of the premises to Elias on the expiration of the term of the lease of the 25th July 1901, or at any rate within a reasonable time thereafter. Mr. Elias considers six months to be a reasonable time. I do not think the words in Exhibit H referred to above can possibly mean that Elias would have to wait for an indefinite

(1) (1919) 33 T. L. R. 74; 64 S. J. 116.
(2) (1919) 36 T. L. R. 29; 64 S. J. 19.

period to obtain possession of the premises. That being so, I think if possession is not given by the plaintiff to Elias, the plaintiff will be exposed to the consequences of a breach of his agreement with Elias and that it is just and proper that protection should be afforded to the plaintiff. It is said that the tenant has certain definite rights under the Rent Act: so indeed he has; but the rights of the landlord have not yet been wholly taken away by the Legislature. It is further said that the view I am taking would render the whole Act nugatory; I do not agree that I am doing anything of the kind. Each case must depend upon its own facts; and to my mind the facts disclosed in the present case are more near the facts in *Green-Price* v. *Webb* (2) than to the facts in the case of *Hunt* v. *Bliss* (1), I am, therefore, inclined to think that the plaintiff landlord has shown cause, which ought to be deemed satisfactory by the Court for the purpose of coming to the conclusion, that he is entitled to the order he seeks (*vide* proviso to sub-clause], section 11 of the Calcutta Rent Act).

While, however, I have been constrained to come to the conclusion which I have just mentioned. I think, having regard to the peculiar facts of this case, I ought at the same time to mitigate the stringency of any order as far as possible. So far as the defendant H. Hobbs & Co., are concerned I find that they had a sub-lease of the first floor in these premises expiring on 31st March 1921. Therefore, so far as they are concerned, they stand or fall with the defendant English Company. The defendants Nos. 4 and 6 have not shown any cause whatsoever why I should not decree the suit against them. The order, therefore, which I propose to make is that the plaintiff will be entitled to recover possession of the premises in question, but he will not be entitled to execute the decree for ejectment for a period of six months from date against the 1st, 3rd, 4th and 6th defendants. I have already stated that the suit has been withdrawn as against the defendant No. 5. The plaintiff will get the costs of the suit on Scale No. 2 against the 1st and 3rd defendants and on Scale No. 1 against the 4th and 6th defendants.

There is no evidence before me that the Indian Company was at the date of the suit in possession of any portion of the premises. I think, therefore, the suit, so far as the Indian Company is concerned, should stand dismissed. In the circumstances of the case, I do not, however, propose to allow any costs to the Indian Company.

As regards the question of mesne profits, it is urged on behalf of the plaintiff that I ought to allow to him at least Rs. 3,500 per month on Mr. Bradshaw's evidence. What Mr. Bradshaw did really say in his evidence is this: that he thought that if the plaintiff was minded to give a fresh lease of the premises after the premises had been thoroughly repaired, and after modern conveniences had been put in including the installation of an electric lift and so on, he would be willing to pay a rent of Rs. 3,500 per month. It is in evidence that the permises in question have not been repaired for a period of 6 years; taking all circumstances into consideration, I allow mesne profits at the rate of Rs. 3,000 per month from the 1st April 1921 till the date when possession of the premises is given to the plaintiff. The defendant English Company has deposited certain rents in the office of the Rent Controller. There is no difficulty as regards the rents up to 31st March 1921; the plaintiff will be entitled to take them out.

As regards the monies deposited in respect of the months subsequent to March 1921 the plaintiff will also be entitled to take out the same from the office of Rent Controller; he will give credit for the same in taking the account of the mesne profits from the 1st April 1921 up to the date when possession is recovered by him. Inasmuch as I have held that the defendant English Company were not entitled to remain in possession of the premises after the 31st March 1921, I think the mesne profits ought to run from the 1st April 1921. Interest on mesne profits at 6 per cent.

B. N. & N. H.

Order accordingly.

SHRIRAM SHANKERLAL v. MADHO PATIL.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No 173-B OF 1921.

December 3, 1921.

Present :—Mr. Dhobley, A. J. C.

SHRIRAM SHANKERLAL THROUGH OWNER INDERSINGH—PLAINTIFF—APPLICANT

versus

MADHO PATIL—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908)—Suit in name of shop by one partner only, whether maintainable.

One of the partners in a shop is competent to sue in the name of the shop, and, in such a case, it is not necessary that all the partners should be named in the plaint as plaintiffs or that the plaint should be signed by all of them.

Application for revision of a decree of the Judge, Small Causes Court, Malkapur, dated the 27th July 1921 in Civil Suit No. 374 of 1921.

Mr. *B. V. Pradhan*, for the Applicant.

JUDGMENT.—The suit giving rise to this revision was brought in the Small Cause Court, Malkapur, by one Indersingh, who described himself as the owner of the shop known as Shriram Shankerlal. The promissory-note for the enforcement of which the suit was brought was executed by the defendant in the name of the shop. The suit was heard *ex parte* and during the course of the evidence it transpired that there were two partners in the shop, Indersingh and one Haridas. Taking this circumstance into consideration, the Court awarded a decree only to the extent of one-half of the amount claimed apparently on the ground that Indersingh had not power to realise the debt on behalf of the other partner. The decree cannot be upheld, as there was no plea that Indersingh had no power to bring a suit in the name of the shop or that either the defendant or the other partner had questioned his right to bring a suit for the whole amount. The suit was brought in the name of the shop and one of the partners could bring it on behalf of all the partners. It was not necessary that all the partners should have been named in the plaint as plaintiffs or should have signed the plaint. The decree must, therefore, be modified and a decree for the full amount claimed passed. The plaintiff is given a decree for the full amount claimed together with his costs in this and in the lower Court.

G. B. D. & W. C. A. *Decree modified.*

AMBIKA DEBI v. SWARNAMAYI DASI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No OF 1920.

February 23, 1922.

Present :—Mr. Justice Greaves and Mr. Justice Ghose.

Sreemutty AMBIKA DEBI AND OTHERS—DEFENDANTS Nos. 1 AND 6—APPELLANTS

versus

Sreemutty SWARNAMAYI DASI AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS Nos. 2 TO 5—RESPONDENTS

Landlord and Tenant—Partial transfers—Occupancy holding, non-transferable—Usufructuary mortgage by tenant—No abandonment—Landlord, if entitled to re-enter—Execution of usufructuary mortgage—Abandonment.

A transfer by way of usufructuary mortgage stands on the same footing as other partial transfers. [p. 427, col. 1.]

Bhupendra Nath Bose v. *Bansi Tanti*, 22 Ind. Cas. 416: 40 C. 870, referred to.

Where there has been no abandonment by the tenant, the mere execution by him of a usufructuary mortgage in respect of a non-transferable occupancy holding, followed by possession of the mortgagee, does not entitle the landlord to re-enter on the holding or recover possession. [p. 427, col. 1.]

Krishna Chandra Datta v. *Krishna Bajania*, 10 C. W. N. 499: 3 C. L. J. 222, not followed.

Dayamoyi v. *Ananda Mohan Roy*, 27 Ind. Cas 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52, referred to.

The mere execution of a usufructuary mortgage might not of itself be sufficient to establish abandonment. [p. 427, col. 1.]

Monohar Pal v. *Ananta Moyee*, 20 Ind. Cas. 198; 17 C. W. N. 802, referred to.

Appeal against a decree of the Subordinate Judge, Second Court, Midnapore, dated the 29th of July 1919, reversing that of the Munsif, Fourth Court at Tamluk, dated the 26th of March 1918.

FACTS appear from the judgment.

Mr. *Jyotish Chandra Hazra* (with him Babus *Mohesh Chandra Banerjee* and *Santosh Kumar Paul*), for the Appellants.—The defendants Nos. 1 and 6 are appellants. The appeal is against a decree awarding possession on payment of Rs. 45 in satisfaction of rent decree. Defendant No. 6 is the landlord and defendant No. 7 is the original tenant against whom the landlord defendant No. 6 obtained rent decree. Plaintiff is the usufructuary mortgagee of the holding from defendant No. 7. In execution of his rent decree the landlord purchased the holding. Hence the present suit. The question is whether I

have any right to maintain this suit and whether there has been abandonment. The finding is that it is an incumbrance being non transferable occupancy holding which not having been annulled the landlord is not entitled to possession. Two of the plots which were mortgaged to me have been found to be not within the holding. I submit it is not an incumbrance. The case in *Bhupendra Nath Bose* v. *Bansi Tanti* (1), is distinguishable. Refers to *Meherun-nesa* v. *Sham Sundar Bhuiya* (2). This case lends support to the view taken by the lower Appellate Court. Refers to *Rasik Lal Dutt* v *Bidhu Mukhi Dosi* (3), *Krishna Chandra Dutta* v *Khiran Barania* (4). The case in *Rajendra Kishore Adhikari* v. *Chandra Nath Dutt* (5), is distinguishable. Refers to *Kali Nath* v. *Kumar Upendra Chandra* (6). If it is not an incumbrance it need not be annulled. The case in *Dayamoyi* v. *Ananda Mohan Roy* (7), is rather in my favour than against me.

Babu *Hiralal Sanyal* (with him Babu *Charu Chandra Biswas*), for the Respondents—They now set up a totally new case. My client lentRs 400 on an usufructuary mortgage. The mortgagor wilfully defaulted and allowed the properties to be sold and purchased it himself. When I came to know of this I instituted the suit impugning the above proceeding as collusive. The defence was that there was no mortgage. These questions were never raised in the Courts below. They said that the plaintiff is a trespasser and that the mortgagor's tenant had either abandoned or that I could eject the trespasser. That is their argument. I submit that argument has now no force in face of the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (7), or the Special Bench decision in *Chandra Benode Kundu* v. *Ala Bux* (8). An occupancy holding is now saleable and transferable with this exception that the landlord may not recognise the transferee. The transfer to me is not by way of sale but as a mortgage. Abandonment implies cessation of interest. Rent suit was instituted with the idea that the tenant had subsisting interest. The mortgage was in 1909. The suit for rent was in 1913. It has been found that there was no abandonment. I submit under these circumstances the landlord is not entitled to re-enter. Refers to *Dayamoyi* v. *Ananda Mohan Roy* (7).

[GHOSE, J.—Look at *Ajodhya Prasad Singh* v. *Jagdeo Singh* (9). But see Explanation to section 87 of the Bengal Tenancy Act.] That was a Patna case. There has got to be abandonment in law and fact.

Mr. *Jyotish Chandra Hazra* in reply.—Section 87, Bengal Tenancy Act, is not exhaustive. Refers to *Bhupendra Nath Bose* v. *Bansi Tanti* (1).

JUDGMENT.—This is an appeal by the defendants Nos. 1 and 6 against a decision of the Subordinate Judge of Midnapore modifying a decision of the 4th Munsif at Tamluk. The plaintiff in the suit was a usufructuary mortgagee. The mortgage was executed in his favour by defendant No. 7. The appellant, defendant No. 6, is the landlord and the first defendant is a new tenant with whom defendant No 6 purports to have settled the lands. The holding, which is a non-transferable occupancy holding, was sold for non payment of rent and was purchased by defendant No. 6, the landlord. The lower Appellate Court has passed a decree for possession of the land in suit in favour of the mortgagee, the plaintiff, on condition of his paying to the landlord, the appellant, defendant No. 6, a sum of Rs 45, the amount of the arrears of rent for which the holding was brought to sale.

Two points have been urged before us in this appeal. First, it is said, that the plaintiff cannot maintain the suit inasmuch as the execution of the usufructuary mortgage by defendant No 7 gave the landlord a right to obtain possession of the holding, and it is said that, by virtue of the mortgage, the plaintiff acquired no rights in the land. Secondly, it is said that there was no prayer for redemption in the original plaint. So far as the first point is concerned, what has been argued before us is that the mere execution of the usufructuary mortgage by the tenant followed by possession of the mortgagee,

(1) 22 Ind. Cas. 416; 40 C. 870.
(2) 6 C. W. N. 834.
(3) 10 C. W. N. 719; 4 C. L. J. 806; 33 C. 1094.
(4) 10 C. W. N. 499; 3 C. L. J. 222.
(5) 12 C. W. N. 878.
(6) 1 C. W. N. 168; 24 C. 212; 12 Ind. Dec. (N. s.) 807.
(7) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52.
(8) 58 Ind. Cas. 353; 31 C. L. J. 510; 24 C. W. N. 818; 48 C. 184 (S. B.).
(9) 37 Ind. Cas. 915.

even without any definite evidence that the tenant has abandoned the holding, is sufficient of itself to entitle the landlord to possession, and in support of this contention we were referred to several cases, the one which bears the most upon the point being the case of *Krishna Chandra Dutta* v. *Khiran Bajania* (4) where it is held that by creating a usufructuary mortgage an occupancy *raiyat* not authorised to transfer his holding makes himself liable to ejectment by the landlord.

As against this on behalf of the respondents it is stated that that decision must be taken to have been impliedly overruled by the decision in the case of *Dayamoyi* v. *Ananda Mohan Roy* (7), for it is said that where a transfer is not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been an abandonment. So far as the abandonment is concerned, there is an express finding in the judgment of the lower Court that there was no abandonment of the holding by defendant No. 7; consequently, it seems to us that the argument advanced before us on behalf of the respondent is well-founded and that the mere execution of a usufructuary mortgage followed by possession does not entitle the landlord to re-enter on the holding or recover possession. Reference may be made in support of the conclusion at which we have arrived to the case of *Bhupendra Nath Bose* v. *Bansi Tanti* (1) which is a decision that a transfer by way of usufructuary mortgage stands on the same footing as other partial transfers; and in the case of *Monohar Pal* v. *Ananta Moyee* (10) it is said (at page 800*) that the mere execution of a usufructuary mortgage might not of itself be sufficient to establish abandonment. So far as the second question is concerned it seems to us that the suit was adequately framed for the purposes of the decree which was obtained.

In the result the appeal fails and must be dismissed with costs.

The cross objections are not pressed. They are dismissed but without costs.

B. N. *Appeal dismissed.*

(10) 20 Ind. Cas 198; 17 C. W. N. 802.

* Page of 17 C. W. N.—[Ed.]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 385 OF 1921.

August 18, 1922.

Present:—Mr. Prideaux, A. J. C.

VINAYAK AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAHEBULLA KHAN—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 920), ss. 6, 110—Retrospective effect of s. 6—C. P Tenancy Act (XI of 1898), s. 41—Absolute occupancy holding—Transfer without consent—Landlord's right to sue for possession—Section, whether one of procedure.

In case of a transfer of an absolute occupancy holding section 41 of the C. P. Tenancy Act XI of 1898) not only gave the landlord a right of pre-emption, but it also gave him the right to sue the transferee for ejectment.

Lahanu Bai v. *Satischander*, 1 C. P L. R. 148, *Ramji Patel* v *Syed Nur*, 4 N. L. R. 4', *Beni Prasad* v. *Mul Chand*, 6 Ind Cas 817: 6 N. L. R. 65, referred to.

The section did not relate to procedure merely but created rights.

Therefore in view of the express provisions of section 110 of the C. P Tenancy Act (I of 920) section 6 of that Act cannot have retrospective effect so as to deprive the landlord of his rights under section 41 of Act XI of 1898 in respect of transfers made while that Act was in force.

Appeal from a decree of the Additional District Judge, Chanda, dated the 27th April 1921 in Civil Appeal No. 3 of 1921,

Mr. *M. R. Bobde*, for the Appellants.

Mr. *K. V Deosher*, for the Respondent.

JUDGMENT.—The defendants-appellants bought by a deed of sale, dated 20th July 1919, three absolute occupancy fields situated in Mouza Kokdi, Tahsil Garchiroli, from one Paiku. The plaintiff is the *malguzar lambardar* of that village. He sues stating that the sale took place without his consent, that it should be declared invalid against him and asks for possession. The claim is decreed in the First Court and the decree of that Court has been confirmed in appeal.

The arguments advanced here are threefold. First, that under section 41 of the C. P. Tenancy Act, 1898, the only remedy of the landlord was to exercise his right of pre-emption; (2) that, that section lays down merely a rule of procedure; it creates no vested rights; and (3) as the present Act, section 6, does not give the landlord any right to sue for possession on the ground that the tenant

DIPA v. LAL CHAND.

was not entitled without sanction to transfer, as the suit was brought when the Act of 1920 was in force, the landlord has not the remedy he claims in this suit. It is contended that the intention of section 6 of the present Act is to take away from the landlord any right that he may have had of bringing a suit of this nature. Now, it is clear that section 41 of the Act of 1898, Act XI, gave the landlord more than a mere right of pre-emption. Sub-section 7 states:—

"Any transfer made in contravention of this section shall be voidable at the instance of the landlord."

And the following sub-section allows the tenant when the transferee has been ejected by the landlord to apply to a Revenue Officer within one year of such ejectment to be re instated in possession of the holding on his depositing for payment to the landlord the costs incurred by the landlord in procuring the ejectment. There is a string of cases of this Court showing that the landlord's right to sue the transferee in a case where the sale has been made without his consent has been allowed. I need only mention *Lahanu Bai* v. *Satischander* (1), *Ramji Patel* v. *Syed Nur* (2), *Beni Prasad* v. *Mul Chand* (3) and *Nakulsao* v. *Ramadhinsao* (4).

It is clear that section 41 of the Act of 1898 refers to more than procedure: it gives two rights to two persons. It gives the *malguzar* the right of pre-emption and ejectment and the tenant the right of re-entry. It cannot, therefore, well be argued that section 6 of the Act of 1920 which came into force on the 1st of July 1920 has retrospective effect as regards the present transfer. Section 110 of the present Act distinctly states that rights acquired under the former Act shall, so far as may be, be deemed to have been acquired under the present Act and it seems to me that the lower Appellate Court's argument on this question is correct. The provisions of section 6 do not give the landlord the power to bring the present suit; but his right to do so had already arisen under the former Act and he could sue to enforce that right; and the right being exercised under the former Act, it seems to me that the tenant can under sub-section 8 of section 41 of the Act of 1898 apply to be re instated within one year of his ejectment under the present decree. The case has, in my opinion, been rightly disposed of. This appeal fails and is dismissed with costs.

Appeal dismissed.

M. H.

(1) 1 C. P. L. R. 143.
(2) 4 N. L. R. 45.
(3) 6 Ind Cas. 817; 6 N. L. R. 165.
(4) 34 Ind. Cas. 698; 12 N. L. R. 86.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 97 OF 1922.

July 1, 1922.

Present:—Mr Justice Brasher.

DIPA—DEFENDANT—APPELLANT

versus

LAL CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharer landlords—Suit for possession against trespasser—One co-sharer, whether may sue to recover entire holding.

One of several joint owners of a holding cannot bring a suit for possession of the entire holding where the person in occupation of the land is not a tenant but a mere trespasser. He can only sue for possession of his own share.

Budh Singh v. *Mihan Singh*, 65 P. R. 1894, distinguished.

Second appeal from a decree of the District Judge, Hissar, dated the 18th July 1921, affirming that of the Munsif, Second Class, Hissar, dated the 10th March 1919.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Soni*, for Pandit *Nanak Chand*, for the Respondents.

ORDER.—The plaintiff, Lal Chand, in this case is one of several landlords who were recorded as owners of the land which formed the subject of the suit. One Dani was an occupancy tenant. He died leaving a widow, *Mussammat* Sundar, who re married in 1903 and abandoned the land. The defendant, Dipa, came into possession of the land and he sold a portion of it to Nathu. The plaint-

iff sued for possession of the whole land, and has been given a decree, it having been found that Dipa had no right to succeed as an occupancy tenant and that his position was that of a trespasser. So far as the land sold to Nathu is concerned, the decree has become absolute, but Dipa has appealed without success to the District Judge, and has preferred a further appeal to this Court. The only question now raised is, whether the plaintiff can be given a decree for more than his own share in the land. For the respondent it is contended, on the authority of *Buah Singh* v. *Mihan Singh* (1) and other rulings, that each individual landlord is landlord of the whole tenancy, and that each landlord can, therefore, maintain a suit for possession of the whole land. The question here, however, is not one between landlord and tenant. It has been found that the tenancy is extinguished and that the appellant Dipa is a mere trespasser. This being so, I fail to see how the plaintiff, as one of several joint owners, can get a decree for more than his own share, and I consider that the appeal must succeed. Neither side, however, is in a position to state what share was held by the plaintiff at the time of the institution of the suit, and I accordingly remand the case to the lower Appellate Court under O. XLI, r. 25, Civil Procedure Code, for a finding on this point. Return to be made within three months.

N. H. *Case remanded.*

(1) 65 P. R. 1894.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 29-B OF 1921.

June 27, 1922.

Present:—Mr. Prideaux, A. J. C.

BALWANT—AUCTION-PURCHASER—APPELLANT

versus

RATANLAL AND ANOTHER—DECREE HOLDER AND JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Representative of judgment-debtor—Auction-purchaser—Execution sale, setting aside of—Auction-purchaser, whether can apply under O. XXI, r. 90.

An auction-purchaser is not the representative of the judgment-debtor and cannot move a Court under section 47 of the Civil Procedure Code. [p. 430, col. 2.]

Nadamuni Narayana Iyengar v. *Veerabhadra Pillai*, 8 Ind. Cas. 429; 34 M. 417; (1910 M. W. N. 662; 9 M. L. T. 152; 21 M. L J 928 and *Narsinhbhat Chintamanbhat* v. *Bandu Krishna Kulkarni*, 46 Ind. Cas. 113; 42 B. 411; 20 Bom. L. R 495, relied on.

An auction-purchaser cannot under O. XXI, r. 90, Civil Procedure Code, apply to set aside an auction sale. [p. 430, col. 1.]

Birj Mohun Thakur v. *Rai Uma Nath Chowdhry*, 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.) and *Sheo Gobind Singh* v. *Dhanukdhari Singh*, 21 Ind. Cas. 774; 19 C. W. N. 1291, relied on.

Appeal from an order in Execution Case No. 51 of 1921, dated the 2nd April 1921, arising out of Civil Suit No. 205 of 1919, passed by the Additional Sub Judge, Akola.

Mr. *W. R. Puranik*, for the Appellants.

Mr. *J. R. Ohandurker*, for Respondent No. 1.

JUDGMENT.—A house at Akola covered by a mortgage, the subject of Suit No. 205 of 1919, was put to auction and sold in execution of the decree on 13th November 1920. It was purchased by Balwant Ram Krishna Gadgil, the present appellant, for Rs. 4,300. He applied on 14th December 1920 saying that he learnt that the house was mortgaged for Rs. 3,000 and interest to one Rangildass Ballabhdas of Khamgaon, a fact not mentioned in the proclamation of sale or at the auction, it being then stated that the house was free from encumbrance. He asked under O. XXI, r. 90 that the sale be set aside and that the money be not paid to the judgment-creditor. The rule referred to runs:—

"Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets or whose

nterests are affected by the sale may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it :

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applisant has sustained substantial injury by reason of such irregularity or fraud."

The application was opposed, it being contended that

(*a*) it was time barred.

(*b*) That it was not tenable under O. XXI, r. 90.

(*c*) That with reasonable diligence the decree-holder could not assertain the incumbrance existed and hence there was no material irregularity.

The petitioner claimed his application was in time as that ran from the date of the confirmation of the sale and as knowledge of the mortgage was fraudulently kept from him. If the application did not fall within the provisions of O. XXI, r. 90 of the Civil Procedure Code, still, the Court had inherent powers to correct a wrong brought about by fraud.

The contentions of the parties led to the following issues :—

(1) Whether the decree holder knew of the mortgage of Rangildas at the time of applying for sale proclamation or at any time before sale ?

(2) Did the decree-holder admit to give the said information purposely to fetch higher price ?

(3) Whether the omission to give such information and to make enquiries amount to fraud ?

(4) Whether the applicant came to know of the incumbrance two days before the application and is the application within time, even if the allegations of the applicant are proved ?

The Judge finds, dealing with the fourth issue, that a purchaser cannot apply under O. XXI, r. 90 relying on *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (1) and quoted *Sheo Gobind Singh* v. *Dhanukdhari Singh* (2) in support of the proposition that the applicant's remedy was by way of a regular suit.

The Judge declined to deal with the application under section 47, Civil Procedure Code, on the ground that the auction-purchaser was not a representative of the judgment debtor. He quotes *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (3) and *Narsinhbhat Chintamanbhat* v. *Bandu Krishna Kulkarni* (4) in support of this view.

It is here contended that the above views are erroneous and that the appellant is entitled to get relief in the lower Court.

In view of the authorities quoted it seems to me that the application under O. XXI, r. 90 did not lie. It is, therefore, unnecessary to consider the question of limitation. The auction-purchaser is not the judgment debtor's representative and cannot move under section 47, Civil Procedure Code. He may have other remedies open to him.

Ground No. 5 of the memorandum has not been argued.

The result is, that this appeal fails and is dismissed with costs. Appellant to pay respondents' costs. I fix Pleader's fees at Rs. 20.

G. R. D. & N. H.

Appeal dismissed.

(1) 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.).

(2) 21 Ind. Cas. 774; 19 C. W. N. 1291.

(3) 8 Ind. Cas. 429; 34 M. 417; (1920) M. W. N. 662; 9 M. L. T 152; 21 M. L. J. 928.

(4) 46 Ind. Cas. 113; 42 B. 411; 20 Bom. L. R. 495.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1635 OF 1919.

February 22, 1922.

Present:—Mr Justice Newbould and Mr. Justice Panton.

RAJENDRA NATH ROY—PLAINTIFF —APPELLANT

versus

SHEIK ABDUL PRINCIPAL DEFENDANT AND OTHERS—*Pro forma* DEFENDANTS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Error of law in matter within jurisdiction—High Court, if should interfere.

The High Court should not interfere in revision under section 115 of the Code of Civil Procedure

on the ground that a Court has committed a serious error of law in coming to a finding in a matter in which it had jurisdiction. [p. 432, col. 1.]

† *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux*, 23 Ind. Cas. 977; 41 C. 321, referred to.

Appeal against a decree of the First Additional District Judge, Dacca, dated the 12th May 1919 reversing that of the Munsif, Second Court at Dacca, dated the 26th March 1918.

FACTS appear from the judgment.

Babu *Sasadhar Roy* (Senior), for the Respondent, took a preliminary objection that the appeal is not competent under the provisions of section 153 of the Bengal Tenancy Act.

Babu *Jogesh Chandra Roy* (with him Babu *Nabadwip Chandra Saha*), for the Appellant.—I will not press the appeal as the other side has raised an objection, so I will argue the Rule. The execution of the *kabuliyat* on which I base my claim has been proved and that is the concurrent finding of both the lower Courts. It is quite surprising that the lower Appellate Court did not grant the decree in spite of his findings in my favour, and that is, I submit, a clear failure of the exercise of jurisdiction vested in the learned Judge by law. *Rama Charan Chowdhury* v. *Administrator-General of Bengal* (1) covers the whole of the present case. As to jurisdiction, even if section 115, Civil Procedure Code, does not help me, I can come under the Charter Act under which your Lordships' powers are very wide. However, the error is so apparent that under section 107 of the Government of India Act your Lordships can act. The Judge has refused to exercise jurisdiction in not giving me a decree when *kabuliyat* has been proved, the relationship of landlord and tenant has also been proved. The Court has refused to exercise jurisdiction which he ought to have exercised on an erroneous view of law. Facts are all found in my favour still the Judge does not give effect to the contract, it is a cardinal error of law. He must give effect to the contract.

Babu *Sasadhar Roy*, for the Respondents.—The presumption raised by the Record of Rights has not been rebutted.

I submit that the Judge has a right to decide erroneously if he has jurisdiction. If a Court decided the question of *res judicata* wrongly, does that mean that he had no jurisdiction or failed or refused to exercise jurisdiction? Section 115, Civil Procedure Code comes in where there has been admitted failure of jurisdiction. Refers to *Muhammad Yusuf Khan* v. *Abdul Rahman Khan* (2) and *Ganga Prasad* v. *Nandu Ram* ( ). Has my friend made out that it is in interest of justice that your Lordships should interfere? To come under section 115, one must show that the decision is by a Judge who has no jurisdiction on the matter or refused to exercise jurisdiction he had in the matter.

On the merits also my friend cannot succeed There is no evidence to show that the *kabuliyat* has been acted upon or rent paid. *Kabuliyat* is nothing but a piece of admission. The conduct of the parties shows that it was not intended to be acted upon.

Reads Mulla's Notes in Civil Procedure Code on section 115

Babu *Jogesh Chandra Roy* briefly replied.

JUDGMENT.—The plaintiff brought a suit for rent against the principal defendants basing his claim on a registered *kabuliyat*. He was given a decree by the First Court On appeal that decree was reversed. A second appeal has been preferred to this Court and also a Rule has been granted on the opposite party to show cause why the decree of the lower Appellate Court should not be set aside. On the objection taken that section 153 of the Bengal Tenancy Act bars an appeal the appeal has not been pressed and the Rule has been argued.

Both the Courts have found that the execution of the *kabuliyat* on which the plaintiff based his claim has been proved. In the lower Appellate Court the defendant-appellant's Pleader was not allowed to argue undue influence or coercion as no such plea had been taken in the written statement. The First Court found that there had been payment of rent in accordance

(1) 6 C. L. J. 72.

(2) 16 C. 749; 16 I. A. 104; 13 Ind. Jur. 170; 5 Sar. P. C. J. 362; Rafique & Jackson's P. C. No. 112; 3 Ind. Dec. (N. s.) 496 (P. C.).

(3) 37 Ind. Cas. 129; 20 C. W. N. 1080; 1 P. L. J. 465; 3 P. L. W. 55.

with the terms of the *kabuliyat*. The lower Appellate Court came to the opposite conclusion on this question of fact. Nevertheless, the lower Appellate Court held that the relationship of landlord and tenant had been proved, but he refused the plaintiff a decree on the finding that the *kabuliyat* alone was insuffisient to prove the amount of yearly rent payable by the defendants to the landlord in view of the entry in the Record of Rights showing that no rent had been paid. The reasons given by the learned Additional District Judge for holding that the *kabuliyat* was insufficient to prove the yearly rent payable do not appear to us convincing. But we are unable to hold that, in coming to this erroneous finding the learned Judge exercised a jurisdiction not vested in him by law, or failed to exercise a jurisdiction which is vested in him by law, or acted in the exercise of his jurisdiction illegally or with material irregularity so as to make section 115, Civil Procedure Code, applicable to this case.

On behalf of the appellant before us it is contended that on the findings arrived at by the lower Appellate Court he was bound to grant him a decree, and not having done so he failed to exercise his jurisdiction. We are unable to accept this contention. On the finding that the annual rental had not been proved the suit was bound to fail and though we may think it was a wrong finding, it was not such an error in the exercise of jurisdiction as to justify our interference. Several cases as to the powers of this Court when sitting in revision have been cited before us, but we think it sufficient to refer to the case of *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (4), where the point has been discussed at some length. That decision supports our view that we should not interfere in revision on the ground that there has been a serious error in law in coming to a finding in a matter in which the Court had jurisdiction.

The result is that the appeal is dismissed as being incompetent and the Rule is discharged. The appellant will pay the respondents' costs in the appeal. We make no order as to costs in the Rule.

B. N.

Appeal dismissed.

(4) 23 Ind. Cas. 977; 41 C. 323.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 477 OF 1921.

July 8, 1922.

Present:—Mr. Hallifax, A. J. C.

RAMKRISHNA—DEFENDANT—APPELLANT

versus

GANPATI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1 —Receiver, appointment of—Vesting of property, when takes place.

The mere appointment of a Receiver under O. XL, r. 1 *a* of the Civil Procedure Code, does not immediately vest the property in him. It is only when the provisions of clauses *b*, *c* and *(d)* of the rule have been complied with, that the property vests him. [p. 433, col. 1.]

Appeal from a decree of the Additional District Judge, Nagpur, dated the 22nd July 1921, in Civil Appeal No. 5 of 1921.

Mr. *M. B. Bobde*, for the Appellant.

Mr *A. V. Zinjarde*, for the Respondent.

JUDGMENT.—In 1916 the plaintiff respondent obtained a decree for arrears of rent of the ordinary holding with which we are concerned. He eventually applied for ejectment of the tenant, and a warrant was issued on 16th August 1918 and executed on 30th August 1918. The appellant, Ramkrishna, who was the fourth defendant in the present suit, held a decree for money against the tenant, in execution of which he applied for the appointment of a Receiver for the holding and an order was passed on 30th April 1918 of which Exhibit D-1 is a copy. It is in the following terms:—

"30th April 1918. Decree-holder by agent Daulat. Judgment-debtor absent. He appears now. Dhada, son of Kawdu, Receiver, present. He undertakes to lease out the field on *thekz* and deposits the lease money in Court on 15th of April in each year after deducting rent and cesses of the field which will be paid to the *malguzar* concerned. Receipts will be filed. He will get Rs. 5 per cent. as his commission. He to produce security of Rs. 200. For 14th May 1918."

(2) It is difficult to construe this as an appointment of a Receiver. It is an adjournment of the making of the appointment till the person designated for it had furnished security. But it may be taken for the purposes of this case that Dhadu was appointed on 30th April 1918 under clause (*a*) of r. 1 (1) of O. XL, to be the Receiver of the property. It is, however, very clear from the terms of that rule that mere appointment does not immediately vest the property in the Receiver. The transfer of the property to his possession, actual or constructive, and the conferral of special powers on him require specific orders under clauses (*b*), (*c*) and (*d*) of the same rule, and no such order was passed at that time. What orders were passed on 14th May 1918 we do not know, as the order quoted above is the only one of which a copy has been filed.

(3) The next event of which we are informed is the issue of a warrant on 13th December 1918 for the transfer of possession by the tenant to the Receiver. The Receiver took possession under this warrant on 22nd December 1918 and put in three persons to whom he had given a lease. These three persons figured as defendants in the case. As has been said, even if the order of 30th April 1918 was an appointment, it is impossible to hold that of itself it vested the property in the Receiver, that is to say, in the Court; much remained to be done before that could happen, and it was not done till 22nd December 1918, nearly four months after the tenant against whom the decree was being executed had been ejected and the land had passed to the *malguzar*.

(4) The entry of the lessees of the Receiver on the plaintiff's land was undoubtedly a trespass, and the decree-holder who procured that trespass and benefited by it is undoubtedly bound to make good to the plaintiff any loss he suffered by it. The only point that really arises in the case seems to have been missed entirely. The measure of damages has been assumed to be the benefit received by the decree-holder who caused the trespass, though there is a finding by the First Court that the plaintiff never suffered any damage at all. As he had leased out the village at the time and was not in actual possession, this finding is very probably correct. But the question of the amount of damages to be awarded has not been raised and cannot be discussed now. The appeal is dismissed and the appellant must pay all the costs.

G. R. D.

Appeal dismissed.

PATNA HIGH COURT.

FIRST APPEALS NOS. 73, 154 AND 155 OF 1918.

May 27, 1921.

Present:—Mr. Justice Das and Justice Sir John Bucknill, KT.

IN F. A. No. 73 OF 1918

Rai Bahadur GOBIND LAL SIJUAR—APPELLANT

versus

RAM SARAN LAL, *alias* LALLOO BABU—RESPONDENT.

IN F. A. No. 154 OF 1918

Rai Bahadur GOBIND LAL SIJUAR—APPELLANT

versus

Babu BALDEO NARAIN SINGH AND ANOTHER—RESPONDENTS.

IN F. A. No. 155 OF 1918

Lala RAM SARAN LAL, *alias* LALLOO BABU—APPELLANT

versus

Rai Bahadur GOBIND LAL SIJUAR AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 50, 106, 115—Record of Rights, final publication of—Presumption under s. 50—Tenant showing unchanged rent 20 years before suit—Presumption of fixed-rate tenancy apart from s. 50, if arises.

When there has been a final publication of the Record of Rights, the tenant is entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act only in a suit under section 106 of the Bengal Tenancy Act. [p. 436, col. 1.]

Apart from a case where section 50 of the Bengal Tenancy Act may be applicable, a tenant, by showing that his rent has not been changed during the 20 years immediately before the institution of the

suit or proceeding in which his status as a fixed-rate tenant is questioned, is not entitled to ask the Court to presume that he has held at that rate from the time of the Permanent Settlement. [p. 436, col. 2.]

Appeal against a decision passed by the Sub Judge, Gaya.

Messrs. *Sultan Ahmad*, *H. L. Nandkeolyar* and *G. C. Pal*, for the Appellants in F. A. Nos. 73 and 154 of 1918 and Respondent in F. A. No. 155 of 1918.

Messrs. *Lakshmi Narain Sinha*, *Kailaspati* and *Siveshwar Dayal*, for the Respondent in F. A. Nos. 73 and 154 of 1918 and Appellant in F. A. No. 155 of 1918.

JUDGMENT.

DAS, J.—On the 11th September 1916 the appellant-landlord instituted a suit against the tenant-respondent for the following reliefs :—

(1) For a declaration that the defendant No. 1 is liable to pay fair and equitable rents for his Nakdi holding and for fixing the Nakdi rent at Rs 258-10-6 excluding cesses for his 30 *bighas* 14 *cottahs* and 14 *dhurs*.

(2) For a decree of the Nakdi rent at the sum determined as aforesaid for the years 1320-1323.

(3) For a decree of Rs. 3,031-3-4 on account of the Bhawli fields of defendant No. 1 from 1320-1323.

(4) For a decree for damages at the rate of 25 per cent. on the amount decreed under prayers Nos. 2 and 3.

On the 7th July 1917 the tenant respondent filed a suit against the appellant-landlord for the following reliefs :—

(1) For a declaration that the status of the plaintiffs was and is that of a *raiyat* holding at fixed rates and not that of a settled *raiyat*.

(2) For a declaration that the landlord's share in the produce of the aforesaid Bhaoli lands is 7/16ths only and not half.

(3) For a declaration that Batai and not Danabandi used to be made of the produce of the said Bhaoli land.

(4) For a declaration that the entries in the Khatian concerning the above three facts are incorrect.

First Appeal No. 73 of 1918 arises out of the first mentioned suit which was Suit No. 632 of 1916.

First Appeal No. 154 of 1918 arises out of the second mentioned suit which was Suit No. 232 of 1917. It will be convenient to dispose of these two appeals together as the issues arising in these two appeals are identical.

It will appear that these two appeals call for the determination of the following points :—

(1) Whether in respect of the Nakdi lands the landlord is entitled to the rent of Rs. 258-10-6 excluding cesses from the tenant ?

(2) If not, what is the Nakdi rent to which the landlord is entitled in respect of the years 1320-1323 ?

(3) Whether in respect of the produce rent the system of assessment is that of Danabandi or Batai ?

(4) What is the landlord's share of such rent ?

(5) Whether the landlord is entitled to recover produce rent from the tenant in respect of the years 1320-1323 ?

Now on the first question it is admitted in the evidence, though not in the plaint filed by the landlord, that the rent payable by the tenant to the landlord before the institution of the suit was Rs. 94-6-0, but the landlord maintains that he is entitled to a determination of what is fair and equitable rent that ought to be paid by the tenant to the landlord and that on such determination he would be entitled to a rent of Rs. 258 10 6 on the ground that other *raiyats* of the village holding lands of a similar description and with similar advantages in the village pay Nakdi rent at the rate mentioned, and also on the ground that there has been a rise in the average local prices of staple food crops during the last fifteen years. The tenant contests the claim of the landlord on two grounds : first, on the ground that he is a tenant holding at a fixed rate of rent and that accordingly rent is not liable to be enhanced, and, secondly, on the ground that, in the circumstances of the case, there ought not to be an enhancement of rent. Mr. Lakshmi Narain Sinha, on behalf of the tenant, took as his first point that the landlord is not entitled to a decree for enhancement of rent in this suit, even though he establishes that the tenant-defendant is not a tenant holding at a fixed rate of rent. In my opinion the contention of Mr. Lakshmi Narain Sinha is correct and ought to prevail. It is quite

clear, reading the plaint, that this is not a suit for enhancement of rent but a suit for the determination of a fair and equitable rent payable by the tenant to the landlord. A suit for enhancement of rent proceeds on the admission that a rent is now paid by the tenant to the landlord and asks for enhancement on any of the grounds mentioned in section 30 of the Bengal Tenancy Act. A suit for the determination of a fair and equitable rent, on the other hand, proceeds on the assumption that no rent has hitherto been paid by the tenant. Now the present suit is confessedly a suit for the determination of fair and equitable rent and the landlord claims the fair and equitable rent which he puts down at Rs. 258-.0-6, not for future years but in respect of past years for which, admittedly, rent has accrued due. In my view the action, so far as it is an action for the determination of fair and equitable rent, does not lie, because he is not claiming this fair and equitable rent in respect of future years but because he is claiming it in respect of the past years for which rent has already accrued due. The decision of the learned Subordinate Judge on this point is right and ought to be affirmed. Having regard to this finding it would be ordinarily unnecessary to deal with the question whether the defendant is a tenant holding at a fixed rate of rent. But the question has been raised by the tenant not only in the written statement but in the suit which he instituted against the landlord and we think it expedient to deal with this point.

Now, admittedly in this case the Record of Rights has been published and the Record of Rights records the defendant as an occupancy tenant, not as a tenant holding at a fixed rate of rent. Section 115 of the Bengal Tenancy Act provides as follows:—"When the particulars mentioned in section 102, clause (*b*), have been recorded under this Chapter in respect of any tenancy, the presumption under section 50 shall not thereafter apply to that tenancy." I may mention that the learned Subordinate Judge has decided this issue in favour of the tenant defendant on the ground that he was entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act. In that view he decided that the tenant-defendant was a tenant holding at a fixed rate of rent. Now, as I have said, section 115 declares that, when the particulars mentioned in section 102, clause (*b*), have been recorded in respect of any tenancy, the presumption under section 50 shall not thereafter apply to that tenancy. *Prima facie*, therefore, the tenant was not entitled to the benefit of the presumption under section 50. But Mr. Lakshmi Narain Sinha, who argued this case with very great ability and fairness on behalf of the appellant, contended that he was entitled to the benefit of this presumption exactly in the same way as he would have been entitled to the benefit of the presumption in a suit under section 103 of the Bengal Tenancy Act. Now his argument may be summarised as follows:—As the provision under section 115 has no application in a suit under section 106 brought by the tenant against the landlord for the purpose of contesting the correctness of the decision of the Revenue Officer in regard to an entry as to his status in the Record of Rights, so it ought not to have any application in a suit brought by the landlord before the publication of the Record of Rights when he is contesting it mainly on the ground on which he could have maintained an action under section 106 of the Bengal Tenancy Act. In other words, if the tenant had instituted a suit under section 106 of the Bengal Tenancy Act, he would undoubtedly have been entitled to the presumption of section 50 of the Bengal Tenancy Act. Mr. Lakshmi Narain Sinha argues that he ought not to be in a worse position, because, instead of instituting a suit under section 106 of the Bengal Tenancy Act, he has preferred to put forward his plea in the landlord's suit which was instituted a few days before the final publication of the Record of Rights. This, I think, was the argument which was put forward before us by Mr. Lakshmi Narain Sinha.

In order to determine the validity of this argument, it will be necessary to give certain dates and to remember that the landlord in this suit asked for no declaration, whatever as to the status of the defendant. The following dates will be important. The landlord's suit, that is to say, Suit No. 632 of 1916, was instituted on the 11th September 1916. The Record of Rights was published on the 16th September 1916. The written statement was filed in the landlord's suit by the tenant on the

18th December 1916 and the tenant instituted his own suit, that is to say, Suit No. 232 of 1917 on the 7th July 1917. It will appear, therefore, that the tenant put forward his plea that he was a tenant holding at a fixed rate of rent more than three months after the publication of the Record of Rights. Under section 106 he had altogether three months from the date of the final publication of the Record of Rights to bring his suit for correcting an entry as to his status in the Record of Rights. On a narrow view of the case one would be entitled to say that, having put forward his defence more than three months after the publication of the Record of Rights, he is not entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act. But I do not intend to decide this case on a narrow view of the case. In my opinion, the Legislature has said as plainly as it knows how to say that when there has been a final publication of the Record of Rights the tenant is entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act only in a suit under section 106 of the Bengal Tenancy Act. Now the policy of the Legislature is perfectly clear that no one is entitled to the benefit of the presumption under section 50 after the final publication of the Record of Rights. That policy emerges clearly and free from all complications in section 115 of the Bengal Tenancy Act. But in laying down this policy the Legislature has safeguarded the interests of the tenants in various ways. First of all, after the draft publication of the Record of Rights the tenant may contest the proposed entry before the Settlement Officer in a proceeding under section 103A. Next, he may proceed by way of appeal or revision under section 104 G against every order prior to the Record of Rights before the Revenue Authorities. Then, after the final publication of the Record of Rights the Legislature reserves to him the liberty to institute a suit before the Revenue Officer at any time within three months from the date of the certificate of the final publication of the Record of Rights by presenting a plaint on stamped paper for the decision of any dispute regarding an entry which a Revenue Officer has made in, or any omission which the said officer has made from, the record. It is quite clear, therefore, that the interests of the tenant have been safeguarded in various ways. Having done that, the Legislature had to consider which presumption was to prevail in a competition between section 50 of the Bengal Tenancy Act and section 103B, sub-section (3), of the Bengal Tenancy Act? There is a presumption under section 103 B that every entry in a Record of Rights is correct until it is proved by evidence to be incorrect. There is a presumption under section 50 (2) of the Bengal Tenancy Act that, if a tenant has held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding he has held at that rent or rate of rent from the time of the Permanent Settlement. The question which the Legislature had to determine was this: In a competition between the two presumptions, which was to prevail? The Legislature has said, that the presumption under section 103B is to prevail. In my opinion, therefore, it is not open to the tenant to argue in this appeal that, notwithstanding the entry in the Record of Rights he is entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act.

Mr. Lakshmi Narain Sinha then argued that he was entitled to prove by evidence that he was a tenant at a fixed rate of rent. In the first place, he argues on the authority of certain cases, to which it is quite unnecessary to refer, that although it may be that he is not entitled to the benefit of the presumption under section 50, still if he shows that his rent has not been changed during the twenty years immediately before the institution of the suit or proceeding, he would be entitled to ask the Court to presume that he has held at that rent from the time of the Permanent Settlement. To accede to this argument, in my opinion, would be to fritter away the provision of section 115 of the Bengal Tenancy Act, and I decline to accede to this argument. There are cases on both sides and I prefer to follow those which have held that a tenant is not entitled to the benefit of the presumption under section 50 when once the Record of Rights has declared that he is not a tenant holding at a fixed rate of rent but that he is an occupancy tenant. Next, he

argues that there is evidence in this case which establishes that he has held at the same rent ever since the Permanent Settlement. All that I can say is that the evidence is unconvincing and I cannot rely upon it. I hold that the tenant has failed to establish that he is a tenant holding at a fixed rate of rent. It follows, therefore, that the defendant is an occupancy tenant and that the tenant is not entitled to the first declaration sought by him in the suit instituted by him, *i. e.*, Suit No. 232 of 1917.

The next point is—What is the Nakdi rent to which the landlord is entitled for the years 1320 1323? The learned Subordinate Judge has given the landlord a decree for Rs. 94 6 0 in respect of 1320 but has refused to grant the landlord any relief in respect of the years 1320 1323 on the ground that the landlord by his oppression made it impossible for the tenant to cultivate any portion of the land in the possession of the tenant. Now, the finding of the learned Subordinate Judge is not quite consistent. On his own findings his decision is far too unfavourable to the tenant. If indeed there was oppression by the landlord which prevented the tenant from cultivating the land, then not only would there be a suspension of rent during those years but the tenant would clearly be entitled to damages from the landlord. The learned Subordinate Judge has come to the conclusion that the landlord is not entitled to the rent for those years and yet he has refused to give the tenant damages in respect of the acts of oppression exercised by the landlord over the tenant. In my view, the evidence in this case, on which the learned Subordinate Judge has relied for coming to the conclusion that there was oppression by the landlord, is wholly unconvincing. In the first place it is noticeable that the tenant has declined to give evidence in the case. This is a material circumstance which should have been taken into consideration by the learned Subordinate Judge. He has, on the other hand, relied upon the evidence of the following witnesses: Witnesses Nos. 2, 4, 5, 6, 8, 9, 10, 11, 12 and 13 examined on behalf of the defendant. Now, so far as witnesses Nos. 4 and 9 are concerned, they say nothing at all on this point. Witness No. 2's evidence is inadmissible because it is hearsay. The other witnesses do say something as to the alleged oppression, but when that evidence is analysed it is impossible to accept it or to rely upon it. The most important witness is, of course No. 13 on whose evidence the learned Subordinate Judge has strongly relied. He is a Zamindar witness, and if his evidence established a case against the landlord it would undoubtedly be entitled to great weight. But when that evidence is read and analysed it comes to this that he heard about these acts from other persons. In other words, his evidence is purely hearsay and, therefore, is inadmissible. I have gone through the evidence very carefully and I find it quite impossible to rely on this class of evidence. It is noticeable that there have been three criminal proceedings between the parties in earlier years. The judgments of the Criminal Courts are to be found in Exhibits 17, 18 and 19. Now in all these cases the landlord's men were acquitted and it is remarkable that there has never been a complaint in the Criminal Court in respect of the oppression of the Zamindar during the years 1321, 1322, and 1323. We have nothing but the evidence of a most flimsy character of certain *raiyats* to go upon and we find it impossible to hold on this kind of evidence that there was oppression on the part of the landlord. I hold that the landlord is entitled to Nakdi rent for the years 1321 1323 at Rs. 94 6-0 per year with cesses at 6 pies per rupee with damages at 25 per cent.

The next question between the parties is,—what is the system of assessment in respect of the Baoli lands? The landlord contends that it is Danabandi and the tenant says that it is Batai. The Record of Rights is in favour of the landlord. There was a previous suit between the parties, Suit No. 490 of 1922. In that suit the learned Subordinate Judge dealt very elaborately with the point and came to the conclusion that the Danabandi system prevailed. That case went up on appeal to the District Judge of Gaya, but the learned District Judge did not determine this point having regard to the fact that the publication of the Record of Rights was near at hand. Therefore, we have not only the Record of Rights to go upon but a very valuable judgment of the learned Subordinate Judge in a previous suit between the parties. The other point established in this case is this that it is admitted that the

system of Danabandi prevails in regard to every other tenant in the village. The tenant in this case says that Batai prevails only in regard to him. A case like this is open to suspicion and has got to be investigated with very great care. The only evidence in favour of the tenant consists of certain papers signed by the Amin in certain proceedings under section 69 of the Bengal Tenancy Act. These relate to the years 1897, 1899, 1900, 1901, 1906 and 1912. So far as the papers of the years 1897, 1899, and 1906 are concerned, they are wholly inconclusive, because we have not got the proceedings of the Revenue Courts in respect of those years. We are, therefore, unable to say whether in respect of those proceedings the provisions of section 70 were complied with. As regards the years 1900, 1901 and 1912, undoubtedly there are order-sheets, but I cannot regard the division made during three years as rebutting the correctness of the entry in the Record of Rights. It was argued on behalf of the tenant that the Record of Rights was based upon the decision of the Subordinate Judge in the previous suit between the parties which was not upheld by the District Judge. This is quite incorrect. The certified copy of the attestation rent-note of the Settlement Officer dated the 7th March 1916 Exhibit 15, shows that he made close and careful enquiry into the whole matter and that upon such enquiry he came to the conclusion that the Danabandi system prevailed. I am of opinion, therefore, that the decision of the learned Subordinate Judge on this point cannot be upheld. I hold that the system of Danabandi prevails and that accordingly the tenant is not entitled to the third declaration sought by him in Suit No. 232 of 1917.

The next point is—What is the landlord's share? The landlord's case is that he is entitled to 9-annas. The tenant's case is that the landlord is only entitled to 7-annas. The Record of Rights shows that the landlord is entitled to 8 annas after making a deduction of 3 seers in the maund for labourers' wages. Now, the identical question was raised in a previous suit between the parties, and was decided in favour of the landlord. The decision of Mr. Foster operates as *res judicata* between the parties and I must accordingly hold that the landlord is entitled to 8-annas after a deduction of 3 seers in the maund for labourers' wages. It follows that the tenant is not entitled to the second declaration sought by him.

The last question so far as this appeal is concerned is—Is the landlord entitled to recover produce rent for the years 1320-1323? The learned Subordinate Judge declined to give any compensation to the landlord, because he came to the conclusion that the landlord prevented the tenant from cultivating the land. I have held that this conclusion cannot be supported. The landlord is accordingly entitled to recover compensation from the tenant for the years 1320-1323. We have no materials before us sufficient to enable us to determine the amount of compensation recoverable by the landlord from the tenant. We must accordingly remand this case to the learned Subordinate Judge for the determination of this issue.

The result is that we must allow First Appeal No. 154 of 1918 and dismiss Suit No. 232 of 1917 with costs in both the Courts. So far as First Appeal No. 73 of 1918 is concerned, we must vary the decree passed by the learned Subordinate Judge and declare that the defendant is an occupancy tenant and not a tenant at a fixed rate of rent and that in respect of Bhaoli lands the system of assessment is that of Danabandi and not that of Batai and that the landlord's share in the produce is half after a deduction of 3 seers in the maund for labourers' wages. The plaintiff is also entitled to a decree for Nakdi rent at Rs. 94-6-0 with cesses at 6 pies per rupee and damages at 25 per cent. in respect of the years 1321-1323. We remand Suit No. 632 of 1916 to the Court of the first instance for assessing the compensation payable by the tenant-defendant to the landlord for Bhaoli rent in respect of those years. As each party has succeeded in part, we make no order as to costs.

I now come to First Appeal No. 155 of 1918 which arises out of Suit No. 25 of 1917 which was a suit instituted by the tenant for the following reliefs :—

(*a*) On a declaration of his title possession of plots Nos. 726, 1118, 137, 970, 973, 977, 985, and southern portion of plot No. 1045 to the extent of 2 *kattas* 2 *dhurs* may be given to the plaintiff No. 1.

(*b*) A decree for Rs. 2,100 on account of damages be passed in favour of the plaintiffs or any of the plaintiffs as the Court thinks proper against defendant No. 1.

(*c*) Costs of the suit be awarded to the plaintiffs against the defendants.

The learned Subordinate Judge dismissed this suit wholly disbelieving the plaintiffs' case that these plots belonged to them and that they were dispossessed of these plots.

I will first consider the question as to the plots. Now it is quite unnecessary, in my opinion, to determine the question of title because there is absolutely no evidence in the record as to dispossession. The suit was brought on the 22nd January 1917, the Record of Rights shows that the landlord is in possession of these plots. It must accordingly be presumed that the defendants are out of possession ever since the publication of the Record of Rights. It is for them, therefore, to prove that they were dispossessed by the landlord. According to their case the landlord dispossessed them sometime in March 1916. As to that there is absolutely no evidence in the record. In my opinion, the decision of the learned Subordinate Judge on this point is correct and ought to be affirmed.

On the question of damages, I have already dealt with this point in the other appeal. The tenants claim damages from the landlord on the ground that the landlord prevented the tenants from cultivating the lands. I have come to the conclusion that the evidence is not sufficient to enable us to hold that there was any act of oppression on the part of the landlord. In my view the decision of the learned Subordinate Judge is right and ought to be affirmed. I must accordingly dismiss First Appeal No. 155 of 1918 with costs in both the Courts.

BUCKNILL, J.—I agree. I have nothing further to add.

N. H. *Appeals dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1239 OF 1920.

June 15, 1922.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

DINA BANDHU SAHA—PLAINTIFF—APPELLANT

versus

ABDUL LATIF MOLLA—DEFENDANT No. 1—RESPONDENT.

Contract Act (IX of 1872), s. 238—Principal and agent—Fraud or misappropriation by agent—Liability of principal—Fraud need not be for principal's benefit.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This is in accordance with the law as enacted in section 238 of the Indian Contract Act. There is nothing in that section to show that, in order to render the principal liable, the fraud must be committed for the benefit of the principal. [p. 441, col. 1.]

Defendants Nos. 2 to 4 who were *manjhis* or boatmen, as agents of defendant No. 1, the owner of the boat, entered into a contract with the plaintiff to carry his goods from one place to another. The goods having been misappropriated on the way by defendants Nos 2 to 4 the present suit was brought for the recovery of the price thereof :

Held, that the defendant No. 1 (and not defendants Nos. 2 to 4 only) was liable for the loss occasioned to the plaintiff's goods by reason of the goods having been misappropriated by his agents, the defendants Nos. 2 to 4, as there was no question that the goods were entrusted to them and were being carried by them in the course of their business when the misappropriation took place. [p. 442, col. 2.]

Appeal against a decree of the Subordinate Judge, Jessore, dated the 20th of February 1920, modifying a decree of the Munsif, First Court at Jessore, dated the 31st of January 1919.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen* (with him Babu *Gopal Chandra Das*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for recovery of compensation to the price of certain goods consigned in the boat of the defendants. The goods did not reach the place of destination. They were lost in the way. The First Court decreed the suit. On appeal it has been decreed in part. The defendants contracted to carry the plaintiffs' goods in their boat on 2nd Magh 1323. The defendant No. 1 is the owner of the boat,

Defendants Nos. 2 and 4 are the boatmen of the boat. The defendants entered into the contract with the plaintiffs' agent for carrying 201 *nayris* of *gur* and 236 tins of *chitta gur* from Jessore District to District Barisal. The goods were loaded in the boat but were misappropriated on the way. That is my case as made in the plaint. The defence of defendant No. 1 was that he did not enter into any contract to carry my goods and that he is not, therefore, liable for the acts of the *manjhis* (boatmen) and, therefore, I could not recover any damages from him. The learned Judge held that the acts done by the *manjhis* (boatmen) were beyond the authority of the agents and that the defendants Nos. 2 to 4 are alone responsible for the loss of goods. I submit the learned Judge was wrong in holding so. He has misread the provisions of section 238 of the Indian Contract Act. Refers to section 238 of the Indian Contract Act; *Barwick* v. *English Joint Stock Bank* (1) and *Lloyd* v. *Grace Smith & Co.* (2). I submit in view of these decisions and also of the clear provisions of section 238 of the Indian Contract Act. Defendant No. 1 is liable for damages for the criminal acts of his servants.

Babu *Kshetra Mohan Ghose*, for the Respondent.—I submit the learned Judge is right in absolving defendant No. 1 of any liability. Section 238 of the Indian Contract Act clearly states that the act of the servant complained of must be done for the benefit of the master. Such was also the view laid down in *Barwick* v *English Joint Stock Bank* (1), *Gopal Chandra Bhattacharya* v. *Secretary of State for India in Council* (3). This case has been decided with reference to the Indian Contract Act. The act must be done for the benefit of the master in course of his employment. The fraud or misrepresentation must be done with the principal's authority.

Babu *Surendra Chandra Sen* replied in brief.

JUDGMENT.—This appeal arises out of a suit for recovery of price of certain goods delivered to the defendants for being carried from Basundia in the District of Jessore to Jhalakati in the Barisal District and which were misappropriated on the way by defendants Nos. 2 to 4.

The defendant No. 1 is the owner of the boat and the defendants Nos. 2 to 4 are the boatmen or *manjhis*.

The suit was decreed against all the defendants Nos. 1 to 4 by the Court of first instance, but on appeal by the defendant No. 1, it was held that the defendant No. 1 was not liable for the price of the goods and only a decree for Rs. 16 being the boat hire advanced was passed against him.

The plaintiff has appealed to this Court and the question for consideration is whether the defendant No. 1 is liable for the loss of the goods.

The Court of Appeal below found that the defendant did not enter into any contract with the plaintiff for carrying the plaintiff's goods. What he meant, however, was that there was no contract with the defendant No. 1 personally as it would appear from the other findings arrived at by the learned Subordinate Judge. He finds that "the defendant No. 1 admits that his boat is let out on hire, that the boatman settles the terms of hire, that the hire is paid to him and the defendant No. 1 pays the wages of the boatman from the hire. There cannot be any doubt that the defendant No. 1 derives profits by letting out his boat on heire"..... In paragraph 5 of the written statement it is alleged by the defendant that he never goes in the boat to settle hire, that the persons who remain in the boat settle hire, that when the hire, is paid to the defendant, he gives a portion to the boatmen." Then again he says:—"it is admitted that defendant No. 1 derives benefit by letting out his boat on hire. He lets out his boat through his boatmen. Defendant No. 1 is the principal and defendants Nos. 2 to 4 are his agents." There is no doubt, therefore, that the Court of Appeal below found that the defendants Nos. 2 to 4 as agents of defendant No. 1 entered into a contract with the plaintiff to carry his goods.

The learned Subordinate Judge says:—"In this case it may be presumed that defendant's agents are responsible for safely carrying plaintiff's goods to Jhalakati. If they are guilty of negligence or for any act within the scope of the agent's apparent

(1) (1867) 2 Ex 259 at p. 265; 36 L. J. Ex 147; 16 L. T. 461; 15 W. R. 877.
(2) (1912) A. C. 716, 81 L. J. K. B. 1140; 107 L. T. 581; 56 S. J. 723; 28 T. L. R. 547.
(3) 7 Ind. Cas. 735; 13 C. W. N. 619; 36 C. 647.

authority, the principal defendant No. 1 would have been made liable "....." the defendants Nos. 2 to 4 committed a criminal offence with respect to the goods during the carrying of goods on the way. The goods must have been misappropriated on the way. Under no circumstances, it can be held that any criminal act with respect to the goods was within the scope of the authority of the agents, defendants Nos. 2 to 4." Further on he observes :—"There cannot be any doubt that the acts done by the agents in the present case are beyond the authority of the agents. There is no evidence to show that defendant No. 1 induced the plaintiff to believe that his *manjhis* had authority to misappropriate the goods on the way. Defendant No. 1 cannot be made liable for the loss accrued to the plaintiff for the price of goods entrusted to defendants Nos. 2 to 4."

We are of opinion that the learned Subordinate Judge has not taken a correct view of the matter.

Section 238 of the Contract Act lays down that misappropriations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals, but misrepresentations made or fraud committed by agents, in matters which do not fall within their authority do not affect their principals.

The learned Subordinate Judge seems to be of opinion that the fraud committed by the agents must be for their principal; in other words, for the benefit of their principal: and that is the argument which is advanced on behalf of the respondent before us. But in the first place, the section does not say that the fraud must be committed for the benefit of the principal. A distinction is drawn in the section between frauds "committed by agents acting in the course of their business for their principals" and frauds "committed by agents in matters which do not fall within their authority", the question, therefore, in each case being whether fraud was committed by the agents while acting in the course of their business for their principals.

It is also contended that the section does not apply because the loss of the goods was occasioned by a criminal act on the part of the defendants Nos. 2 to 4.

In the case of *Barwick* v. *English Joint Stock Bank* (1) Willes, J. observed as follow:—"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principal is acted upon every day.....It is true, he has not authorised the particular act but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

The learned Pleader for the respondent relied upon the words " and for the master's benefit " in the passage from the judgment of Willes, J., quoted above, as showing that the principal is not liable unless the fraud is committed by the agent for the master's benefit as well as in the course of business for the principal. In this contention, he is supported by the decision of this Court in the case of *Gopal Chandra Bhattacharya* v. *Secretary of State for India in Council* (3). In that case the learned Judges held that "the true rule of law with regard to the liability of the master for the misconduct of the servant is that the master is liable for the fraud of his servant comitted in the course of his service and for the master's benefit and that a master is not liable for the misconduct of the servant committed for the servant's own private benefit, and that it is not necessary that the benefit should accrue to the master." The learned Judges in enunciating that proposition relied upon the cases of *Barwick* v. *English Joint Stock Bank* (1), *Houldsworth* v. *City of Glasgow Bank* (4) and certain other decisions.

Barwick's case (1), however, has been misunderstood, as pointed out by the House of Lords in *Lloyd* v. *Grace Smith & Co.* (2). In that case, a widow who owned two cottages

(4) (1880) 5 A. C. 317; 42 L. T. 194; 28 W. R. 677.

and a sum of money secured on a mortgage, being dissatisfied with the income derived therefrom, consulted a firm of Solicitors and saw their managing clerk who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm he induced her to give him instructions to sell the cottages and to call in the mortgage money and for that purpose to give him her deeds and by means of certain documents in the course of his business defrauded the widow and dishonestly disposed of the property of the widow for his own benefit. It was held by the House of Lords that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Referring to *Barwick's case* (1) Lord Macnaghten (at page 732) observed as follows: "It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that Willes, J., expressed himself in the language which has been misunderstood. What Willes, J. said was this: 'The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved'. To that statement of the law, no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. Willes, J., does not, I think, say anything of the kind. In a sentence immediately preceding the sentence I have quoted, he observes that the question whether the principal is answerable for the act of an agent was settled as early as Lord Holt's time—a general observation not confined to the case where the principal is a gainer by the fraud. The question as to the meaning and effect of the ruling of Willes, J may, I think, be best ascertained by reference to a few cases in which some of the learned Judges who took part in the decision in *Barwick's case* (1) delivered opinion."

Lord Macnaghten then discussed the cases on the point and explained *Barwick's case* (1) as also the case of *Houldsworth* v. *City of Glasgow Bank* (4) in which the proposition of law enunciated by Willes, J., in *Barwick's case* (1) was quoted with approval. His Lordship pointed out at page 738: "It is a hardship to be liable for the fraud of your partner. But that is the law under the Partnership Act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guarantee of his honesty, but there are such things as fidelity policies. You can insure the honesty of the person you employ in a confidential situation or you can make your confidential agent obtain a fidelity policy." His Lordship further observed: "Willes, J., cannot have meant that the principal is absolved wherever his agent intended to appropriate his proceeds. Nearly every rogue intends to do that."

The case of *Gopal Chandra Bhattacharya* v. *Secretary of State for India in Council* (3) was decided upon a principle erroneously supposed to have been laid down in *Barwick's case* (1). Having regard to the statement of the law by the House of Lords in the case of *Lloyd* v. *Grace Smith & Co* (2) we think that the defendant No. 1 is liable for the loss occasioned to the plaintiff's goods by reason of the goods having been misappropriated by his agents, the defendants Nos. 2 to 4, as there is no question that the goods were entrusted to them and were being carried by them in the course of their business when the misappropriation took place. The principle of law enunciated by the House of Lords in the case of *Lloyd* v. *Grace Smith & Co.* (2) is in accordance with the law as enacted in section 238 of the Indian Contract Act. As stated above there is nothing in that section to show that in order to render the principal liable the fraud must be committed for the benefit of the principal.

For these reasons, we are of opinion that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored with costs here and in the lower Appellate Court.

B. N. *Decree set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 11 OF 1922.

August 15, 1922.

Present:—Mr. Batten, J. C., and Mr. Hallifax, A. J. C.

LACHMANSINGH—DEFENDANT—JUDGMENT-DEBTOR—APPELLANT

versus

MARDANSINGH—PLAINTIFF—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 1, 2—Mortgage-decree—Adjustment out of Court—Adjustment notified by judgment-debtor—Court, duty of.

O. XXI, r. 2, of the Civil Procedure Code, applies to a final decree in a mortgage suit and such a decree, like any other decree, is capable of adjustment out of Court. When, therefore, a judgment-debtor informs the Court that the decree against him has been adjusted, the Court is bound, under O. XXI, r. 2 (2) of the Civil Procedure Code, to issue notice to the decree-holder to show cause why the adjustment should not be regarded as certified.

Appeal against an order of the Additional District Judge, Saugor, dated 8th December 1921, in connection with Civil Suit No. 44 of 1919, dated 10th December 1919.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *Gopilal*, for the Respondent.

JUDGMENT.—The only reason the Additional District Judge has given for refusing to take notice on the application is that a final decree had already been made. As appears from the wording of O. XXI, r. 2 (1), the rule applies even to a final decree in a mortgage suit and such a decree, like any other, is capable of adjustment. The judgment-debtor has given information to the Court that the decree has been adjusted, and under r. 2 (2), the Court is bound to issue a notice to the decree-holder to show cause why the adjustment should not be regarded as certified. It is objected for the decree-holder that what the judgment-debtor alleges is not an adjustment of the decree but is merely an agreement to adjust the decree which, it is argued, is not an adjustment within the meaning of the rule. This is a mixed question of fact and law and we cannot discuss the law until we know the facts. The details given in the application are scanty and there are no further pleadings. The primary duty of the Court

was to issue notice to the decree-holder, take pleadings, frame issues, decide the facts and proceed according to law. We set aside the order to file the application and direct the Additional District Judge to restore it to file and to proceed according to law. Costs in this Court, in which Pleader's fee will be Rs. 15, will follow the result.

G. R. D. & W. C. A.

Order set aside.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL 2558 OF 1920.

May 11, 1921.

Present:—Mr. Justice Martineau.

SIRAJ UD-DIN—DEFENDANT—APPELLANT,

versus

Musammat CHAMPO AND ANOTHER REPRESENTATIVES OF BRIJ NATH DECEASED—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 48 (a)—Pro-note—Consideration—Presumption—Onus *of proof.*

Although under the law there is a presumption that the maker of a pro-note has received the consideration for it, yet if the statement of the plaintiff's agent as to consideration is altogether inconsistent with the plaintiff's allegation in his plaint, the *onus* will shift to the plaintiff, and he must prove that consideration passed.

Miscellaneous second appeal from an order of the District Judge, Delhi, dated the 11th October 1920, reversing that of the Subordinate Judge, Delhi, dated the 19th May 1920.

Lala *Daulat Ram*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—The plaintiff in this case sues for money due on a promissory-note for Rs. 1,200 executed by the defendant.

The latter pleaded that he had not received consideration. The plaintiff said in his plaint that he had paid the consideration for the promissory-note to the defendant in cash, but his agent, Parmeshri Das, when examined by the Court in the pleadings, said that the promissory-note had not been executed in lieu of a *hundi*,

PORKODI ACHI, *In re.*

The Subordinate Judge framed an issue whether the promissory-note was with consideration, placing the *onus* on the plaintiff, and after taking the evidence he found that no consideration had been passed and dismissed the suit.

On appeal the District Judge has held that the *onus* should have been placed on the defendant to prove want of consideration, and he set aside the order of the Trial Court and remanded the case for trial of the issue. The defendant has filed a second appeal in this Court.

There is, no doubt, a presumption under the law that the maker of a promissory-note has received the consideration for it, and if the only material before the Subordinate Judge when he framed the issue had been the plaint and the defendant's pleas it would certainly have been right to place the *onus* on the defendant. But the Subordinate Judge had also the statement of the plaintiff's agent before him, and the fact that that statement with regard to the consideration for the promissory-note was entirely inconsistent with the plaintiff's allegation in his plaint was, I consider, sufficient to shift the *onus* at once to the plaintiff, and the Subordinate Judge was, therefore, right in calling upon the latter to prove that consideration passed. *Zohra Jan* v. *Rajan Bibi* (1) is a case in point.

I, accordingly, accept the appeal, set aside the order of the lower Appellate Court, and remand the case to that Court for disposal of the appeal before it on the merits. Court fee on the appeal in this Court to be refunded. Other costs to be costs in the case.

W. C. A.

Appeal accepted;
Case remanded.

(1) 28 Ind Cas. 402; 48 P. R. 1915; 62 P. W. R. 1915; 120 P. L. R. 1915.

MADRAS HIGH COURT.

STAMP REGISTER No. 6103 OF 1921.

October 18, 1921.

Present:—Mr. Justice Kumaraswami Sastri.

In re PORKODI ACHI—RESPONDENT No. 1 IN S. A. No. 22 OF 1921.

Court Fees Act (VII of 1870), s. 7 5), Schs. I and II —Decree directing payment of certain amount as condition precedent to getting possession—Appeal against the conditional order—Court-fee payable.

Where, in a suit for possession, the Court decrees possession on condition of the plaintiff paying a specified amount to the defendant, and the plaintiff appeals, the memorandum of appeal is chargeable with Court-fees calculated *ad valorem* on the amount from which he seeks to escape liability. [p. 448, col 1.]

(Authorities reviewed.)

The value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which a party wishes to get rid of. [p 447, col 2.]

Memorandum of objections sought to be preferred by 1st respondent in Second Appeal No. 22 of 1921 to the High Court against the decree of the Third Additional Subordinate Judge, Tanjore in Appeal Suit No. 13 of 1920.

FACTS appear from the judgment.

Mr. *K. S. Venkataramana Aiyar*, for the Respondent.—Where the decree directs a specified amount as payable by the plaintiff to defendant before the former could recover possession, the decree is not executable by the defendant for whose benefit the payment is ordered. It is a declaratory decree as it declares the plaintiff's liability to pay.

The condition imposed does not change the character of a suit for possession and for mesne profits into one for redemption. The suit remains a suit for possession notwithstanding the condition in the decree. The value of the appeal cannot be higher than that of the suit.

Mr. *C. Madhavan Nair*, Government Pleader, for Taxing Officer,

Mr. *K. S. Venataramani Ayyar*, for the Respondent.

ORDER.—The first respondent as daughter and reversioner filed a suit for a declaration that the sale-deed executed by the widow of the last male holder alienating the lands specified in the plaint was not binding on her, for delivery of possession by the defendants who claim under the vendee, for mesne profits and for costs. The plaint contained an alternative prayer that should the Court find any amount payable to the defendants, then

possession be decreed with mesne profits on payment of the sum so found due by the plaintiff to the defendants. Various pleas were raised by the defendants who contended that the alienation by the widow was binding on the plaintiff. The District Munsif dismissed the plaintiff's suit as he was of opinion that the sale was binding on her. On appeal the Subordinate Judge held that there was necessity only for a sum of Rs. 3,831-4-0 out of the consideration of Rs. 8,000, set out in the sale deed and decreed possession on payment of the sum of Rs. 3,881-4-0. Against this decree the defendants filed a second appeal and the plaintiff filed a memorandum of objections objecting to the decree of the Subordinate Judge so far as it directs her to pay Rs. 3,881-4-0 as a condition precedent to the recovery of possession. A stamp duty of Rs. 10 was paid on the memorandum of objections and the Registrar claims an *ad valorem* duty on the sum of Rs. 3,881-4-0, the liability to pay which is questioned in the memorandum of objections.

The suit as filed being one for possession and mesne profits fell within clause (*v*) of section 7 of the Court Fees Act which relates to suits for possession of immoveable property and clause (1) which relates to suits for money and the plaintiff paid a stamp duty of five times the *kist* payable on the lands and also on the amount claimed for mesne profits. The suit was valued at Rs. 2,300 and the second appeal is also valued at that figure.

There is no express provision in the Court Fees Act which covers a case like the present. The contentions of the respondent are, (1) that the decree of the lower Appellate Court merely declares plaintiff's liability to pay a certain sum of money as a condition precedent to recovery of possession and that such decree is not executable by the defendants for whose benefit the payment is to be made; (2) that the suit being one for possession of immoveable property and mesne profits, its nature is not changed into one for redemption merely by the fact that an unsustainable condition as to payment has been imposed by the Court; (3) that the alternative prayer in the plaint as to payment of such sums as the Court may find to be due is not estimable in money and falls under Art. 17, clause (*vi*) of Schedule II; (4) that in any event the stamp duty payable on the memorandum of objections cannot be more than the duty payable on the plaint, as it would be an anomaly if the party who fails entirely should have to pay less than a party who succeeds in part. The contention of the Registrar is that the stamp duty payable in cases where a person is asked to pay a certain sum as a condition precedent to getting possession and disputes his liability, is on the amount which he disputes.

I do not think that the direction as to payment of a sum of money as a condition precedent to the recovery of possession makes the decree a declaratory decree simply because the defendant cannot execute the decree. The test is whether the plaintiff cannot execute it. As regards the contention that the alternative prayer is not estimable in money, all that can be said is that the plaintiff reversioner cannot say when he filed the plaint what the defendants can prove to be binding on the plaintiff. Where the Court finds the amount that has to be paid by the plaintiff the amount is ascertained, and where the plaintiff wants to appeal against the decrees the amount or value of the subject-matter in dispute for the purposes of Art. 1 of Schedule I is the amount which the plaintiff calls in question in the memorandum of appeal or objections. The case is analogous to one of a suit for an account.

The objection that the suit for possession which falls under clause (*v*) of section 7 cannot in appeal change its nature because a condition is annexed for payment of a sum of money which is disputed by the plaintiff presents more difficulty especially as there is no provision in the Court Fees Act governing such cases and there is a conflict of authority.

In *Reference Under Court Fees Act, Section* 5 (1), the question was what was the duty payable in a suit for ejectment where a tenant claimed compensation for improvements which was disallowed and the tenant appealed against the decree. It was held that the tenant was bound to pay stamp-duty only on the value of the lands and not on the value of the improvements claimed and disallowed. Subramania Aiyar and Boddam, JJ., were of opinion that the claim for improvements to the lands was not the subject-matter of the suit but was merely incidental to the decree for possession. The

(1) 23 M. 84; 8 Ind. Dec. (N. S.) 453.

learned Judges also refer to the difficulty and inconvenience of ascertaining the fee payable in each case if a different view were adopted. With respect, it seems to me that in cases where the law annexes the liability to pay for improvements as a condition precedent to ejectment, the claim for improvements allowed by the lower Court and disputed in appeal falls under Schedule I, Art. 1. Whatever difficulties may exist in valuing it in the plaint there is no difficulty once the Court fixes the amount, and the party appeals against the liability to pay the amount and files a memorandum of objections. So far as appeals against decrees for compensation under the Malabar Tenancy Improvements Act are concerned, though the same considerations as urged in *Reference under Court Fees Act, Section* 5 (1) may be urged, stamp duty is paid on the amount in dispute. This decision does not seem to have been followed. In *Sekharan Nair* v. *Kongot Kucharan Nair* (2) Munro and Abdul Rahim, JJ., were of opinion that though in a suit for redemption the stamp duty was by section 7, clause (*ix*) to be calculated according to the principal money expressed to be secured by the instrument of mortgage and the subject matter of the suit was the existence of the right to redeem, any question as to the amount payable as the condition of redemption being regarded merely as incidental to that right, yet where the right to the redeem is not called in question in appeal and the only question is as to the amount payable, the right to redeem cannot be said to be the subject-matter in dispute in the appeal-memorandum but a definite amount payable, and that the case fell within Art. 1, Schedule I, the Court fee being computed on the amount in dispute. In *Reference under Court Fees Act*, 1870 (3), it was held, following *Nepal Rai* v. *Debi Prasad* (4), that section 7 (*e*) clause (*ix*) of the Court Fees Act applied only to suits and not to appeals and that in the case of appeals, Art. 1, Schedule I applied, the Court fee payable being on the value of the subject-matter in dispute.

In *Hafiz Ahmad* v. *Sobha Ram* (5) it was held that in suits for pre-emption where the vendees-defendants appealed on the ground that they were entitled to receive a larger sum than that awarded by the Court and that plaintiffs had estopped themselves from asserting the right by refusing to purchase, Court-fee was payable under section 7, clause (*vi*) on the value of the property as computed in clause (*v*); but that when the question in appeal relates solely to the amount to be paid by the pre-emptor, his right to pre-empt not being challenged, the proper Court-fee was the amount calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other.

In *Nepal Rai* v. *Debi Prasad* (4) it was held that when an appeal in a suit for redemption related solely to the amount payable the Court-fee payable on a memorandum of appeal was to be calculated according to the sum which the appellant claimed to have deducted from the decree, and not, as in the case of a suit for redemption, according to the principal sum secured on the mortgage. Stanley, C. J., after expressing his dissent from the view taken in *Pirbhu Narain Singh* v. *Sita Ram* (6), observed: "It appears to me, upon a perusal of section 7 of the Court Fees Act and Schedule I to that Act, that in a case such as the one before me the Court fee is to be calculated on the value of the subject-matter in dispute only. Section 7 sub section (*ix*) provides that in suits against a mortgagee for the recovery of the mortgaged property the Court fee is to be valued according to the principal money expressed to be secured by the instrument of mortgage. The section is confined to a suit apparently, and not to an appeal. In Schedule I to the Act we find that in the case of a plaint or memorandum of appeal not otherwise provided for in the Act, except those mentioned in section 3, an *ad valorem* fee is payable at the rate mentioned in that schedule. In this schedule a memorandum of appeal is.....not mentioned. Therefore, I take it that if in the case of an appeal the value of the subject-matter of the appeal can be determined, as it has been in this

(2) 8 Ind. Cas. 459; 20 M. L. J. 121; 6 M. L. T. 245.
(3) 29 M. 367; 16 M. L. J. 287.
(4) 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40.
(5) 6 A. 488; A. W. N. (1884) 179; 4 Ind. Dec. (N. S.) 142.

(6) 13 A. 94; A. W. N. (1890) 231; 7 Ind. Dec. (N. S.) 52.

case, the appellant is only bound to pay a Court-fee on the amount ascertained to be the value of the subject matter of the appeal." With these remarks I respectfully agree. This decision was followed in *Mahadeo Prasad* v. *Gorakh Prasad* (7) and *Baji Lal* v. *Gobardhan Singh* (8).

In *Basdeo Ban* v. *Sri Krishn Gir* (9), it was held that when a plaintiff prayed for an unconditional decree for possession as against a defendant who set up a mortgage executed by plaintiff's predecessor and a decree was passed for possession on payment of a certain sum and the plaintiff appeals against that portion of the decree directing payment, he must pay *ad valorem* stamp duty on the amount in question. The learned Judges (Chamier, J. C., and Evans, A. J. C.) dissented from the decision in *Jawahir Singh* v. *Rajendra Bahadur Singh* (10) and followed the decision in *Baji Lal* v. *Gobardhan Singh* (8). A similar view was taken in *Mata Badal Singh* v *Jai Singh* (11). *Ragha Sah* v. *Wasid Ali* (12) no doubt supports the petitioner's contention but no reference is made to any authorities. The only reason given is that if that decree dismissed the plaintiff's suit for possession the fee payable would have been only five times the land revenue and that as it was more favourable it cannot be larger. The facts of the case are also peculiar. The plaintiff prayed for possession and the Court passed a decree for possession but allowed the defendant to redeem and the decree for possession was only if the defendants failed to redeem. *Rup Chand* v. *Fateh Chand* (13) which was referred to, does not throw much light on the question. The plaintiff sued for possession as absolute owner and a decree was passed in his favour On appeal the Subordinate Judge gave a decree for possession but limited the duration to the lifetime of the plaintiff's vendor. Against this decree the plaintiff appealed It was held that as tamp duty of Rs. 10 was sufficient. Tudball, J., observed: "As matters stand now, the plaintiff-appellant seems to me to be in the position of a person in possession of property who seeks to clear his title and to obtain a declaration that he has the full right of ownership to the property." Treating the subject-matter of the appeal as one to get rid of the limitation imposed by the Subordinate Judge it is difficult to see how it can be valued.

In *Lukhun Chunder Ash* v. *Khoda Buksh Mondal* 14) where a decree was passed in favour of the plaintiff but the Court directed payment in three instalments and the plaintiff appealed against that portion of the decree, it was held that he was not bound to pay Court-fees on the sum decreed but on the difference between the amount claimed in the Court below and the sum of the present values of three instalments payable on the dates mentioned in the decree. Banerjee, J., observed: "Now, having regard to the provisions of Art. 1, Schedule I, of the Court Fees Act, read with section 16 of that Act, it is clear that an appellant is bound to pay a Court-fee on a memorandum of appeal from a decree which gives him only partial relief, upon the difference between the values of the relief he claims to be entitled to and that granted by the decree appealed against."

In *Kishun Dutt Misir* v. *Kasi Pandey* (15) it was held by Coutts, J., following *Basdeo Ban* v. *Sri Krishn Gir* (9), that when a decree awards possession on condition of the plaintiff paying the encumbrances on the property and the plaintiff appeals against that part of the decree, the Court-fee payable on the memorandum of appeal must be *ad valorem* on the value of the encumbrances.

The current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of. In some cases the stamp duty may be more than that paid on the plaint and in some cases it may be less, and in considering the effect of the provisions of section 7 of the Court Fees Act and of Schedule I, I do not think that this is a consideration which is of much weight.

(7) 30 A. 547; 5 A. L. J. 531; A. W. N. (1908) 247; 4 M. L. T. 448.
(8) 1 Ind. Cas. 1003; 31 A. 265; 6 A. L. J. 155.
(9) 5 Ind. Cas. 941; 13 O. C. 62.
(10) 2 Ind. Cas. 836; 12 O. C. 133.
(11) 15 Ind. Cas. 746.
(12) 50 Ind. Cas. 353.
(13) 11 Ind. Cas. 977; 8 A. L. J. 821; 33 A. 705.
(14) 19 C. 272; 9 Ind. Dec. (N. s.) 627.
(15) 57 Ind. Cas. 431; 5 P. L. J. 455; 2 U. P. L. R. (Pat) 196; 1 P. L. T. 738.

ASWINI KUMAR DUTT *v.* SUKHODA SUNDARI.

I am of opinion that the memorandum of appeal should be stamped on the amount which the respondent was directed to pay, and which she seeks to escape liability from. He will have three weeks from this date to pay the deficient stamp duty.

M. C. P. & W. C. A.

Order accordingly.

CALCUTTA HIGH COURT.
CIVIL RULE No. 42 OF 1922.
April 24, 1922.

Present:—Mr. Justice Suhrawardy and Mr. Justice Panton.

ASWINI KUMAR DUTT AND OTHERS —PETITIONERS

versus

SUKHODA SUNDARI DEBYA—OPPOSITE PARTY.

Appeal, dismissal of, in default—Compromise filed subsequently—Court, duty of.

Where after an appeal has been dismissed in default, both appellant and respondent being absent, the parties present a petition of compromise and ask that the case be decided in terms thereof, the Court is bound to give effect to the compromise.

Rule against the order of the Sub-Judge, First Court, Bakarganj.

FACTS appear from the judgment.

Babus *Suresh Chandra Talukdar* and *Probodh Chandra Kar*, for the Petitioners.

—The facts shortly are these. I was the appellant in the Court below. The appeal was fixed for 27th July 1921. When both parties being absent the appeal was dismissed for default, I then applied for restoration on 25th August 1921, and on 29th August 1921 both parties filed a petition of compromise in accordance with which the case was to be decided. On 24th September 1921 the Judge rejected my application for re hearing. I submit the learned Judge was absolutely wrong in rejecting my application and in not giving effect to the compromise arrived at between the parties.

No one appeared to show cause.

JUDGMENT.—This Rule must be made absolute. The petitioner was the appellant in the Court below. The appeal was taken up by the Court on the 27th July 1921 for hearing when neither the petitioner nor his Pleader was found, nor was the respondent present. The Court, therefore, dismissed the appeal for default. On the 25th August the petitioner filed a petition for re-hearing of the appeal on the ground that he was unable to be present on the 27th July as he was ill and could not come to Court to instruct his Pleader. It appears, however, from the judgment of the learned Judge that the reason for non-appearance of the petitioner was that the 27th July was observed in that locality as a *hartal*. That may or may not be, but on the 29th August both parties, the appellant and the respondent, filed an application before the learned Judge settling the dispute between them and asking that the case might be decided in terms of the petition of compromise filed. The petitioner's application for restoration was taken up on the 17th September when one witness was examined for the plaintiff. On the 24th September the Court passed the order complained of rejecting the plaintiff's application.

We think in the circumstances of this case that the Court was wrong in not restoring the case, giving effect to the petition of compromise filed and in dismissing the application on the simple ground that the petitioner had not sufficient reason for not appearing on the 27th July. The order of the 24th September 1921 passed by the Court below will, therefore, be set aside and the appeal restored. The learned Judge will proceed to re-hear the appeal and give effect to any compromise that may be legally entered into by the parties.

W. C. A. *Rule made absolute.*

KULA MIAH *v.* NAZU MAIH.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE
No. 2717 OF 1919.
February 22, 1922.
Present:—Mr. Justice Greaves and
Mr. Justice Ghose.
KULA MIAH—PLAINTIFF—APPELLANT
versus
NAZU MIAH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 37—Creation of patni *by auction-purchaser—Annulment of under-tenures—Presumption.*

The mere creation of the *patni* by an auction-purchaser at a revenue-sale would not, by itself, be an indication to the under-tenure-holders that the option to annul the under-tenures had in fact been exercised. [p. 450, col. 2.]

Appeal against a decree of the Additional Subordinate Judge, Chittagong, dated the 18th of July 1919, modifying that of the Munsif, First Court at that place, dated the 20th of April 1918.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Chandra S. Sen*), for the Appellants.—The plaintiff is the appellant. Plaintiff took a *sadar patni taluka* lease of the disputed land from the purchaser of a revenue paying estate at a revenue sale held under Act XI of 1859 and instituted a suit against the defendants for recovery of possession setting aside all incumbrances under section 37 of Act XI of 1859. The defence *inter alia* was that as the plaintiff's lease did not cover the land of the entire under-tenure in possession of the defendants, the plaintiff was not entitled to avoid the under-tenure. The Trial Court gave a decree to the plaintiff but the suit was dismissed on appeal. My point is that Act XI of 1859 does not prescribe any particular procedure to avoid incumbrances. Hence the creation of a *patni* by the auction-purchaser of the entire estate, avoids the under-tenure and the *patnidar* may sue for the land covered by his lease inasmuch as the under-tenure was avoided by the purchaser of the entire estate.

Babu *Narendra K. Das*, for the Respondents.—Creation of a *patni* does not avoid under-tenures nor shows any intention of doing so. *Patni* leases are given for collection of rent. The lease is described as *sadar patni* lease. That assumes the existence of under-tenures from whom rent is to be collected. An under tenure cannot be avoided in part especially by a person who has got no right over the entire land covered by the under tenure. Refers to *Narayan Chandra* v. *Kasiswar Roy* (1), *Sooharam Barma* v. *Doorga Charan Das* (2). All purchasers must join to protect the under-tenure-holders from multiplicity of suits. Refers to *Jatra Mohun Sen* v. *Aukhil Chandra* (3).

Dr. *Basak* replied in brief.

JUDGMENT.—This is an appeal by the plaintiff against a decision of the Additional Subordinate Judge of Chittagong modifying a decision of the Munsif. The plaintiff, as appears from the plaint, sued for a declaration that he had a *sadar patni taluqa* interest in the disputed land and he asked for *khas* possession of the land free from all incumbrances by virtue of the provisions of Act XI of 1859 under which the land was sold and he also asked for a declaration that the defendants had no protected interest in the disputed tauk land. Defendants Nos. 19, 23 and 24 are all *taluqdars* and defendants Nos. 2, 3 and 6 are *raiyats* under the *taluqdars*. We are told that the defendants Nos. 5, 12 and 22 are under-*raiyats* but there is no finding as to this. It is stated that these defendants Nos. 5, 12 and 22 are dead and that their heirs have not been brought on the record. Accordingly, it may be that if the plaintiff succeeds in this appeal the heirs of these persons may be entitled to remain on the land as under-*raiyats* if in fact they are such. A question arose as to whether defendant No. 6 had in fact been served, but it appears that a report has been made that service was effected on this defendant. The Munsif decreed the plaintiff's suit but the lower Appellate Court said that, as the suit was one for a portion only of the *taluq*, it was not maintainable but the plaintiff's title to the land was declared. The finding of the learned Subordinate Judge with regard to the suit being for a portion only of the *taluq* is as follows: "It appears from Exhibits B and C that this *taluq* does not consist of only Maghi Survey Plot No. 5342 but there are many other Maghi Survey Plots in it." Later, he says: "upon the evidence I find that,

(1) 1 C. L. J. 579.
(2) 5 C. L. J. 264.
(3) 24 C. 324; 12 Ind. Dec. (N. s.) 890.

besides the disputed tank and the bank, these *taluqa pottas* include several other *dags* of the *taraf*. A suit for annulment of a portion of a *taluq* is not maintainable." It was urged before us on behalf of the appellant that the suit was maintainable, and, secondly, that the learned Judge was wrong in holding that defendants Nos. 2, 3 and 6 had occupancy rights in the land, and lastly, it was contended that the fact that a portion of the land, that is a part of the bank of the tank, was used as a graveyard could not protect the whole of the land under the provisions contained in the Fourth Exception to section 37 of Act XI of 1859. In the view that we take of the section, all the other questions which have been argued at some length before us do not arise and it is not necessary that we should express any opinion with regard to these points. But we think that the learned Judge in the Court below was right upon the facts before him in coming to the conclusion which he did, namely, that, inasmuch as the plaintiff only held a portion of the under-tenure it was not open to him in this suit to obtain *khas* possession. Now, section 37 of Act XI of 1859 provides that the purchaser of an entire estate sold under the Act for recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of Settlement, and that he shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with certain exceptions which are named. It is stated that what defendant (*sic*) No. 3 purchased at the auction sale was an entire estate and that he must be taken to have avoided the under-tenures when he created the *patni* in favour of the plaintiff and also *patnis* in respect of the other portions of the under tenure in favour of other persons, and this being so, it is said that as no suit is required under section 37 for the purpose of annulling an under-tenure, this suit is maintainable because it is merely a suit by a *patnidar* for *khas* possession of that portion of the under-tenure which has been leased to him under the *patni*, and it is accordingly stated that the decision in *Jatra Mohun Sen* v. *Aukhil Chandra* (3) has no application, for it is suggested that that was a suit to avoid and annul a tenure and that it was rightly held that in a suit of that nature all the purchasers must join to protect the under-tenure holders from multiplicity of suits. Now there is no doubt that there is considerable force in the argument addressed to us but, unfortunately, neither the plaintiff himself in the plaint nor either of the Courts below, have approached the case from this point of view with the result that there is no evidence that defendant No. 3, the auction-purchaser, had in fact annulled all encumbrances of the under tenure. If there had been evidence before us that this had been done, we think the case in 24 Calcutta [*Jatra Mohun Sen* v. *Aukhil Chandra* (3)] would very likely have been distinguishable and the plaintiff's contention might have prevailed. In the absence, however, of evidence that the auction purchaser had annulled all incumbrances on the under-tenure it is not possible for us to say that this is anything but a suit in similar form to that in 24 Calcutta [*Jatra Mohun Sen* v. *Aukhil Chandra* (3)], that is, a suit to annul encumbrances.

So far as it is urged that the creation of the *patni* was an overt act which would amount to an avoidance by the auction-purchaser of an under-tenure, we think that this by itself would not be sufficient, for the mere creation of the *patni*, would not by itself be an indication to the under-tenure holders that the option to annul the under-tenure had in fact been exercised.

For these reasons, we think that the appeal must fail, and it is not possible for us, in the mode in which the case came before us, to remand the case for a finding as to whether the auction-purchaser had in fact annulled the under-tenure prior to the creation of the *patni*.

The appeal, accordingly, fails and must be dismissed with costs.

B. N. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Re: Sec. 115, C. P. C.
Re: S. C. Ct. Suit No. 5755 of 1918.
November 22, 1920.
Present:—Mr. Justice Greaves.

SARAT CHANDRA CHATTERJEE—
APPELLANT
versus
BIRAJ MOHUN CHUCKERBUTTY—
RESPONDENT.

Costs—Taxation—Appeal preferred in case where none allowed—Appeal, dismissal of—Counsel's fees, taxation of—Refresher, if allowable—Rules and Orders of the Original Side, Calcutta High Court, Chap. XXXVI, r. 57.

When an appeal is preferred in a case where no appeal lies, the fees of only one Counsel should, having regard to the provisions of Chapter XXVI, r. 57, be allowed on taxation on the dismissal of the appeal. No refreshers, too, are allowable in such a case.

Appeal from the decision of the Taxing Officer.

Mr. *P. N. Chatterjee*, for the Appellant.
Mr. *P. Roy Chaudhuri*, for the Respondent.

JUDGMENT.—This is an application to review a taxation by the Registrar. The facts are as follows:—A Rule was obtained under the Revisional Jurisdiction of this Court, *viz.*, under section 115 of the Civil Procedure Code. That Rule was discharged and it appears to me having regard to the provisions of Chapter XXXIV of the Rules and Orders of this Court that, under the provision of rule 7, only the fee to one Counsel should have been allowed on taxation. Against the discharge of the rule, an appeal was preferred. No appeal in fact lay and the appeal was ultimately dismissed, but, having regard to the provisions of Chapter XXXV, rule 57 (*a*), it seems to me that if an appeal had lain only the fees of one Counsel would have been allowable on taxation unless the Court otherwise ordered and it seems to me to follow, under the circumstances, *viz*, of no appeal lying, that similarly the fees of only one Counsel should be allowed.

Consequently, I think that fees of two Counsel in the Appeal Court have been wrongly allowed. Similarly, I think, that no refresher should have been allowed. From the table which appears at page 430

of the Rules and Orders no refreshers are apparently allowed under appeals to which rule 57 applies and for reasons, accordingly, already stated it seems to me that I must apply the provisions of rule 57 and, this being so, no refreshers are allowable in taxation in respect of costs of appeal.

This application, for reasons already stated, succeeds. The applicant is entitled to his costs. Certified for Counsel.

Mr. *Roy Choud uri*.—Costs awarded to-day to be set off against the costs that I am entitled to obtain from them.

THE COURT.—Yes.

N. H.

Order accordingly.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.
March 7, 1922.
Present:—Lord Atkinson, Lord Carson, Sir John Edge and Mr. Ameer Ali.

RAMALINGA ANNAVI AND ANOTHER
—DEFENDANTS—APPELLANTS
versus
NARAYANA ANNAVI AND OTHERS—
PLAINTIFFS—RESPONDENTS.
NARAYANA ANNAVI AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
K. RAMALINGA ANNAVI AND OTHERS—
DEFENDANTS - RESPONDENTS.

Hindu Law—Joint family—Partition—Notice of intention to separate, effect of—Partial partition—Gift—Father's power to gift moveable property to daughter.

Under the Hindu Law it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family [p. 45, col. 1.]

Appovier v *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. P. C. 1; 1 Suth. P. C. J. 607; 2 Sar. P. C. J. 828; 20 E. R. 30, referred to

Under the Law of the *Mitakshara* an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. [p. 460, col. 1.]

RAMALINGA ANNAVI v. NARAYANA ANNAVI.

Girja Bai v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321; 43 I. A. 151; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455 (P. C.), referred to.

A father has the power under the Hindu Law of making, within reasonable limits, gifts to a daughter of moveable property including gifts of sums of money. [p. 459, col. 2.]

Consolidated appeals from the judgment and decree of the High Court (Sankaran Nair and Oldfield, JJ.), in Appeal Suit No. 89 of 1913, dated 20th Appril 1915, reported as 35 Ind. Cas. 428, modifying the decree of the Subordinate Judge, Tinnevelly, in Original Suit No. 10 of 1910.

Sir *George Lawndes*, *K. C.*, and Mr. *Dube*, for the Appellants.

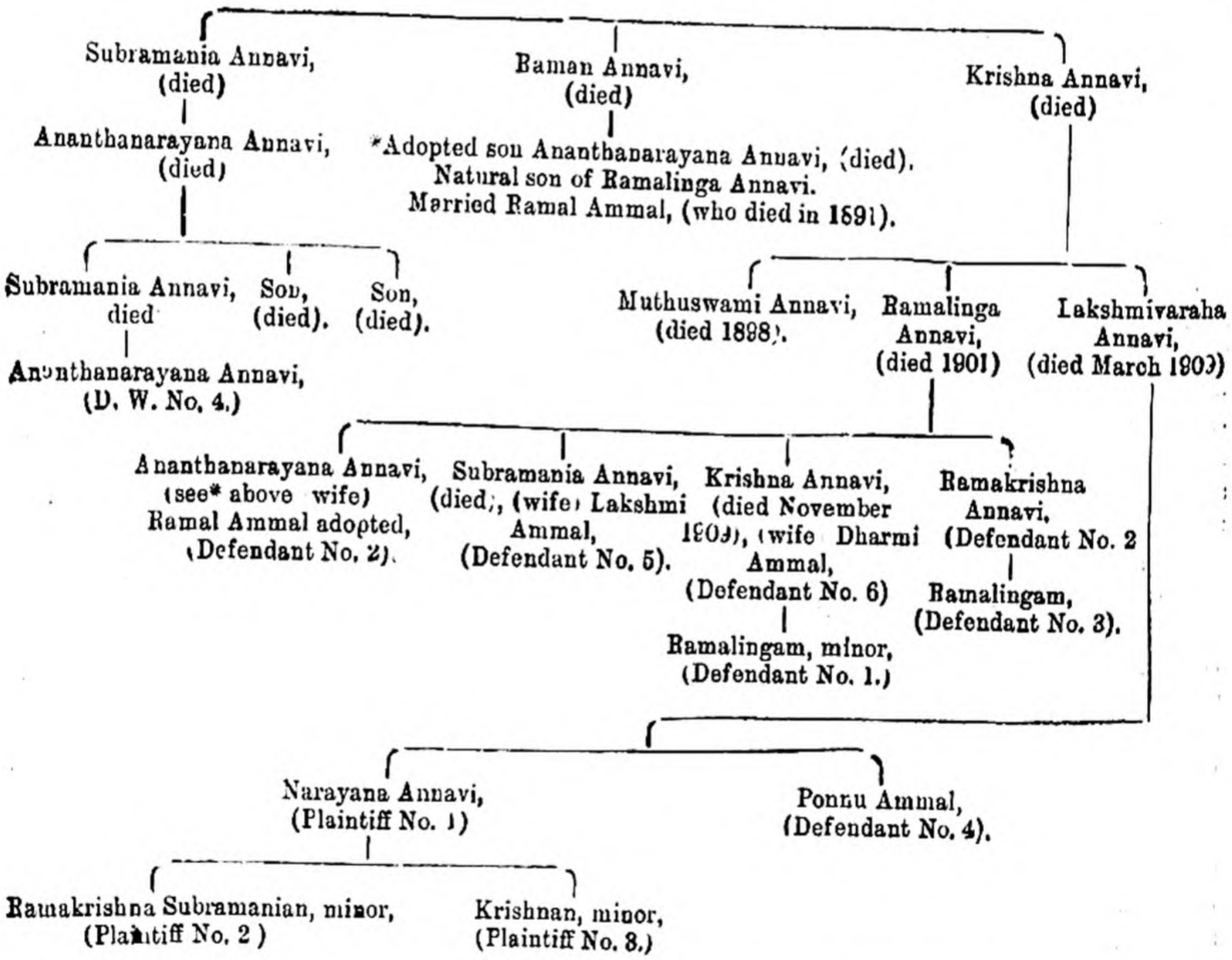
Mr. *Dunne*, K. *C.* and Mr. *Kenworthy Brown*, for the Respondents.

Mr. *DeGruyther*, *K. C.* and Mr. *Narasimham*, for the Defendant.

Mr. *Parikh*, for Ponnu Ammal.

JUDGMENT.

MR. AMEER ALI.—These two consolidated appeals from a decree of the High Court of Madras arise out of a suit which was brought by the plaintiffs in the Court of the Subordinate Judge of Tinnevelly on the 31st January 1910, for a decree for partition in respect of certain moveable and immoveable properties together with outstandings of a money-lending business on the allegation that they and the defendants Nos. 1, 2 and 3 formed members of a joint undivided Mitakshara family. The following pedigree will explain the relative positions of the parties and their respective contentions.



For the convenience of reference Krishna Annavi at the head of the table may be called Krishna No. 1 and his grandson, the son of Ramalinga, as Krishna No. 2. Krishna Annavi No. 1 had two brothers, Raman and Subramania, who had separated from him in his lifetime; and on his death his three sons Muthuswami, Ramlinga and Lakshmivaraha, with their sons, continued to hold and dea with their properties as members of a joint family. Ramalinga had five sons, whose names are given in the pedigree. One of them Anantha was adopted by Raman Annavi. On his death, somewhere in the sixties, his widow Ramal Ammal purported to adopt Ramkrishna, her deceased husband's

brother, as a son to him. This adoption was held by the Courts to be invalid under the Hindu Law, as one brother cannot adopt another as his son. Ramal, however, remained in possession of Anantha's property until her death in 1891, when it was divided among his reversionary heirs of whom the three sons of Krishna Annavi No. 1 were the principal sharers. Subramania, the fourth son of Ramalinga, appears to have died without issue, leaving Lakshmi Ammal, his widow, who is defendant No. 5. Ramakrishna's adoption having been set aside he remained a member of his branch of the family and is now constituted as defendant No 2 in the present action for partition. His son, Ramalinga No. 2, is joined with him as No. 3. Defendant No. 1 is the son of Krishna No. 2, the second son of the first Ramalinga who died in 1909. The defendant No. 1 was an infant at the time of suit and appears by his mother, defendant No. 6. Muthuswami died in 1898, and Lakshmivaraha in 1909. The plaintiff No. 1 is the son of Lakshmivaraha and the other two plaintiffs are Lakshmivaraha's grandsons. Besides the immoveable property the family held from the time of Krishna No. 1 and what they acquired after Ramal Ammal's death, they appear to have carried on a profitable money-lending business. Ramalinga had assigned to Ramakrishna (defendant No. 2) certain properties, apparently owing to the failure of his adoption. Lakshmivaraha had also in his lifetime made certain gifts to his daughter, Ponnu Ammal, defendant No. 4, the first plaintiff's sister. The plaintiffs' case is that these assignments and gifts are ineffective and inoperative, and they seek to have the properties assigned to defendant No. 2 as above and the monies given to defendant No. 4 by Lakshmivaraha, included in the partition. And they allege that they are entitled to a half share; and the defendant No. 1 and the defendant No. 2 (with his son) to the other half. The plaintiffs also claim that in the partition a sum of Rs. 2,000 should be allotted to them out of the joint assets for the marriages of the second and third plaintiffs. The defendant No. 6 is the mother of the minor defendant No. 1 and the widow of Krishna No. 2. She is made a party to the action, on the allegation that she has appropriated to her own use a large amount of joint family funds.

In 1895, which was the crucial period in the case, there were large outstandings due to the family in respect of the money-lending business which appears to have been mainly in the hands of Krishna, the father of defendant No. 1, as he was a man of intelligence and knew something of law. The first defendant alleges in his written statement that in that year there was a complete division among the three brothers, the sons of Krishna No. 1, of the family properties both moveable and immoveable, including the outstandings. He accordingly maintained that the present suit for partition is unfounded. He also denied the right of the defendant No. 2 to any share in the family properties. His case is set forth clearly in paragraph 14 of his written statement as follows:—

"About 16 or 17 years ago, during the lifetime of Muthuswami Annavi, Lakshmivaraha Annavi and Ramalinga Annavi, mentioned in paragraph 4 of the plaint, they became divided. At that time, considering the facts that since the 2nd defendant's adoption had been adjudged to be invalid, some provision should be made for him and that the said Muthuswami Annavi was unmarried and childless, and considering the welfare of the family, Rs. 5,000 was given to Muthuswami Annavi in lieu of his share and a sum of Rs. 20,000 was given to the 2nd defendant out of the remaining outstandings only. And it was settled that the father of the 1st plaintiff and the grandfather of the 1st defendant should equally divide between themselves the rest of the outstandings as well as the immoveable properties and they gave effect to it even during their lifetime."

Defendant No. 2, in his written statement, alleges that in 1895 the money-lending business carried on by the joint family was wound up so far as it was a joint business, and the outstandings which belonged to the joint family were divided among the different members; but that the immoveable property was not divided, nor was there a disruption of the joint family. He claims that the properties which stood in his name prior to 1895 and what he himself has acquired since belong to him exclusively. Defendant No. 4 asserted that the gifts to her were valid and could not be questioned by the plaintiffs.

Defendant No. 5, widow of Subramania, claimed that provision should be made for her maintenance in the partition proceedings.

Upon these contentions twenty-six issues were raised for trial in the first Court. For the purpose of the present judgment, however, they resolve themselves into four main questions: (1) Whether, as the plaintiffs allege, the family continued joint until its severance on institution of the suit, or as the High Court seem to hold on the decree of the Subordinate Judge directing partition; (2) whether, as the first defendant alleges, there was a complete partition between all the members of the joint family in 1895; (3) whether the second defendant was a member of the joint family and entitled to take a share on partition; and (4) whether the properties acquired after 1895, were held jointly, as the plaintiffs allege, or whether they were acquired and held by the members according to specific shares in proportion to the contributions made by each towards their acquisition. To these main questions should be added the following subsidiary points for determination, *viz.*, (1) Whether the defendant No. 2 was entitled, as he alleges, to the properties which were held in his name before 1895 and those he personally acquired after that date; (2) whether the gifts by Lakshmivaraha to Ponnu Ammal are valid; and (3) whether the plaintiff Narayana was entitled to have certain sums allotted to him on partition for the marriage of his sons.

The Subordinate Judge, on the consideration of the oral and documentary evidence, decided against the plaintiffs in respect of their allegation that the family continued absolutely joint in all respects until the present claim. As regards the first defendant's contention he held that there was no complete partition in 1895, and that the arrangement in that year related only to the winding up of the family money-lending business and to the division of the outstandings. He held that there was no disruption of the joint status, and that they continued undivided in respect of all the immoveable property, though the houses which each of the members occupied were allotted to the parties occupying the same. He held further that the defendant No. 2 was entitled upon partition to his share in the joint property, and that the properties that had been held in his name prior to 1895, together with those he had acquired since belonged to him. He held also that the properties which had been acquired after 1895 in individual names belonged to the particular person in whose name it was purchased; but that the properties which were acquired by the parties jointly were divisible in three parts in proportion to the purchase money paid by each, or, where that was not indicated, in proportion to the shares in the rents and issues enjoyed by each With regard to the gifts to Ponnu Ammal by Lakshmivarah, he held them to be valid; and in respect of the claim of the plaintiff No. 1 to have a sum of Rs. 1,000 set apart for each of his sons' marriage he held it to be untenable.

Respecting the properties in schedules 11 and 13 attached to the plaint, which the plaintiffs had claimed as exclusively their own in their possession, the trial Judge, towards the end of his judgment, said as follows:—

"As to the properties in plaint Schedules XI and XIII, there is no evidence on plaintiff's side to show that they belong to the family. Defendants Nos. 1 and 2 do not claim any right in them. If the plaintiffs are in possession of these properties exclusively they may enjoy them. They will be excluded from the decree."

These properties were accordingly not included in the decree for partition made in the first Court.

The plaintiffs appealed to the High Court from this decision, and the defendant No. 1 preferred a cross-appeal and one of the contentions he raised had reference to the properties in schedules 11 and 13. It was alleged on his behalf that the Subordinate Judge was in error in holding that the first defendant did not claim any right to them; and it was further urged that if by any omission on the part of his guardian no claim in fact had been preferred, he should not be prejudiced thereby. This contention was supported by an affidavit Their Lordships will deal with this point later, after they have considered the conclusions at which the learned Judges of the High Court arrived on the main facts of the case. They have held

that the claim of the plaintiffs that the family remained joint in every respect after 1895 was well founded; and that in 1895 only three specific items of the outstandings were divided among the parties jointly entitled to the same. They held further, differing from the first Court, that although the properties acquired after 1895 in individual names belonged exclusively to the persons in whose name they stood, those that had been acquired in joint names were divisible in three shares as acquisitions by members of a joint family. In other words, the learned Judges held that in these after-acquired properties, as in the ancestral immoveable properties left undivided in 1895, the plaintiffs were entitled to a half share, the first defendant to a one-fourth, and the second defendant with his son (defendant No. 3), to the remaining one-fourth. They affirmed the decree of the Subordinate Judge in respect of the claim of defendant No. 2 and upheld the validity of the gifts to Ponnu Ammal. Regarding the claim of the plaintiffs to have separate provision made for the marriages of the second and third plaintiffs, they disallowed it in respect of the plaintiff No. 3, but allowed it in respect of No. 2 as he was married after the institution of the suit but before the decree of the Subordinate Judge, they being of opinion that the severance of the joint status did not take place until the decree for partition by the first Court.

With regard to the properties in schedules 11 and 13 they held, apparently on the affidavit filed by defendant No. 1, as follows:—

"The plaintiffs claim a share of the properties in schedules XI and XIII. The defendants did not claim in the lower Court any interest in them. On the ground that the plaintiffs did not prove them to be properties belonging to the family, the suit was dismissed. We think the properties should be divided between the parties. The decree will be modified accordingly."

They accordingly modified the decree of the Subordinate Judge and further directed that:—

"According to our findings, the houses and *Manaikats*, which belonged to the family in 1895-1896 will be divided as family properties. All parties bear their own costs."

The High Court made their decree on the 29th April 1915. On the 28th March 1917 there was an application on behalf of the plaintiffs for review of the judgment. And on the fresh arguments advanced on the review, the learned Judges amplified and enlarged their findings in favour of the plaintiffs and made a decree in accordance with these findings. From this decree these two appeals have been preferred to His Majesty in Council, one on behalf of the first defendant, the other on behalf of the plaintiffs, and both appeals, as already stated, have been consolidated.

The concurrent finding of the Courts in India that the family continued joint after the division of the outstandings in 1895 and remained in joint possession and enjoyment of the ancestral immoveable properties is not impugned now; but the decision of the Hight Court in respect of the transaction of 1895 is strongly challenged on behalf of the first defendant, the son of Krishna No 2. It is contended on his behalf that the conclusion of the High Court that in 1895, only three specific items of the outstandings were divided, is against the weight of evidence and inconsistent with the general scheme of the transaction. And it is urged that the reasoning on which the division is supported in respect of the three items, applies with equal force to all the other items. It is also urged that the view the Judges of the High Court took in respect of the shares of the parties in the acquisitions made after 1895 is not in accordance with the evidence and does not proceed on right inferences from the facts.

On the plaintiffs' side it has been contended that as it is found that the family continued to be joint, the division of the respective interest of the parties in certain outstandings in 1895 could not affect the business as a whole: or discharge the properties acquired with the monies so divided from the obligations that attached to them as acquisitions of the joint family. The plaintiffs have also re-urged their objections to the gifts to Ponnu Ammal and pressed their claim to a provision for the marriages of the plaintiffs Nos. 2 and 3.

It seems to their Lordships that in the debate before the Board the difference between a complete "partition" in a joint undivided Hindu family and a partial division of interests in respect of some specific property or part of the joint properties has

been overlooked. This distinction has been clearly pointed out in the judgment of Lord Westbury in the well-known case of *Appovier* v. *Rama Subba Aiyan* (1) and, although the passage has often been cited, it is desirable to reproduce it here.

"But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

It will thus be seen that, under the Hindu Law, it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family.

Both the Courts in India held as a question of fact that whatever took place in 1:95, did not create a disruption of the family status. The Subordinate Judge found upon the evidence in the case that the worship had remained joint. The parties undoubtedly lived in separate dwellings, but that circumstance is explained by the fact that the family had increased in number and the original building could not accommodate all. The Subordinate Judge also points out that there was no cessor of commensality inasmuch as all the members of the family drew their provisions from one store-room or granary as stated in the evidence.

The sole question for determination thus resolves itself into an enquiry as to the character of the division which took place in 1895-1896. Was it a mere division of three items of outstandings, or did it relate to the whole money-lending business as a joint family business? The defendant No. 1, in support of his allegation that there was a complete winding up of the family money-lending business and a complete division of the outstandings has rested his case on Exhibit IX on the record, which is a list of outstandings due to the family at that time. That list covers 27 items and consists of 4 parts; Part 1 deals with the actual outstandings, the other three deal with the allotment of the shares to the three persons who were entitled to the monies at the time and among whom, after allotment of a large sum to defendant No. 2, the outstandings were divided. It begins with the statement: "List of outstandings due to the sons of Krishna Annavi," and goes on to say, "particulars of the total amount belonging and due to Muthuswami, Ramalinga and Lakshmivaraha, sons of Krishna Annavi;" List No. 2 shows the sums set apart for a certain worship; List No. 3 gives the particulars of the monies allotted to Muthuswami, the eldest brother; List No. 4 contains the particulars regarding the sum of Rs. 32,039 allotted to the share of Ramalinga; List No. 5 relates to the allotment of Rs. 32,038 to the share of Lakshmivaraha; and List No. 6 shows the particulars relating to the Rs. 21,359 allotted to defendant No. 2. With regard to the method of division the Subordinate Judge states as follows:—

"The 1st defendant's case is that, as Muthuswami Annavi was unmarried, he took Rs. 5,073 out of this amount and that in lieu of the 2nd defendant's share in the family immoveable properties, he was given Rs. 21,359 14-10. A sum of Rs. 1,000 was reserved for payment as *stridhanam* (to whom it is not stated) and a sum of Rs. 534 was set apart for charity. A sum of Rs. 500 was reserved for payment of family debts. The balance, Rs. 64,000 and odd, was divided almost equally between Lakshmivaraha Annavi and Ramalinga Annavi. The total amount of outstandings set apart to Ramalinga Annavi consisting of 37 items as stated in sheet No 6 of Exhibit IX came to Rs. 32,039 5-9. The total of outstandings set apart to Lakshmivaraha Annavi consisting of 26 items as stated in the 7th sheet of Exhibit IX came to Rs. 32,038 10-11. The particulars of the outstandings set apart to the 2nd defendant, Ramakrishna Annavi, are given in sheet No. 8 of Exhibit IX. The particulars of the three items, amount-

(1) 11 M. I. A. 75; 8 W. R. P. C. 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

ing to Rs. 5,073, set apart to Muthuswami Annavi are given in the 5th sheet of Exhibit IX. Exhibit IX. (a) purports to be the rough draft from which Exhibit IX was copied."

Out of the amounts which were allotted to Ramalinga and Lakhmivaraha, the Subordinate Judge took the six principal items in order to consider the nature of the division and the circumstances connected with the subsequent application of the monies received in the transaction of 1895 by the individual members. His examination of the facts is so close and his method of treatment so clear and detailed that their Lordships feel themselves relieved of the necessity of discussing at length the mode in which the parties dealt with the different items; but a few remarks seem necessary to indicate the considerations which have weighed with their Lordships in the determination of these appeals. The largest amount shown in the list is a sum of Rs. 22,150, which was owing from a Mutt in the Tanjore District. The division of this sum was made in the following way: Rs. 8,700 were allotted to Ramalinga, Rs. 8,300 to Lakshmivaraha and Rs. 5,150 to the second defendant. After stating these facts the Subordinate Judge proceeds to show how this money came into the hands of the persons to whom the several sums were allotted and how these sums were applied. With regard to this amount of Rs. 22,000 the learned Judges of the High Court agree with the Subordinate Judge that the division was effective and the various sums allotted to the three parties were applied by them in the manner pointed out by him. The next item which the Subordinate Judge took up for examination was the sum of Rs. 19,725, with which he deals in the same exhaustive manner and shows how that sum was divided and how it was applied by the persons among whom the division was made. He shows that out of that sum Rs. 7,400 were set apart to Ramalinga, Rs. 7,400 to Lakshmivaraha and that Rs. 4,925 were given to defendant No. 2. After an examination of the documents connected with this division he came to the conclusion that Lakshmivaraha received his share and applied the same to his uses, and that, therefore, he is not entitled to any share in the sums allotted to the defendants Nos. 1 and 2. With regard to this item the High Court take a different view. They hold, upon a letter which Krishna Annavi No. 2, the first defendant's father, wrote to the manager of the mortgagor on the 26th March 1909, saying that: "We consent to receive for the total debt due by the *zemindar* a certain rate of interest," that there was no such division as the first Court had found. With regard to Exhibit C., on which practically the decision of the High Court in respect of this particular item rests, it seems sufficient to say, as the Subordinate Judge properly observes, that a mere statement of Krishna Annavi No. 2 cannot outweigh the other facts.

With regard to the item of Rs. 6,550 the Subordinate Judge has applied the same method of examination and the High Court have affirmed his view. Regarding another item consisting of Rs. 1,795, due from a Mutt on a mortgage, the Subordinate Judge held that it had been divided among the parties in accordance with the allotments shown in the list. The learned Judges of the High Court have set aside his finding upon what appears to their Lordships a certain misapprehension of the facts. These facts are fully set out in the judgment of the first Court and do not require repetition.

Regarding item (No. 2) in the first list, which amounted to Rs 7,594, due to the Annavi family from a *zamindar*, it appears that Rs. 2,847 were set apart to Ramalinga and the same amount to Lakshmivaraha and the balance of Rs. 1,898 was given to the second defendant. Respecting this item the Subordinate Judge deals with it equally exhaustively and holds—

"In this item, Rs. 2,847-15-9 was set apart to Ramalinga Annavi and the same amount to Lakshmivaraha Annavi. The balance, Rs. 1,898 10-6, was set apart to the 2nd defendant Exhibit XI is a pro note for Rs. 3,185 2-1 executed to 1st defendant's father, Krishna Annavi by Sivan Sethuroyar on 13th August 1897. This amount is described as his father's share in the amount due under a pro-note executed to Ramalinga Annavi and on account of a chit conducted by Sivan Sethuroyar. This pro-note was attested by Lakshmivaraha.

Annavi and Rama Krishna Annavi. Exhibit XI (*a*) is a pro-note for Rs. 3,846-13 8 executed by Siwan Sethu royar on 5th August 1900, for the amount due under Exhibit XI. Sivan Sethuroyar's son, Sundara subramania Sethuroyar executed to Krishna Annavi, the 1st defendant's father, the pro note, Exhibit XI (*b*), on 28th July 1903, for Rs. 4,671-7-0, being the principal and interest due under Exhibit XI (*a*). Defendants' 7th witness, Mana Rama Aiyar, has attested Exhibits XI and XI (*b*). Defendants' 5th witness, Jagannadhaiyar, who was Kariyasthan under Siwan Sethuroyar, swears that he wrote Exhibit XI and that 1st plaintiff's father and 2nd defendant attested it. This witness also wrote the pro-note Exhibit XII, which was executed to 2nd defendant by Sivan Sethuroyar on the same date as Exhibit XI, namely, 13th August 1897, for Rs. 2,123-6-8. The amount is described in that document as his share. This pro-note was renewed in 2nd defendant's name on 5th August 1900, by Exhibit XII (*a*) for Rs. 2,514-8-11 and a pro-note similar to Exhibit XI (*b*) was executed to 2nd defendant for Rs. 3,114-4-0 on 28th July 1902. The pro note executed to 1st plaintiff's father on the dates of Exhibit XI and XII has not been produced. But it is mentioned in the pro-note, Exhibit XIII, for Rs. 3,844-13-8, which was executed to 1st plaintiff's father on 5th August 1900 at the same time as Exhibits XI (*a*) and XII (*a*). Exhibit XIII (*a*) was executed to 1st plaintiff's father in renewal of Exhibit XIII by Sivan Sethuroyar's son for Rs. 4,671-7-0 on the same date as Exhibits XI (*b*) and XII (*b*). These documents are proved by defendants' 5th witness, Jagannadha Aiyar. Defendant's 6th witness, Ganapathi Aiyar, wrote Exhibits XI (*a*), XII (*a*) and XIII.

'On the 1st of December 1903, Sivan Sethuroyar's son, Sundarasubramania Sethuroyar executed the sale-deed, Exhibit XIV, for Rs. 15,350 in respect of certain lands in the village of Vellanguli, that is, the properties described in Schedule VIII, and a land in Uppuviyanputtur in the Oorkadu Zemin, that is, item No. 1 in Schedule XI (*b*). The sale-deed was executed jointly to 1st plaintiff's father, 1st defendant's father and 2nd defendant. The recital in the sale-deed is that, out of the sale price, Rs. 7,000 was paid in cash and that the balance, Rs. 8,350, was credited towards a portion of the amount due to the vendees."

In respect of this item the High Court took a different view. They state their reasons thus:—

"There is nothing in the document to show that this amount was not the common joint property of all the three persons. The balance of Rs. 8,350-0-0 was credited towards a portion of the amount due to the vendees under various promissory notes and a *razinamah* decree. There is nothing in the document to show the debts that were due to each individual co-parcener. There is no doubt, therefore, that the property purchased under Exhibit XIV was treated as common property. The purchase in the names of all the co-parceners jointly is inconsistent with the case set up by the defendants so far as this property is concerned. The Subordinate Judge says that the three persons purchased the property with the intention of dividing it along with the other lands of the family which were left undivided. If this is so, there is nothing to suggest that this property was not intended to be treated as the other immoveable properties in which they were equally interested. There is nothing to support the inference of the Subordinate Judge that this property should be divided in the proportion in which the debts were divided We, therefore, hold that the plaintiffs are entitled to a half share in the property purchased under Exhibit XIV."

In their Lordships' opinion the view expressed by the Subordinate Judge appears to be fully warranted by the evidence.

The theory that in 1895 there was only a partial division of the outstandings which only related to three items, whilst the rest were left joint, is not consistent with the evidence, nor indeed logical. The defendant No. 2, in his written statement, gives the reason why the joint money-lending business was wound up. He says that in that year or about that time Lakshmivaraha desired to make some gifts of money to his daughter; the other members objected to those monies being paid out of the joint funds; it was then decided that the business should be wound up, and the shares of the different parties ascertained and divided; that Lakshmivaraha thus obtained his

share, and out of that share made the gifts which are now impugned by the plaintiffs. This statement is supported by defendant No 2 in his evidence The reason for the division is clear and straightforward, and explains the subsequent conduct of the parties to the transaction. The deliberate preparation of the lists with their precise details and systematic apportionment of shares, the setting apart of a sum for worship, and the allotment of a sum to Muthuswami disproportionate to the share to which he was legally entitled, for reasons which do not seem at all illegitimate, betoken a design to wind up altogether the family money lending business and divide the outstandings. That those outstandings were, in fact, divided and were taken by Ramalinga, Lakshmivaraha and the second defendant in certain specific shares, which roughly came to three-eighths to the first two and two-eighths to Rama Krishna, is proved beyond doubt. When subsequently the three combined in fresh purchases or mortgages they contributed towards such acquisitions in proportion to the shares they acquired on the division of the outstandings.

In connection with these purchases, the Subordinate Judge pertinently observes :—

"In all these documents there is reference to *Thargal Bhagam* (your share). If there was no division, this recital would not have been made. The object of taking the signatures of the other two co-parceners in the documents executed to each of them was to prevent them from afterwards contending that the documents were taken without their knowledge."

And the oral evidence shows that the rents and issues of the properties so acquired were taken by the parties in those shares. The High Court does not seem to have attached much importance to this circumstance. But the enjoyment of the subsequent acquisitions is strong evidence of the fact the Subordinate Judge has found that they bought them in those shares and enjoyed them in those shares.

It has been strongly contended, on behalf of the plaintiffs, that Narayana was of age in 1895 and was not a party to the partition, and is, therefore, not bound by it. But it is conclusively proved that Narayana acquiesced in and adopted the acts of his father not only in his lifetime, but also since his death. He cannot now turn round and repudiate the division made in 1895. On the whole, their Lordships are of opinion that the view taken by the High Court of what took place in that year cannot be sustained.

There remain now the two questions, one relating to the validity of the two gifts made by Lakshmivaraha to the fourth defendant, Ponnu Ammal. The first is an assignment of Rs. 5,000 out of the money which fell to the share of Lakshmivaraha due from the Thiruvadudurai Mutt. This was done at the instance of Lakshmivaraha. The other is an assignment of a usufructuary mortgage held by him. In the aggregate the two sums amount to Rs. 8,000. The father has undoubtedly the power under the Hindu Law of making, within reasonable limits, gifts of moveable property to a daughter. In one case the Board upheld the gift of a small share of immoveable property on the ground that it was not shown to be unreasonable.* In the present case, the gifts relate to sums of money. The only question is whether they were reasonable. Both the Courts in India have answered the question in the affirmative and their Lordships have no materials or ground to hold otherwise.

Regarding the prayer for the allotment upon partition of Rs. 2,000 for the marriages of plaintiffs Nos. 2 and 3, the High Court disallowed the claim in respect of the prospective marriage, but allowed it for the expenses of the marriage that took place before decree in the first Court, on the ground that the joint family status was not dissevered until the decree for partition, and that the joint family liability continued until then. This view is opposed to the law laid down in the case of *Girja Bai* v. *Sadashiv Dhundiraj* (2) where it was held expressly, that under the Law of the Mitakshara,

(2) 37 Ind. Cas. 321; 43 I. A. 151; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 14 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455 (P. C.).

* See *Bachoo Harkisondas* v. *Mankorebai*, 34 I. A. 107; 31 B. 373; 9 Bom. L. R. 646; 11 C. W. N. 769; 6 C. L. J. 1; 17 M. L. J. 343; 2 M. L. T. 295 (P. C.)—[*Ed.*]

to which the parties in the present case are subject, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. This intention was clearly intimated to the co-parceners when the plaintiff Narayana served on them the notice, Exhibit II, on the 30th of July 1909. That notice effected a separation so far as his branch of the family was concerned, and no obligation rested on the joint family in respect of his sons' marriages. The decree of the Subordinate Judge dismissing the claim was, therefore, correct.

As regards the properties in Schedules XI and XIII, there are not sufficient materials before their Lordships to determine whether they belonged to the joint family or formed the exclusive property of the plaintiffs. It will be for the first Court to decide the question upon proper materials when giving effect to the decree for partition. But the parties would be well advised to settle it amicably.

It is admitted that the land allotted to the widow of Subramania Annavi (defendant No. 5), on her decease, became divisible among the heirs of her husband, in other words, the male members of the family, parties to this action. To this extent the declaration made by the Subordinate Judge will be varied.

The High Court directed in its discretion that each party should bear his own costs. With that direction their Lordships do not propose to interfere. But having regard to the nature of the contentions, they consider that the plaintiffs must pay the costs of defendants Nos. 1, 6 and 4. The defendants Nos. 1 and 6, who alone impugned the right of defendant No. 2 to a share in the joint family properties, must play his costs. The plaintiffs' cross-appeal will be dismissed with costs.

Their Lordships will accordingly humbly advise His Majesty to set aside the decree of the High Court and restore the decree of the Subordinate Judge, subject to the above variation, with the above directions as to costs.

Appeal allowed.

Solicitors for the Appellants.—Messrs. *Chapman, Walker* and *Shephard.*

Solicitors for Respondents Nos. 1 to 3.—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitor for Respondent No. 4.—Mr. *Douglas Grant.*

Solicitor for Respondent No. 6.—Mr. *E. Dalgado.*

W. C. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No 42 OF 1920.

July 20, 1921.

Present—Mr. Hallifax, A. J. C.

Seth JASKARAN AND ANOTHER—APPLICANTS—APPELLANTS

ve sus

GAIND PRASAD AND OTHERS—NON-APPLICANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 37—Secured creditor, whether "creditor."

The word "creditor" in section 37 of the Provincial Insolvency Act includes a secured creditor.

Appeal from an order of the Additional District Judge, Raipur, dated the 31st August 1920, in Insolvency Case No. 10 of 1919, dated 29th October 1919.

Dr. *H. S. Gour*, for the Appellants.

Mr. *J. C. Gosh*, for the Respondents.

JUDGMENT.—The order in the proceedings under the Provincial Insolvency Act which is attacked in this appeal was passed on the 31st of August 1920. The proceedings began on the 22nd of February 1919 when Act III of 1907 was in force,

but that was repealed on the 26th of February 1920, six months before the order was passed, by Act V of 1920. The two Acts are, however, practically identical in respect of the provisions with which we are concerned, so that the question of the new or the old Act applying does not really arise. The learned Additional District Judge has referred to the sections of the Act of 1907 throughout. I do not consider it necessary to set out at any length the reason for saying that the order of the learned Judge is wrong and setting it aside. It is, indeed, not easy to find anything in the order that is right. It is mainly based on the assumption that a secured creditor is not a creditor within the meaning of section 37 of the Act. For this extraordinary proposition no reasons have been or could be given. Many could, but need not, be stated against it. The transfer of the village share, which with characteristic inaccuracy is usually called a ten-anna share in the proceedings, being in fact a two-thirds or ten-anna eight-pie share, is fraudulent and void under section 37 of Act III of 1907 or section 57 of Act V of 1920 and must be annulled.

(2) It is also void and must be annulled under section 36 of Act III of 1907 or section 53 of Act V of 1920. The learned Judge appears to have held that the sale to Ramprasad, for which the consideration is stated in the sale-deed to be Rs. 5,000, was for good consideration, because it is proved that a sum of Rs. 4,700 was actually paid by him to one Gajadhar Prasad in satisfaction of his mortgage dated the 19th of December 1914 to the same property. But whatever the exact value of the share may be, it is certainly a great deal more than Rs. 5,000, and the sale did in fact extinguish also Ramprasad's own mortgage for Rs. 3,105 which was executed exactly five months earlier, though mention of this extinguishment is very carefully omitted from the sale-deed. The burden of proving that that part of the consideration was given as well as the Rs. 4,700 paid to Gajadhar Parasad, lay upon the respondents, and every part of the evidence to be found on the record tends directly in the opposite direction. I may mention that in his order of the 29th of October 1919 the same learned Judge on practically the same materials and in the same proceedings came to the conclusion that both the mortgage and the sale to Ram Prasad were mere shams and fraudulent.

(3) The order of the lower Court is set aside. The sale on the 10th of December 1918 of a share in the village of Jhanj by the insolvent to Ramprasad is declared fraudulent and void as against the Receiver and is annulled. The appellants' costs in the appeal and in the proceedings out of which it arose will be paid by the respondent, Ramprasad.

The Pleader's fee in this appeal will be Rs. 50.

Appeal allowed.

G. R. D.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2638 OF 1921.

June 6, 1922.

Present:—Mr. Justice Broadway.

JOTI PARSHAD—PLAINTIFF—APPELLANT

versus

BRIJ RAJ SHARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 4—Promissory-note—Instrument containing unconditional undertaking to pay certain sum with interest annually, whether pro-note.

An instrument in writing which contains an unconditional undertaking to pay a certain sum of money with interest annually is not a promissory-note within the meaning of section 4 of the Negotiable Instruments Act.

Miscellaneous first appeal from an order of the Senior Subordinate Judge, Karnal, dated the 7th October 1921.

Mr. *Shamair Chand*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

OBILISETTI VENKATA KRISHTNIAH v. ATAYAM SUBBIAH.

JUDGMENT.—The first point for determination in this case is, whether the document on which the suit is based is or is not a promissory-note.

The Court below has held that it is, and that, as it is improperly stamped, it is inadmissible in evidence under section 35 of the Stamp Act for any purpose whatever. Mr. Shamair Chand for the appellant has contended that the document is not a promissory note, and, further, that if it is, it is admissible to prove that the monies due under the original transaction were payable at Karnal.

The document itself purports to be a promissory-note. After reciting the circumstances which led to its execution it goes on as follows: "I promise that I shall pay Rs. 11,891-15 3, within three years from the date of this *rugga* with interest at the rate of annas 8 per cent. per mensem. The interest shall be paid annually. The said amount shall be paid to Lala Joti Pershad.....or his order at Karnal...."

Now, a promissory note, as defined in the Negotiable Instruments Act, "is an instrument in writing....containing an unconditional, undertaking signed by the maker, to pay a certain sum only to, or to the order of, a certain person,....."

The document in question is certainly an instrument in writing containing an unconditional undertaking to pay Rs. 11,891-15 3 with interest at annas 8 per cent. per mensem to Lala Joti Pershad or his order, and were this all I would have no hesitation in agreeing with the Court below, that it is a promissory-note. There is however, an undertaking to pay the interest annually, and I think there is force in Mr. Shamair Chand's contention that such a term is inconsistent with the document being a promissory-note.

It seems to me that, with this undertaking embodied in the document, the payee could sue for any interest that had become due and remained unpaid.

Such a clause is repugnant to the essential character of a commercial document negotiable by mere endorsement.

In this view I am fortified by a decision of Beaman, J., reported as *Pratab-chand Gulabchand* v. *Purshotamdas Mulji* (1). Whatever this document may be, I do not think it is a promissory-note, falling under the absolute prohibition of section 35 of the Stamp Act and I hold accordingly. As to the second point, *i. e*, whether the document, assuming it to be a promissory-note, is admissible for any other purpose I am of opinion that section 35 renders a promissory note improperly stamped inadmissible for any purpose whatever, *vide Mulji Lala* v. *Lingu Makaji* (2), *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat* (3) and *Thaji Beebi* v. *Tirumalaiappa Pillai* (4). As I hold the document is not a promissory-note, I accept this appeal and return the case to the Court below for disposal in accordance with law. Costs of this appeal will be costs in the cause.

W. C. A. *Appeal accepted.*

(1) 33 Ind. Cas. 366; 18 Bom. L. R. 124.
(2) 21 B. 201; Chitty's S. C. C. R. 482; 11 Ind. Dec. (N. S.) 136.
(3) 7 Ind. Cas. 955; 35 B. 29 at p. 33; 12 Bom. L. R. 723.
(4) 30 M. 386; 17 M. L. J. 308.

MADRAS HIGH COURT.

CIVIL APPEAL No. 121 OF 1920.

September 16, 1921.

Present.—Mr. Justice Oldfield and Mr. Justice Ramesam.

OBILISETTI VENKATA KRISHTNIAH —DEFENDANT—APPELLANT

versus

ATAYAM SUBBIAH AND OTHERS— PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Co-parcener, contract by—Contract in own name but really as agent of manager—Liability of manager and family—Personal liability—Contract Act (IX of 1872), s. 231, cl. (1), application of.

Where a single member of a joint Hindu family enters into a contract in his own name but really

as the agent of the manager, the manager as well as the whole family is bound. [p. 464, col 2.]

So far as the manager is concerned it is a case of an undisclosed principal and has reference to the Law of Agency. So far as the family is concerned it is a case of the application of the Hindu Law wherein the acts of the manager are binding on the family. [p. 464, col. 1.]

In such a case, therefore, the contracting member, and (with reference to the first clause of section 23 of the Contract Act) the manager may be personally liable but not the other members. [p. 484, col. 2]

Krishna Ayyar v. *Krishnaswami Ayyar*, 23 M. 597, 8 Ind. Dec. (N. S.) 819, referred to.

Appeal against a decree of the Court of the Temporary Subordinate Judge, Ellora, in Original Suit No. 14 of 1919, Original Suit No, 72 of 1918 on the file of the Court of the Subordinate Judge, Ellore.

Messrs. *T. Y. Kuthekrishna Aiyar* and *V. Suryanarayana*, for the Appellant.

Messrs. *P. Narayanamurthy* and *K. Kammana*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—I agree with the judgment to be delivered by my learned brother and have nothing to add.

RAMESAM, J:—The plaintiff sues as the assignee of one Nunna Venkataratnam. His case is that the defendant's family had, during the lifetime of their father, Jagannadham, two *khatas* with the said Venkataratnam, (1) in which Venkataratnam acted as a Commission Agent for the family and (2)—the suit transaction—in which Venkataratnam and the defendant's family were partners in paddy trade. In Venkataratnam's accounts, the 1st *khata* stood in the name of their father and manager, and the second, in the name of the 2nd defendant. The 1st defendant contested the suit on the ground that the 2nd *khata* did not relate to a family transaction; but the Subordinate Judge decreed in plaintiff's favour. The 1st defendant appeals.

The only point argued for the appellant is, that the 1st defendant cannot be made liable in this suit, as there was no privity of contract between him and Venkataratnam even though the debt was a family debt and the 1st defendant may be liable to his brothers in a suit for contribution.

The following facts may be taken as admitted or proved in the case. The defendants and their father were living together as a joint family until the father's death which happened about the end of 1915 or very nearly in 1916. Shortly after the father's death, there was a partition between the brothers. The suit transaction commenced in 1908. The accounts were settled on 22nd October 1915, and it was found that a sum of Rs. 36,496 and odd was due to Venkataratnam. This settlement appears in the account books of Venkataratnam and in the accounts of the defendant's family. In the former, it was signed by the 4th defendant (Exhibit A). The other transaction in the name of the father which is admitted to have been carried on for the family was settled on 15th October 1915 and it was found that Venkataratnam owed Rs. 3,721 and odd to the defendant's family. This amount was transferred to the suit account to the credit of the defendants on 17th January 1916, after the father's death. The defendants' family ledger, contained both the *khatas*, Exhibit B relating to the suit *khata* and Exhibit C relating to the admitted family *khata*. There are day-books corresponding to the ledger. The 1st defendant, while admitting that there are accounts kept by the family, says he never cared to look into them. He attended to the cultivation of the family lands, while the 2nd defendant, who was regarded by the father as a person of greater capacity than his brothers, looked after the family trade. The family had two shares in a rice mill—the shares standing in the 2nd defendant's name. The 2nd defendant settled the accounts relating to the dealings of the family with one Pulavarti Venkanna. He was also borrowing from the Madras Bank for the family purposes, though all the members executed a security bond in favour of the Bank. Not only did the 1st defendant not repudiate the transfer of the amount in his father's *khata* to the suit *khata* but he adopted, in Exhibit D, the result of the transfer as continued up to the date of the petition. In this petition he admitted the suit debt as a family debt. The reference in it, in the sentence "Until two years ago, Nunna Venkataratnam and we carried on paddy business jointly. There was loss to the extent of rupees ten thousand

for our share" is obviously to the suit transaction and not to the *khata* in Jaganadham's name in which Venkataratnam was not a partner but only a Commission Agent and which did not result in a loss for the defendants. The irresistible inference is that the suit transaction was, from the beginning, one entered into on behalf of the family, being known to its manager, and carried on for its benefit, the understanding, from the beginning, being that the family will share in the profit or loss. It is not a case where a member carried on business separately with his own funds and for his own benefit and afterwards the family took upon itself the debts he had incurred, and hence no question as to whether Exhibit D amounts to a valid ratification in law arises (Vide *Keighley Maxsted & Co.* v. *Durant* (1).

It seems to me that where a debt was incurred on behalf of the family—though only a single member, not being a manager, deals with the creditor, the creditor being ignorant of the fact that the single member was acting on behalf of the family—a suit is maintainable against all the members. In such a case, the single member is the agent of the manager (and some or all of the adult junior members). This is the basis of Subramania Iyer, J.'s judgment in *Krishna Ayyar* v. *Krishnasami Ayyar* (2). The dissenting judgments of Davies J, (at pages 601 and 607) were based on his view that the suit was based on the note only. At page 601 he conceded that "had it been a bond that was sued on or had the suit been brought on the debt, of which the promissory note afforded evidence, other members of the 1st defendant's family might have been held liable as well as himself on the ground that the 1st defendant represented them." This sentence of Davies, J. gives the reply to the argument of Mr. K. V. Krishnaswami Iyer, the learned Vakil for the appellant, who earnestly urged upon us the view that the decision proceeded on the ground that the 1st defendant in that case was the manager. He relied on the judgment of Shephard, J. (at page 605) and also referred to the following cases:—*Nagendra Chandra Dey* v. *Amar Chandra Kundu* (3), *Baisnab Chandra De* v. *Ramdhon Dhor* (4), *Pulukkavandy Ambalam* v. *Periyakaruppa Kone* (5), *Angat Singh* v. *Srinath Das* (6), *Govindan Nair* v. *Nanu Menon* (7), *Nachiappa Chetty* v. *Dakshinamurthy Servai* (8), *Chinniah Chetty* v. *Tikkan Ramaswami Chetty* (9) and *Ayyasami Pillai* v. *Gurusami Naicken* (10) affirmed on Letters Patent Appeal in *Nataraja Naicken* v. *Ayyasami Pillai* (11). It is true that in some of these cases *Krishna Ayyar* v. *Krishnasami Ayyar* (2) was referred to as a decision relating to the dealing by a manager. But, I am of opinion that Shephard, J. was merely meeting the objection of Davies, J. that the suit was based on the note and not on the debt and did not intend to lay any particular emphasis on the word 'manager' used by him. When a single member acts in his own name but really as the agent of the manager, the case is one of an undisclosed principal and the manager is bound. So far it is an application of the Law of Agency. In so far as the manager's acts bind the whole family it is the application of the Hindu Law relating to the manager and involves no extension of the ordinary rules of Hindu Law. Thus, it is a case of a combined application of the Hindu Law and the Law of Agency and involves no unjustifiable extension of either. In such a case, the contracting member, and (with reference to the first clause of section 231 of the Contract Act), the manager may be personally liable but not the other members. This is the view taken in *Krishna Ayyar* v. *Krishnasami Ayyar* (2) where certain-

(1) (1901) A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R, 527.
(2) 23 M. 597; 8 Ind. Dec. (N. S.) 819.
(3) 7 C. W. N. 725.
(4) 11 C. W. N. 139.
(5) 2 Ind. Cas. 203.
(6) 3 Ind. Cas. 403.
(7) 26 Ind. Cas. 750; (1914) M. W. N. 782; 27 M. L. J. 595.
(8) 28 Ind. Cas. 345; (1915) M. W. N. 217; 17 M. L. T. 232.
(9) 31 Ind. Cas. 317.
(10) 33 Ind. Cas. 691; 3 L. W. 463.
(11) 38 Ind. Cas. 339; 32 M. L. J. 354; 5 L. W. 410; (1917) M. W. N. 230; 21 M. L. J. 405.

ly none of defendants Nos. 2 to 9, was the manager. I hold, therefore, that the 1st defendant is not personally liable *i. e.*, the 1st defendant's share in the joint family properties is liable (but not his separate properties or his person). The decree will accordingly be modified. Subject to this modification the appeal is dismissed with costs, of 1st respondent.

M. C. P.

Decree modified.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No 67 OF 1921.

July 12, 1922.

Present:—Mr. Hallifax, A. J. C.

MAROTI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BHAGI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 112—Presumption of paternity—Facts necessary to be proved—Civil Procedure Code (Act V of 908), s. 35, O. XXXII, rr. 8, 9—Minor pauper—Suit by next friend—Costs, whether may be recovered from next friend—Powers of Court.

A person relying on the presumption of paternity under section 112 of the Evidence Act must establish all the facts mentioned in the section before he can ask the Court to treat them as conclusive proof of his paternity. [p. 466, col. 1.]

A Court has power under the Civil Procedure Code of 1908 to order the costs of a pauper suit by a minor to be recovered from the next friend who has filed it on behalf of the minor. [p. 467, col. 2.]

Appeal from a decree of the Additional District Judge, in Civil Suit No. 20 of 1920, dated the 20th July 1921.

Mr. *D. W. Kathalay*, for the Appellants.

Mr. *S. R. Mangrulkar*, for the Respondents.

JUDGMENT.—The oral evidence for the plaintiff is such a mass of impossibilities and patent falsehoods that there was no course open to the learned Pleader who conducted his appeal but to admit that the story told by the defendants' witnesses must be accepted as the truth. The facts, stated shortly, are these. Chindhu Mahar of Adam was married at the age of fifteen to *Musammat* Pauli who was then about seven years old. She remained in the house of Chindhu's parents for a fortnight or so after the wedding and then returned to her own home at Deoli which is about four miles from Adam. Later on, after she had attained puberty, her father Jairam was asked to complete the marriage by sending her to her husband's house for its consummation, but he refused then and always thereafter. Except at the wedding, which is really no more than an irrevocable betrothal, Pauli never formally entered her husband's house or even visited it casually.

2. In the course of time Chindhu married at least three other women in succession, but all of them were childless. Eventually, Jairam found that his daughter was pregnant. He then went with her to Adam, convened a *Panchayat* and demanded that Chindhu should either take her to live with him as his wife or divorce her formally. He naturally chose the latter course and Pauli was taken then back to Deoli, where she gave birth, not long afterwards, to a son Maroti, who is the plaintiff in this case. It was also within a few months of the divorce that she married one Kandu who had been living in her father's house for some years. Chindhu died in November or December 1918, and in this suit, which was filed in the following March on behalf of Maroti by a next friend against the mother and the widow of Chindhu who were in possession of his property, it is claimed that he is Chindu's son and entitled to succeed to his estate.

3. The plaintiff's case in the lower Court was that his mother lived with her husband, Chindhu, for some years and that he was born during that cohabitation and long before there was any separation between his parents. It was also most strenuously denied that their separation was anything but an amicable separation by mutual consent and that Pauli was pregnant at the time; indeed

it is admitted by everybody that the plaintiff Maroti is Pauli's only child. It is, therefore, very doubtful whether the plaintiff ought to be allowed in appeal to call in aid section 112 of the Evidence Act and apply it to the facts proved against him in the face of strenuous denials. This has, however, been allowed, and the plaintiff's case now is that he is proved and admitted to have been conceived during the continuance of a valid marriage between his mother and Chindhu, and to have been born well within two hundred and eighty days after its dissolution, and that the defendants have failed to show that his mother and her husband had no access to each other at the time when he was begotten, as they were living in villages only four miles apart up to the time of the divorce.

4. It cannot be denied that, according to Hindu custom, a husband is not allowed to have access to his wife for the purpose of sexual intercourse until she has been formally sent to his house for the consummation of the marriage after she has attained puberty. The rule is strict, and the fact that Jairam never allowed his daughter to go formally to her husband's house at all is complete proof that Chindhu and Pauli never had access to each other for the purpose of sexual intercourse. The very strong presumption raised by virtue of section 112 of the Evidence Act has been successfully rebutted by the defendants in the manner allowed by that section.

5. There is, however, another matter which must defeat the plaintiff's claim to be considered the son of Chindhu merely on the strength of the facts set out above. It is, that he has failed to prove that his mother did not marry Kaudu before he was born. It was for him to establish all the facts mentioned by section 112 of the Evidence Act before he could ask that they should be treated as conclusive proof of his parternity. Most of them he has established, or rather they were established by the defendants in his despite. But the fact of his "mother remaining unmarried" till after his birth has not only not been proved by the plaintiff's evidence but is strongly counter indicated by it, and is disproved by the evidence on the other side. Bodu Mahar (P. W. No. 1), the next friend of the plaintiff and brother of Pauli, says the marriage with Kaudu was two months after the divorce from Chindhu. Damu Mahar (P. W. No. 2) makes the period "two or four months," and Mania Mahar (P. W. No. 4) says "one or two months." It is true that Shioram (P. W. No. 3) and Jotiram (P. W. No. 7) state that this period was two years, but that is impossible and is admitted to be untrue. Now, it can safely be assumed that Pauli was not more than seven months gone in pregnancy at the time of the divorce at the *Panchayat*, for otherwise the witnesses would probably have mentioned the fact, and some of them do not even mention her pregnancy; indeed, all the plaintiff's witnesses deny it absolutely. But in no case can it be said that the plaintiff has proved that he was born during the period of not more than four months at the end of which his mother married Kaudu.

6. The learned Pleader for the plaintiff-appellant referred to the deposition of a witness for the defendants, Ramji Mahar (D. W. No. 5), to the effect that the plaintiff was born one month after the divorce. Even that is not proof that the marriage with Kaudu did not take place less than a month after the divorce and it would be for the plaintiff to prove that it did not, after it had once been proved that it did take place about that period after the divorce. The objection of the learned Pleader for the respondents to the acceptance of this statement by Ramji as evidence on the ground that it is "hearsay" does not seem sustainable. The meaning of the words as I read them is that about a month after the divorce Ramji was informed that Pauli had given birth to a son; it is not that he was informed later on that she had given birth to a son a month after the divorce. The point is, however, of no importance.

7. But not only has the plaintiff failed to prove that he was born before his mother's marriage to Kaudu, but the defendants have succeeded in proving that he was not. It would perhaps be more correct to say that the plaintiff himself proved this, as the statement appears in the cross-examination of a witness for the defendants, who had said nothing about it in his examination in chief. The witness is Rama Mahar (D. W. No. 12), a resident of

Debli, where Jairam lives and the plaintiff was born and the *pat* marriage between Pauli and Kaudu was celebrated. If he has any bias either way it would be towards the daughter of Jairam, his fellow villager and partner in business to whose nephew his daughter is married. He states also that he does not visit Adam where Chindhu lived. These are good reasons for accepting him as a reliable witness at least in anything he says against the plaintiff's interest, and his deposition has every appearance of being truthful. He is recorded as having made the following statement at the end of his cross-examination. "I was not in any *Panchayat* at all. But I know of the 'pregnancy' when *Musammat* Pauli was married with Kaudu by *pat* which was celebrated 11 or 12 years ago Maroti was not in being then. He was born a month or two after the *pat*. *Pat* was celeberated in Mouza Deoli. I do not go to Mouza Adam," I hold that it has been proved affirmatively that the plaintiff, Maroti, was born after the marriage of his mother to Kaudu, and also that Chindhu and Pauli had no access to each other for the purpose of sexual intercourse at any time whatever. The suit must accordingly fail, and its dismissal by the lower Court was correct.

8. Bodu Mahar, the next friend of the plaintiff-appellant, has also included in the plaintiff's appeal one on his own account and adverse to the plaintiff against the order of the lower Court that he and not the minor plaintiff is personally liable to the defendants for their costs and to the Collector for the amount of Court fees payable on the plaint, the suit having been filed *in forma pauperis*. It is not suggested that the order is not appropriate to the circumstances of the case. Indeed the record is not lacking in indications that the litigation has been conducted in the interests of the next friend only. The contention is that the omission from r. 1 of O. XXXII, of the words in the corresponding section of the old Civil Procedure Code which authorised the Court to order the next friend to pay the costs has taken away that authority, and r. 11 of O. XXXIII distinctly lays down that at least the amount of the Court fees payable on the plaint shall in a suit of this nature be recoverable from the plaintiff himself. A complete answer to this contention is to be found in section 35 of the Code, and rr. 8 and 9 of the same O. XXXII also clearly indicate that the Court still has power to order a minor's next friend to pay the costs.

9. In this connection it is necessary to point out that though the value of the claim in the lower Court was absurdly and recklessly inflated, doubtless because it was pauper suit, it was still stated, owing to a mistake in addition, at a hundred rupees less than it was. The total of the values of the items of the property claimed as stated in the plaint is Rs. 34,070 and this has been wrongly shown and accepted as Rs. 33,970. The Court-fee shown in the Schedule of costs in the decree of the lower Court is Rs. 1,015. It should be Rs. 1,035, and the decree will be modified accordingly. For the rest it will stand, and Bodu Mahar, the minor appellant's next friend, will also pay all the costs incurred by the respondents in this appeal and will be further liable for the Court-fees payable on the memorandum of grounds of appeal. The claim here was for the immoveable property alone, which was valued at Rs. 6,100 only.

G. R. D.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 159 OF 1920.

March 22, 1922.

Present:—Justice Sir John Woodroffe, Kt., and Mr. Justice Ghose.

Syed MAHAMMAD HOSSAIN CHAUDHARY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Sreemutty RABIA KHATUN *alias* PORI BANU BIBI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Judgment of Appellate Court affirming that of Trial Court—Short form of judgment, if contrary to law.

MOHAMMAD HOSSAIN CHAUDHARY v. RABIA KHATUN.

Whether or not a judgment of an Appellate Court is in accordance with the provisions of O XLI, r. 31 of the Civil Procedure Code depends upon the facts and circumstances of each case. There is, firstly, that difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the First Court. Then there is to be considered the nature of the judgment affirmed, its fullness and accuracy and so forth

Where the First Court has fully discussed in its judgment all the matters which were placed before it, the Appellate Court's judgment affirming that of the First Court is not contrary to law, because it is given in a short form and is unaccompanied by reasons.

Appeal against a decree of the District Judge, Backerganj, dated the 26th September 1919, affirming a decree of the Subordinate Juge, First Court of that District, dated the 30th September 1918.

FACTS appear from the judgment.

Babu *Gunada Charan Sen* (with him Babu *Bepin Chandra Bose*), for the Appellant:—The defendants are appellants. The appeal arises out of a suit for recovery of arrears of annuities due on a *wakfnama* and under subsequent devolution. The First Court decreed the suit which was affirmed on appeal. The Appeal Court has disposed of the appeal in two or three lines, agreeing with the judgment of the First Court. My apprehension is that the judgment having been delivered four months after hearing, he forgot the facts altogether. The judgment was delivered by his successor though it was written by him. I submit the Judge ought to have given his own reasoning on the documents in view of the complicated nature of the facts of the case. Refers to O. XLI, r. 31, Civil Procedure Code; Woodroffe's Civil Procedure Code (2nd Edition) page 131. Under the circumstances the case ought to go back.

Babu *Ram Charan Mazumdar* (with him Babu *Nagendranath Ghosh*), for the Respondents was not called upon to reply.

JUDGMENT.—In this suit the arguments, we are told, lasted for some three days in the First Court. It was dismissed as against defendant No. 2 and a decree was made in favour of the plaintiff against defendant No. 1 for the sum mentioned in the Subordinate Judge's judgment. Then it went on appeal to the District Judge and in his Court the arguments, we are told, lasted for four days. The District Judge did not deliver his judgment forthwith but we are told that he reserved his judgment and had it under consideration for some time. In the result he came to the conclusion that the decree of the First Court should stand. Therefore, we have before us a case of a judgment of concurrence as regards the fact.

It has been argued before us here (and this is the only point of law in this appeal) that the judgment of the Court below is not in accordance with the provisions of O. XLI, r. 31 of the Civil Procedure Code inasmuch as the Court did not assign any reason for its decision. That the learned Judge appreciated the main facts in this case is shown by the fact that the main points have been decided, namely, those necessary in order to arrive at a decision. They appear from the judgment itself. He has considered the main facts and as regards these he says concerning the *kabin kistibandi*: "I entirely agree with the finding of the lower Court that it was the result of conclusion (collusion?)". The judgment then proceeds to the other main points in the case touching the genuineness and validity of Nazir Hossain's Will and of the connected *Nadavipatra* and *Muktipatra*. As regards this the learned Judge says: "This has been very fully and carefully discussed by the learned Subordinate Judge and I need only say that I entirely agree with his findings." I think it would be putting a reasonable interpretation on what the Judge has said if we suppose that he not only affirms the findings of the First Court but adopts at least in the main the grounds on which those findings have been arrived at by the First Court. Whether or not a judgment is according to law must depend upon the facts and circumstances of each case. There is firstly that difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the First Court. Then there is to be considered nature of the judgment affirmed, its fullness and accuracy and so forth. In the present case the First Court, as appears from its judgments, has fully discussed all the matters which were placed before it and, therefore, we are unable to say that the lower Appellate Court's judgment is contrary to law, because, it gave its judgments in the short form in which it is now before us. There is no other ground in this appeal.

The appeal is accordingly dismissed with costs.

B. N.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 671 OF 1919.

July 27, 1921.

Present:—Sir William Ayling, KT., Acting Chief Justice, and Mr. Justice Krishnaswami Rao.

KUTHIRAVATTATH KONGASSERI MOKSHATH THOTTAMMA *alias* AMMA NEITHIER—DEFENDANT No. 1—APPELLANT

versus

C. S. SUBRAMANIYAN AND ANOTHER—PLAINTIFF AND DEFENDANT No 32—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI—Commissions for valuation of things—Procedure.

When the report of a Commissioner appointed to make a valuation of anything under O. XXVI of the Civil Procedure Code is objected to, the Court should hear the objections in open Court and decide, with the aid of such evidence as it may take, whether the valuation should be varied and, if so, in what direction. [p. 470, col. 1.]

The filing of objections to a report is no ground for appointing another Commissioner and in all cases where a second Commissioner is appointed to do the same work, the reasons for adopting such a course must be recorded in writing to enable the Appellate Court to see whether the judicial discretion has been properly exercised [p. 470, col. 2]

There may be cases in which the Commissioner may have so misconceived his duties as to render his report and valuation useless for a decision. In such cases a new Commissioner may be appointed. But this would mean that the old report and valuation were superseded. The Court has no power, after the issue of a second Commission, to still treat the report and valuation obtained under the first as available data on which if it was so minded, it might base its decision [p. 470, cols. 1 & 2.]

Second appeal against the decree of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 300 of 1917, preferred against the decree of the Court of the District Munsif, Ottapalam, in Original Suit No. 399 of 1914.

This second appeal came on for hearing on the 26th and 28th October 1920, before Court (Ayling and Seshagiri Aiyar, JJ.).

Mr. *S. Srinivasa Iyengar*, for the Appellant.

Mr. *O. V. Ananthakrishna Iyer*, for the Respondents.

JUDGMENT.—The first defendant had a mortgage in 1889 of certain properties belonging to the Cochin Government in British territory. Proposals for its renewal were made in the beginning of 1911. As the District Munsif points out in paragraph 14, "the *purapad* was collected, the demise was renewed, renewal fee was paid and accepted, *Kanom*-deed was written and executed on stamp paper supplied by the tenant, and the *kychit* was prepared on a similar stamp paper." But there was no registered instrument. There can be little doubt that the first defendant objected to the new terms. Though apparently the Circar did not consider, the door was closed for re-consideration. But eventually, the Circar gave a *Melcharth* to the plaintiff in 1913. He sues to redeem the old Kanom of 1889.

The District Munsif held that the contract was complete and the only course open to the Circar was to have sued for specific performance to compel the first defendant to accept the mortgage with the new terms. The Subordinate Judge held that the contrast was repudiated by the first defendant and that it gave her no right to resist possession.

Mr. Srinivasa Iyengar contended before us that, as the plaintiff took with notice of the agreement of the first defendant, he was in a fiduciary position towards her and that, therefore, his suit should fail.

Reliance was placed on section 91 of the Trusts Act. This argument proceeded on the assumption that there was an enforceable contract. Even on this assumption, it seems to us that, as in the written statement she repudiated the contract, it is not open to the first defendant to plead that the plaintiff was a *quasi*-trustee for her. This disposes of the main question argued.

There are some subsidiary questions. The Subordinate Judge, while rightly holding that the only right of the plaintiff is to claim payment for the assessment actually payable on the land and paid by him, has, by inadvertence, failed to bring the decree into conformity with his judgment on this point. His decree must, therefore, be modified by omitting therefrom the following words and figures occurring in the first paragraph of the decree, *viz.*, "future *purapad* from 1090 at 358 *paras.* 5 *edangalies*.....and Rs. 1-9-2 a year" and substituting therefor the following words and figures *viz.*, "future *purapad* from 1090 at 71 *paras.* and 6 *edangalies* of paddy and Rs. 1-9-2 a year till recovery of possession and future revenue from 1904 at Rs. 87-4-2 a year till recovery of possession with interest at six per cent.

per annum on the *purapad* and the revenue from the due dates."

On the question of costs we are of opinion that the Subordinate Judge was wrong in decreeing two sets. The Circar is not a necessary party to this litigation and it was the plaintiff that originally impleaded it. He must, therefore, pay its costs, and not the first defendant. However, as there is no memo. of objections by the Circar, we must modify the lower Appellate Court's decree by deleting the portion relating to the costs of the 32nd defendant.

On the question of interest, we see no reason to differ from the Subordinate Judge.

Now comes the question relating to the appointment of three successive Commissioners by the First Court. As the procedure followed by the lower Court appeared to us to find no support in law, and as we were informed that the practice followed in this case is typical of what happens in valuing improvements in almost every Malabar suit, we think it desirable to express our emphatic disapproval of the course followed. What happened was apparently this: at first a Commissioner was appointed to make the valuation. His conclusions were objected to by both the parties. Thereupon the first defendant asked for the appointment of a second Commissioner. The plaintiff consented to this course. Once again, objections were raised to the report. A third Commissioner was appointed with the consent of the parties. He sent in his report and valuation. Again objections were raised. The Munsif then said that he preferred the valuation of the first Commissioner as he was a respectable Vakil, and the Subordinate Judge has agreed with him.

This procedure seems to us to be wholly wrong. Ordinarily when the report of a Commissioner is objected to, the Court should hear the objections in open Court and decide with the aid of such evidence as it may take whether the valuation should be varied and, if so, in what direction. This is the obvious duty of the Court. There may be cases in which the Commissioner had so totally misconceived his duties as to render his report and valuation useless as a basis for a decision. In such cases, no doubt, a new Commissioner may be appointed. This would mean that the old report and valuation were superseded. But to regard the reports and valuations of the three Commissioners as available data from which the option of the District Munsif to choose any one of them is to be exercised is opposed to every principle governing Courts in such matters. It means that the Court abdicates its function of deciding the matter on hearing the objection and reserves to itself the privilege of selecting one of the reports as its decision.

It certainly encourages a haphazard and careless selection of Commissioners. It subjects parties to unnecessary and avoidable expense, and encumbers the records with useless papers. In our opinion this practice should be put an end to at once. We want it to be distinctly understood that the filing of objections to a report is no ground for appointing another Commissioner, and that in all cases where a second Commissioner is appointed to do the same work, the reason for adopting such a course must be recorded in writing to enable the Appellate Court to see whether the judicial discretion has been properly exercised.

In the present case in law there is only one possible meaning that can be attached to the procedure followed. It must be assumed that the Court regarded the work done by the first Commissioner to be so bad as to entail the rejection of his report, and that with the consent of the parties it appointed a second Commissioner. Similarly, it must be taken that the Court rejected the second valuation also and asked for a third valuation from another Commissioner to which the parties consented. In this view, the District Munsif was not justified in regarding the first valuation as still alive and in basing his judgment upon it. What he ought to have done is to hear objections to the third valuation and report in open Court and to decide whether any and if so what modification should be made in that report taking evidence if necessary. We must now direct the Subordinate Judge to do this. He will pass a fresh award regarding the value of improvements claimed by the first defendant in the light of the above observations and sumbit fresh findings thereon to this Court in six weeks. Seven days for objections.

In compliance with the order contained in the above judgment the Subordinate Judge of Ottapalam submitted the following

FINDING:—In this case the District Munsif

valued improvements in accordance with the account of the first Commissioner while three commissions had been issued in all. His conclusions were substantially accepted by my predecessor-in-office, Mr. Kannan. In second appeal, it has been held that only the result of the third and last commission should be taken into account and the appeal has been remanded in order that a fresh finding may be submitted on the question of the value of improvements claimed by the first defendant on the suit properties in the light of the observations contained in their Lordships' judgment and taking evidence if necessary.

2. The matter has been tried and heard in accordance with the order of remand. For the defendant no fresh evidence has been produced. The plaintiff has re-called his 10th witness and examined him. He has also examined one of two of the Vakils to whom the third commission was issued by the District Munsif.

3. For the plaintiff the Commissioner's account is objected to in respect of four items:—(1) the Pathayapura or building; (2) fruit trees; (3) trees classed as firewood; (4) a tank.

4 Before dealing in detail with the points raised, a few general observations may be submitted. Although the plaintiff has made a show of objection to the Commissioner's account the state of the record stands where it was before the remand The first Commissioner who was originally examined as the plaintiff's 10th witness has again been examined. But his evidence does not carry the matter any further. Mr. Sesha Aiyar, one of the two Vakils appointed under the third commission warrant, has now been examined. But the result proved so disappointing to the plaintiff that he did not wish to examine the other Vakil, Mr. A M. Narayana Menon, who was the joint Commissioner with Mr. Sesha Aiyar. I may state that the evidence now produced does not materially shake the general correctness of the account submitted by these Commissioners.

5. The first point argued was with reference to the building in the Kalam. The plaintiff's Vakil contended that it is a very old structure the timber of which in parts had become decayed and that the deduction of 10 per cent. from its value made by the Commissioners is far too low and that there should be a reduction of 25 per cent. at least. The value of the timber as found by the Commissioner was also subjected to strictures. Exhibits AA and E show that the building must have been in existence for more than 50 years. The defendant's first witness admits that it was built in 1043 M. E. which corresponds to 1867. It is also not denied that in portions the timber has suffered by age. It is usual in cases of old buildings like this to allow a reduction of 20 to 25 per cent. on the estimated value. I think the 10 per cent. allowed is far too low in view of the circumstances appearing in the evidence and I would allow a reduction of 20 per cent.

6. As regards fruit trees, trees fit for fuel, and the tank in question, I see no reason to think that the Commissioner's account is not right. Some arguments were advanced with regard to the price of fuel. But I think Mr. Sesha Aiyer's evidence shows satisfactorily that his estimate is a fair one.

7. The matter which, next after the Pathayapura, received most attention at the bar, was the value fixed for tamarind trees in the property. The contention was that fruit bearing tamarind trees should not be included in the category of fuel trees. I cannot agree. The evidence of the plaintiff's 10th witness shows that the practice in all these cases of improvements is not to treat them as fruit trees but only as trees fit for fuel. The District Munsif refers to the practice and my experience has been to the same effect. In my opinion, their value should be only like the other trees classed as fuel.

8. My finding is that the third Commissioner's account respecting the value of improvements is correct except that a 20 per cent reduction should be made on the value of the Pathayapura building.

This appeal came on for final hearing before their Lordships Sir William Ayling, Acting Chief Justice, and Krishnaswami Rao, J.

JUDGMENT.—As regards the classification of tamarind trees as fruit trees Mr. Srinivasa Iyengar is not in a position to say that a reversal of the lower Court's decision will favourably affect his client in the case and we do not, therefore, feel called upon to decide it.

We accept the finding of the lower Court. A decree will be drawn up in accordance

therewith. The additional amount now allowed to defendant will bear interest at 6 per cent. per annum from the date on which plaintiff got possession. Six months from this date allowed for payment. No costs in this Court.

M. C. P. *Decree modified.*

N. H.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1673 OF 1919.

March 1, 1922.

Present :—Mr. Justice Greaves and Mr. Justice Ghose.

GOPINATH JALUA—DEFENDANT No. 2—APPELLANT

versus

BHAJAHARI DAS ADHIKARI AND OTHERS PLAINTIFFS—KAILASH CHANDRA MAITY—DEFENDANT—RESPONDENTS.

Res judicata—*Decision in rent suit on question of title—Suit for possession by receipt of rent - Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, applicability of.*

The plaintiff brought a suit for a decree for possession of land upon a declaration that he was entitled to receive rent at a certain rate from defendant No. 2 upon a finding and a declaration that the plaintiff was a tenant under defendant No. 1 in respect of the land under claim. The defendant No. 2 was on the land holding under defendant No. 1 but the plaintiff claimed that he took a settlement of the land from defendant No. 1 and that as a result of such settlement the defendant No. 2 was bound to pay the rent to him which he had previously paid to the first defendant. Previous to the present suit the plaintiff had unsuccessfully brought a rent-suit against the second defendant in which the latter had put forward the defence that he held the land not under the plaintiff but under the first defendant who was no party to that suit:

Held, (1) that as the present suit was not a suit as between landlord and tenant, the special rule of limitation contained in Art. 3, Sch III of the Bengal Tenancy Act had no application and the general law of limitation was applicable to the suit; [p. 474, col. 1.]

(2) that the decision in the previous rent-suit on the question of the plaintiff's title did not operate as *res judicata* even though the question of title had to be investigated in that suit by reason of the fact that defendant No. 2 was previously on the land. [p. 474, col. 1.]

Dwarkanath Roy v. *Ram Chand Aich*, 26 C. 428; 3 C. W. N. 266; 13 Ind. Dec. (N. S.) 876 F. B.), followed.

Appeal against the decree of the Subordinate Judge, Third Court, Midanpore, dated the 19th May 1919, affirming the decree of the Munsif, Second Court at Tamluk, dated the 30th August 1917.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak*, (with him Babu *Makunda Behari Mullick*), for the Appellants.

—Plaintiff had brought rent suit against defendant No 2. My defence was that I held land under defendant No. 1 and not plaintiff. Defendant No. 1 is the superior landlord admittedly. The suit was dismissed on 17th April 1913. Appeal against that decision was also dismissed in December 1914. Plaintiff then instituted the present suit in 1916. He prayed for decree for possession upon a declaration of his title to rent at Rs. 20 15 per annum. The disputed land with other lands belonged to Dhananjoy who mortgaged 5 *bighas* to plaintiff No. 1 and subsequently all the lands to Harakissen. A third mortgage was executed in favour of Nitai in respect of some lands. Then there was a fourth mortgage in favour of Bhagabati of some lands including the disputed lands. Plaintiff No. 1 in execution of his mortgage decree purchased the 5 *bighas* of land and a personal decree for the balance, in execution of which he purchased 24 *bighas* including the lands in dispute. The second mortgagee brought his suit and sold all the lands which were purchased by defendant No. 1. Plaintiff's purchase was in 1900. The suit by the second mortgagee was in 1902. Plaintiff was no party to it. There was a dispute between plaintiff and defendant No. 1 which was settled according to plaintiff in this way that he would be recognised by defendant No. 1 on payment of arrears of rent. The plaintiff's case is that the land in dispute was not settled with plaintiff. In the rent suit defence plea was upheld by both Courts. In the present suit plaintiff does not seek to eject me. Subsequently, however, he wanted to amend the plaint by praying for ejectment. That was disallowed by the First Court which decreed the suit. There was an appeal and a cross-objection by plaintiff regarding his amendment. The cross-objection was disallowed and the appeal by me was dismissed. The questions to be decided are (1) whether Art. 3, Schedule III of the Bengal Tenancy Act applies to the case and (2) if so, whether two years would run from the date of the appellate judgment. Art. 3, Schedule III, prescribes two years from the

date of dispossession. I submit the present suit being one for possession and against the landlord Art. 3, Schedule III, of the Bengal Tenancy Act would apply. As regards the second question, see *Hukum Chand Boid* v. *Pirthichand Lal Chowdhury* (1) and *Ramasawmy Mudali* v. *Valayuda Mudali* (2). There it has been held that an appeal from the decree is a voluntary risk on the part of the plaintiff and that limitation would run from the date of the judgment of the First Court. The present suit is more than two years from that date. My submission is that the Courts ought to have held that the present suit was barred by *res judicata*. In the previous suit the question decided was that plaintiff did not hold these lands from defendant. The Court below holds that defendant No. 1, not being a party to that suit that question does not operate as *res judicata*. Refers to *Dwarkanath Roy* v. *Ram Chand Aich* (3). The reliefs sought in the two suits are the same.

Mr. *S. C. Maity*, Counsel (with him Babu *Apurba Charan Mookerjee*), for the Respondent, was not called upon to reply.

JUDGMENT.—This is an appeal by the second defendant against a decision of the Third Subordinate Judge of Midnapore confirming a decision of the Munsif. The suit was brought by the plaintiff for a decree for possession of the land upon a declaration being made that he is entitled to get an annual rental of Rs 20 15 from defendant No. 2 upon a finding and a declaration that the plaintiff No. 1 is tenant under the defendant No. 1 in respect of the land under claim and the second prayer involved a decree against the first defendant who is not an appellant before us.

The First Court decreed the suit in part declaring the plaintiff's title to the *ka* land in suit, declaring him to be a tenant under defendant No. 1, and declaring defendant No. 2 to be a tenant on the land at a yearly rent of Rs. 20-15 under plaintiff No. 1, and the decree provided that plaintiff No. 1 was to get possession of the plaint land through the defendant No. 2 and that he should be entitled to realise rent at the rate mentioned above. The lower Appellate Court dismissed the appeal. There is evidently a mistake in the judgment of the Subordinate Judge when he says, "the cross-objection is decreed without costs;" for the cross-objection was clearly rejected by him as appears from page 27 of the paper-book. It appears that some years ago, the plaintiff sued defendant No. 2 for rent in a rent suit and defendant No. 2 in that suit put forward the defence that he held the land not under the plaintiff but under defendant No. 1. It appears that defendant No. 2 was on the land holding under defendant No. 1, but the plaintiff claims that he took a settlement from defendant No. 1 of the land, and consequently from such settlement the defendant No. 2 was bound to pay the rent to him which he had previously paid to the first defendant. It appears that certainly one, if not two, decrees for rent had been obtained by the plaintiff against the second defendant before the rent suit now under consideration was brought. At page 26 of the paper-book we find it stated, that after the close of the litigation with one Dhananjoy, the plaintiff sued defendant No. 2 for rent of this particular land and obtained a decree at the admitted rate of rent in 1906. However, in spite of this the rent suit was decided against the plaintiff the Trial Court dismissing the suit on the 17th April 1913, an appeal was preferred by the plaintiff against the decision of the Trial Court which was dismissed on the 4th December 1914. This suit was commenced on the 8th July 1916 and two points are urged before us on behalf of the appellant. First of all, he says that the claim is barred by limitation and that the special period of limitation provided by Schedule III, Art. 3 of the Bengal Tenancy Act applies, that is to say, the two years' rule of limitation, and he urges that the time began to run, not from the decision of the appeal on the 4th December 1914, but from the decision of the First Court on the 17th April 1913 and, consequently, he contends that inasmuch as the present suit was commenced on the 8th July 1916, it is barred by limitation on the assumption that the special period of limitation provided by the Bengal

(1) 50 Ind. Cas. 444; 46 C. 670 at p. 673; 17 A. L. J. 514; 36 M. L. J. 557; 28 C. W. N. 721; 21 Bom. L. R. 612; 1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.).

(2) 4 M. H. C. R 266.

(3) 26 C. 428; 3 C. W. N. 266; 13 Ind. Dec. (N. S.) 576 (F. B.).

Tenancy Act applies. Secondly, it is said that between the second defendant and the plaintiff the rent suit operates as *res judicata*, so far as the claim against the second defendant is concerned. What is said is this, that having regard to the fact that the 2nd defendant was not settled on the land by the plaintiff but had previously been on the land, it was necessary for the Court to go into the question of the title of the plaintiff which the plaintiff claimed to derive from the defendant No 1 and, consequently, it is said that although the judgment in the rent suit may not operate as *res judicata* as far as the defendant No. 1 is concerned as he was not a party to the rent suit, yet as regards defendant No. 2, as the question of title was gone into, the matter is *res judicata* as between him, the second defendant and the plaintiff. So far as the first point is concerned, we do not think that, this (in spite of the argument addressed to us) can be deemed to be a suit to which the provisions of Schedule III, Art. 3 of the Bengal Tenancy Act apply, that is to say, it is not a suit to recover possession of land claimed by the plaintiff within the meaning of Art. 3; shortly stated it is not a suit as between landlord and tenant so as to bring it within the provisions of that Article. The result is that the point raised with regard to limitation does not arise. The appellant is, we think, perfectly correct in saying that if Art. 3, Schedule III, applies, time will begin to run from the decision of the First Court. But of course, this is merely a matter of academic interest if, as we hold, Art. 3, Schedule III has no application and the general law of limitation applies.

So far as the question of *res judicata* is concerned it seems to us that this argument is concluded by the decision in the case of *Dwarkanath Roy* v. *Ram Chand Aich* (3) and we think that this decision directly covers the present case, and in so saying we are not unmindful of the reasons whereby the learned Vakil sought to distinguish this decision from the present case, namely, that as the defendant No. 2 was previously on the land the question of title had to be investigated.

In the result both points fail and this appeal is dismissed with costs.

It is pointed out by the learned Vakil for the appellant that the decree of the lower Appellate Court must be modified to this extent so that it may appear that the cross-objection was in fact rejected, we so modify the decree.

B. N.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 20-B OF 1921.

March 29, 1922.

Present:—Mr. Kotwal, A. J. C.

Musammat LAXMIBAI —APPELLANT

versus

Khan Sahib ABDUL KADIR—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 7—Minor —Guardianship of property—Relatives desiring appointment of somebody else—Mother, claims of, if can be ignored.

The bare desire of the relatives of a minor that some person other than the mother should be appointed a guardian of his property is not a sufficient reason for depriving the mother of her recognised claim to be the guardian of her minor child's property, if she is otherwise fit to be appointed as such by her character and capacity. [p. 475, col. 1.]

Appeal from an order of the District Judge, Amraoti, dated the 13th May 1921, in Miscellaneous Judicial Case No. 90 of 1920.

Mr. *D. T. Mangalmurti*, for the Appellant.

JUDGMENT.—The District Judge has found that the allegations made against the appellant that she was mismanaging and wasting the property, that she was unchaste, and that she had ill-treated one of the minors have not been sufficiently established. He has also held that the applicant was not a fit person to be appointed the guardian. He has, however, appointed the Official Receiver a guardian of the property of the minors. He states his grounds for making this appointment as follows:

"The other relatives of the minors who

appeared state that a guardian should be appointed by the Court, and I think that a guardian of the property should be so appointed."

All that these relatives had urged before the Court was that the property was being wasted. The District Judge found that the charge of mismanagement and waste was not established. In view of this finding all that we are left with and all that the District Judge has acted upon is the bare desire of the relatives that some person other than the mother should be appointed. This is not a sufficient reason for depriving the widowed mother of her recognised claim to be the guardian of her minor children's property. This appeal is not opposed by the guardian appointed by the District Judge. The mother is herself willing to be appointed guardian and as it is not found that she has unfitted by her character and capacity or by her previous relations with the minors' property to be the guardian of that property; or that her appointment will not be justified in the interests of the minors, I hereby appoint her guardian of the property of the minors, and remand the case to the District Judge's Court for such action as may be deemed necessary under section 34, Guardians and Wards Act. I make no order as to costs.

G. R. D. & N. H. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1395 OF 1918.

February 23, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

MEA HOSSAIN KHAN AND OTHERS—PLAINTIFFS AND MAKRAM KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEIKH SAMIR AND OTHERS—DEFENDANTS—RESPONDENTS

Appeal—Preliminary decree, appeal against—Final decree, passing of—Court, jurisdiction of, to decide appeal, if affected.

There is a difference between cases where the final decree is passed before an appeal against the preliminary decree is preferred and when it is passed after the appeal is preferred. In the latter case the Court is not deprived of its jurisdiction to decide the appeal which is already before it.

Appeal against a decree of the Additional Subordinate Judge, Mymensingh, dated the 20th March 1918, reversing that of the Munsif, Second Court at Netrakona, dated the 29th January 1917.

FACTS appear from the judgment.

Babu *Birendra Kumar De*, for the Appellants.—The other side too appealed to the lower Appellate Court against the preliminary decree after the final decree was passed, so their appeal too should fail and the final decree will stand. The preliminary objections taken by my friend are highly technical.

On the merits, refers to *Baikuntha Nath* [*Kulada Prosad*] v. *Ramanand Patnaik* (1). The Appellate Court is incompetent to entertain an appeal against a preliminary decree after the passing of the final decree. The final decree stands. The other side ought to have appealed against the final decree also.

Babu *Annada Charan Karkoon*, for the Respondents,—Refers to *Nistarinee Dabee* v. *Rai Mohun Biswas* (2). I specially rely on the case reported as *Nistarinee Dabee* v. *Rai Mohun Biswas* (2).

The appeal against the preliminary decree was filed before the judgment granting the final decree was delivered.

Babu *Birendra Kumar De* briefly replied.

Babu *Brij Mohan Majomdar*, for the Deputy Registrar.

JUDGMENT.—In this appeal several preliminary objections have been taken, but we do not think it necessary to consider them as we hold that the appeal fails on the merits.

On the merits the only point taken was that the lower Appellate Court had no jurisdiction to hear the appeal against a preliminary decree in a partition suit after the final decree had been passed in that suit. Reliance is placed on the case of *Baikuntha Nath* [*Kulada Prosad*] v. *Ramanand Patnaik* (1). But the facts of the present case are similar to those of the case of *Nistarinee Dabee* v. *Rai Mohun Biswas* (2). In the report in *Bai-*

(1) 61 Ind. Cas. 923; 25 C. W. N. 776; 33 C. L. J. 414; 48 C. 1036.

(2) 20 Ind. Cas. 576; 18 C. L. J. 214.

HAZARILAL v. HAZARIMAL.

kuntha Nath [*Kulada Prosad*] v. *Ramanand Patnaik* (2) there seems to be an error in the reference to the case of *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (3). Obviously the case meant to be distinguished was that mentioned above *Nistarinee Dabee* v. *Rai Mohun Biswas* (2). As pointed out in that case there is a difference between cases where the final decree is passed before the appeal is preferred and where it is passed after the appeal is preferred. In the present case the appeal against the preliminary decree was filed on the 21st March 1917 and the judgment granting the final decree was delivered on the 2nd June 1917. Following the case of *Nistarinee Dabee* v. *Rai Mohun Biswas* (2) we hold that the appeal to the lower Appellate Court was competent.

This being the only point taken on behalf of the appellants this appeal must be dismissed with costs.

N. H.

Appeal dismissed.

(3) 21 Ind. Cas. 516; 18 C. L. J. 321.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 64 OF 1921.

August 19, 1922.

Present:—Mr. Kotval, A. J. C.

HAZARILAL—DECREE-HOLDER—APPELLANT

versus

HAZARIMAL—JUDGMENT-DEBTOR—RESPONDENT.

Decree, mortgage, for foreclosure of village—Khudkasht *fields specified*—*Decree-holder, whether can claim field not specified.*

If a mortgage-decree foreclosing a village specifies particular *khudkasht* fields by their number and does not refer in a general way to lands held in *khudkasht* right it is not open to the decree-holder to claim a particular field not specified in the decree. [p. 477, col. 2.]

Appeal against the decree of the District Judge, Chhindwara, dated the 16th June 1921, in Civil Suit No. 35 of 1916.

Messrs. *B. R. Pandharker* and *V. V. Chitale* for the Appellant.

Messrs. *M. Gupta* and *A. V. Khare*, for the Respondent.

JUDGMENT.—The Appellant, Hazarilal, obtained a preliminary foreclosure decree upon two mortgages against certain mortgagors and the respondent, Hazarimal, an attaching creditor of the mortgagors. One item of the property included in the decree was a 2/3rd interest in *Mouza* Sarra with all rights excepting cultivating rights in *sir*. This decree is dated the 15th January 1917. During the pendency of the suit Hazarimal purchased the mortgaged property in auction on the 30th November 1916. On the 12th June 1917 Hazarimal took a surrender of the occupancy rights of the mortgagors in the *sir* land of *Mouza* Sarra and on the 4th July 1917 leased the land which, it is contended, had become *khudkasht* to his wife, Falabai. An appeal was filed in this Court from the mortgage-decree. In the appellate decree which is dated the 7th September 1917 the description of *Mouza* Sarra was altered so that it stood as follows:

"Entire *malguzari* of *Mouza* Sarra, Pragana and Tahsil Amarwara, District Chhindwara, No. 805, *Thak bast* No. 698, area 689·89 acres, *Jama* Rs. 316-7-0 including cesses with the *jungle*, *mungo*, *mango-groves*, *mahua*, *tendu*, *jalkar*, *bankar*, *phal ar*, *phul kar*, *wells*, *tanks baolis*, cultivated and uncultivated lands, etc., appertaining to the village and with all rights, tenancy and proprietary, and *khudkasht* Nos. 61-2, 69 3, 83-1, 83-4, 98,99, 100, 37 4, 63 2, 63 7, 34-2, 63-5, 63-6, 51, 37 5, 49, 59-2, 61-5, 63 10 and 104-2, total area 19·27 acres, which exist at present and may exist hereafter, except the *sir* land."

On the 26th April 1918 a final decree was passed in which *Mouza* Sarra is described as in this Court's decree. On the 10th September 1919 this Court amended its decree by substituting the expression "except the cultivating rights in *sir* land" for "except the *sir* land" in the schedule of property attached to the decree. On the 30th October 1919 Hazarilal was put in possession of the mortgaged property including field No. 23 which was *sir*. Hazarimal objected to the possession of this field being given to the decree holder and his objection was allowed on appeal to this Court on the ground that under the final decree as it stood at the time of the execution the decree-holder was not entitled to claim possession of this field. This judg-

ment is dated the 24th February 1921. On the 16th August 1920 Hazarilal had put in an application for amendment of the final decree by substitution of the expression "except the cultivating rights in *sir* land" in place of "except the *sir* land," so as to bring it into conformity with the preliminary decree of this Court. This application was allowed by the lower Court and the necessary amendment was made on the 14th May 1921. On the 8th March 1921 Hazarimal had applied to the lower Court for restoration of the field. This application was opposed by Hazarilal on the ground that having got the final decree amended in conformity with the preliminary decree he was entitled to retain possession as only cultivating rights in *sir* were excluded and not *sir* land. Hazarilal admitted before the lower Court that the field had become *khudkasht* of Hazarimal. The lower Court held that if the field was *khudkasht* it was not mentioned in the decree as it stood and if it was *sir* the decree-holder was not entitled to physical possession as the cultivating rights in *sir* were excluded from it. It directed restoration of the field to Hazarimal. After the amendment of the final decree Hazarilal applied to be formally put in possession of the field. His application was rejected on the 16th June 1921 in view of the order dated the 14th May 1921 restoring possession to Hazarimal. Hazarilal appeals from both these orders. First Appeal No. 64 of 1921 is from the order dated the 16th June 1921 refusing to put Hazarilal in possession of the field and first Appeal No 65 of 1921 is from the order dated the 14th May 1921 restoring possession to Hazarimal.

It is contended that the land having become *khudkasht* when Hazarimal got a surrender of the ex-proprietary tenant right on the 12th June 1917 Hazarilal was entitled under the decree to its possession along with the village even though it was not mentioned by number in the decree and that in any case it was covered by the general words "which may exist hereafter." As regards the latter part of the contention it must be said that the words "which may exist hereafter," if they are held to be applicable, as contended, to the *khudkasht* numbers mentioned immediately before, do not express any clear idea. It is difficult to understand to what an expression like "Field No. so and so which may exist hereafter" can refer. So long as the decree stands worded as it is, this expression cannot help the decree holder in his present claim. As regards the first part of the contention that all *khudkasht* land goes with the village, if the decree had not specified particular *khudkasht* fields, this field as *khudkasht* could have been claimed by Hazarilal. But since the decree specifies the *khudkasht* fields by their numbers it seems to me that it is not open to him to claim one that is not so specified. The decree does not refer in a general way to lands held in *khudkasht* right as it does to tenancy and proprietary rights. Again although the field is said to have become *khudkasht* before the preliminary decree of this Court was amended, no attempt was made to have it included in the list of *khudkasht* fields at that time. It seems to me that on the decree as it stands Hazarilal is not entitled to claim field No. 23. Both the appeals fail and are dismissed with costs. Pleader's fee Rs. 20 in each appeal.

G. R. D.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1765 OF 1919.

March 15, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Suhrawardy.

BANKA BEHARI GHOSH—DEFENDANT—APPELLANT

versus

MADAN MOHAN ROY—PLAINTIFF—RESPONDENT.

Landlord and Tenant—Third person, suit for possession by, against tenant—Landlord not party to suit—Decree for possession by receipt of rent—Subsequent rent suit by landlord—Tenant, whether entitled to deduct rent paid to third person—Title paramount, eviction by, what is—Physical dispossession, whether necessary—Landlord's covenant for quiet enjoyment, meaning of—Tenant, whether entitled to be indemnified against acts of strangers—Transfer of Property Act (IV of 1882), s. 108 (c).

Eviction by title paramount means eviction by a title superior to the titles both of lessor and lessee against which neither is enabled to make a defence. [p. 479, col. 2.]

BANKA BEHARI GHOSH v. MADAN MOHAN ROY.

To constitute eviction by title paramount it is not necessary that there should be a forcible expulsion of the tenant, nor is it necessary that the tenant should actually go out of possession, and if, upon a claim being made by a person with title paramount, the tenant consents by an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking. But an eviction, whether actual or constructive, must be by a party having a *good title*. [p 479, col]

Section 10-, clause c) of the Transfer of Property Act, provides for an implied covenant to the lessee to hold a lease without interruption and the clause is wide enough to include disturbance of possession by a person with a paramount title. But it does not include a case of disturbance by persons having no lawful title or right of entry. [p. 480, cols. 1 & 2.]

The plaintiff let out a certain plot of land to the defendant who obtained possession and was in possession, when a third party *S.* brought a suit for possession against him alone for a portion of that same land and obtained a decree for possession by receipt of rent. In a suit by the plaintiff for rent the defence was that the defendant had been ejected from a portion of the land by a title paramount and that he was, therefore, entitled to a proportionate abatement of rent :

Held, (1) that, although *S.* had obtained a decree against the defendant, it could not be said that he had got a title superior to that of the plaintiff who was no party to the suit brought by *S.* and had no opportunity of showing that he had a title to the land and that, therefore, the defendant was not entitled to abatement of rent; [p. 479, col 2: p. 480, col. 2]

Rani Dassi v. *Asutosh Roy Chowdhury*, 6 Ind. Cas. 206; 15 C. L. J. 310 and *Noorijan Sardar* v. *Bimola Sundari Guptya*, 18 Ind. Cas. 87; 18 C. W. N. 552, distinguished.

(2 that the plaintiff, having once put the defendant in actual physical possession of the land, was not bound by any implied covenant to restore the defendant to possession unless it was shown that *S.* had a title superior to that of the plaintiff. [p. 479, col. 1.]

Obiter:—The express covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, even though followed by the words 'or by any other person or persons whomsoever,' does not extend to the unlawful acts of third persons having no title. [p. 479, col. 2; p. 480, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 31st of May 1919, affirming that of the Subordinate Judge of that District, dated the 13th of December 1917.

Babus *Brajalal Chukerbutty* and *Susil Kumar Bose*, for the Appellant.

Babus *Mohendra Nath Roy* and *Hemendra Nath Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for rent. The defence was that the defendant had been ejected from a portion of the land by a title paramount and that he was, therefore, entitled to a proportionate abatement of rent.

It appears that the Administrator-General of Bengal representing the estate of Kumar Indra Chundra Singha Bahadur brought a suit for possession in respect of the land the rent of which is in dispute in the present suit, and certain other lands, against certain persons representing the estate of one Haripada Shaha and who may be referred to in this judgment as the "Shahas". He claimed the land as appertaining to his estate Sujapur. The Sahas claimed the land as appertaining to their village Juranpur. The suit, however, was decreed and Madan Mohan Roy (the plaintiff in the present suit) purchased the decree and the decretal land from the decree-holder, and in execution of the decree obtained delivery of possession of the land through Court. While in *khas* possession of the decretal land he let out 279 *bighas* out of the same to the defendant in 1903. Subsequently, however, the Government settled a portion of the lands of which the rent is claimed in this suit together with certain other land as re formed land (bed of a river) with the Shahas on the 1st April 1903. On the strength of that settlement, the Shahas brought a suit for recovery of possession of some lands including a portion of the land for which the rent is in dispute, against the defendant, Banka Behari Ghose alone. Banka in that suit, among other defence, set up the title of the present plaintiff, Madan Mohan Roy, and also pleaded that the latter should be made a party to the suit. This was disallowed. The Court, however, held that the defendant was a *bona fide* tenant and should not be ejected. The Sahas were, accordingly, given a decree for possession by receipt of rent from the defendant in respect of 131 *bighas* in May 1912. There was an appeal and a second appeal and ultimately the decree of the Court of first instance was upheld.

The present suit was instituted by Madan Mohan, the plaintiff, for rent in respect of the 279 *bighas* of land which was let out by him to the defendant, Banka Behari, who pleaded that there should be an abatement of rent in respect of 131 *bighas* of land, with regard to which there was a

decree obtained by the Shahas against him. The Courts below have come to the conclusion that the defendant was not entitled to claim abatement of rent, as the defendant was not dispossessed, and the plaintiff was not a party to the suit upon which the defendant relies in claiming abatement of rent. The defendant has appealed to this Court and two questions have been raised on his behalf. The first is that it is not necessary that the tenant should be physically dispossessed by a person having a title paramount, and secondly, that it was not necessary that the plaintiff should have been a party to the decree in the previous suit which resulted in eviction, in order to entitle the defendant to claim abatement of rent.

So far as the first contention is concerned, it is true that a forcible expulsion is not necessary, nor is it necessary that the tenant should actually go out of possession, and that if, upon a claim being made by a person with title paramount, he consents by an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking See Foa on Landlord and Tenant, 4th Edition, 169. But an eviction, whether actual or constructive, must be by a party having a *good title*. There is no doubt that the Shahas obtained a decree against the defendant. But that is not sufficient to show that they had a title superior to that of the plaintiff of the present suit. The learned Pleader for the appellant relies upon the case of *Rani Dassi* v. *Asutosh Roy Chowdhury* (1) and the case of *Noorjan Sardar* v. *Bimola Sundari Guptya* (2). In the first case no question of the lessor's title was in controversy. It was assumed for the purposes of the judgment that the lessor had no title. It was a suit by a lessee for abatement of rent against the lessor, and the only question which the Court had to consider was what was the quantity of land for which the tenant could claim abatement of rent. There was no suggestion in that case that the person who dispossessed the plaintiff in that suit was not a person having a title paramount. In the second case cited above, the decision was that where a tenant is induced to attorn to the superior landlord by an offer to accept a reduced rent the doctrine of *quasi*-eviction does not apply, and in the course of their judgment, the learned Judges referred to the general principle enunciated in Foa on Landlord and Tenant, 4th Edition at page 169. The question which we have to decide in the present case was not dealt with in either of the cases cited above.

In the case of *Neale* v. *Mackenzie* (3) Lord Denman, C. J., observed that eviction by title paramount means "eviction by a title superior to the titles both of lessor and lessee; against which neither is enabled to make a defence." Here although the Shahas have obtained a decree against the defendant, it cannot be said that they have got a title superior to that of the present plaintiff who was no party to that suit, and had no opportunity of showing that (he?) had got a title to the land.

It is found in the present case that after the plaintiff had obtained delivery of possession through Court, he was put into *khas* possession of the land in suit and he then let out 279 *bighas* to the defendant. The defendant obtained possession and was in possession, when the Shahas brought the suit against him alone and obtained a decree. We do not think, under the circumstances, that the plaintiff was bound by any implied covenant, which the learned Pleader for the appellant set up to restore the defendant to possession unless it is shown that the Shahas have a title superior to that of the plaintiff. We have been referred to certain passage from Redman on Landlord and Tenant, 7th Edition at page 263 where the learned author says: "Any proceeding in a Court of Law interfering with the title and possession of the land amounts to a breach of a covenant for quiet enjoyment, *e. g.*, an action of ejectment or for trespass." But the proposition is qualified by the words "by a person having a lawful title." See also Woodfall's Law of Landlord and Tenant, 19th Edition, 812, where it is stated: "The express covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, even though

(1) 6 Ind. Cas. 206; 15 C. L. J. 3 0.
(2) 18 Ind. Cas. 87; 18 C. W. N. 552.
(3) (1836) 1 M. & W. 747; 2 Gale 174; 6 L. J. (N. S.) Ex. 268; 150 E. R. 685; 46 R. R. 478.

followed by the words 'or by any other person or persons whomsoever,' does not extend to the unlawful acts of third persons having no title. The law will never adjudge that the lessor covenants against the wrongful acts of strangers, except where his covenant is express to that purpose, for the law itself does defend every man against wrong, and therefore, though one warrants land to another expressly (or covenants for quiet enjoyment generally) yet he does not defend against tortious entries."

The learned Pleader for the appellant referred to a passage in Redman that the landlord is allowed to come in, in order to show that he has a good title, and to maintain the possession of the lessee. It is not stated, however, that the landlord is bound to come in a suit brought against the lessee by a person who has not a superior title. There is also no authority for the contention raised on behalf of the appellant that where a third party has obtained a decree against the lessee the onus is shifted on the landlord to prove that such a third party has got no title.

In the case of *Muktar Ahmad* v. *Rani Sundar Koer* (4), it was pointed out that section 108, clause (*c*) of the Transfer of Property Act, provided for an implied covenant to the lessee to hold a lease without interruption and that the clause was wide enough to include disturbance of possession by a person with a paramount title. It was also observed that even before the Transfer of Property Act it was held that, in the absence of an express agreement to the contrary, a landlord is under an implied obligation to indemnify the tenant against ouster or disturbance in his possession by his own acts or by the acts of those who claim under or have paramount right to him but not against the wrongful acts of strangers. The same view has been taken of the section in Shepherd and Brown's notes to sub-section (*c*) of section 108 of the Transfer of Property Act at page 404, 7th Edition. There it was pointed out: "The covenant in the unqualified form followed in the section covers the case of the superior landlord, or other person claiming by title paramount, exercising power of re-entry or otherwise dispossessing the lessee. But it does not include a case of disturbance by persons having no lawful title or right of entry" We do not think, therefore, that there was any covenant to protect the tenant from persons having no title superior to that of the plaintiff, or that the decree obtained against the tenant shifted on the plaintiff the burden of proving that the third party had no title. In the case of *Rung Lall Singh* v. *Lalla Roodur Pershad* (5) the learned Judges observed: "The defendant accepted a lease from and was let in possession by the lessors. He has not shown in this suit that his lessors had no title and that the person who ousted him had a title, and he has relied for that purpose upon the result of certain suits, one of which in no way affects this property at all and the other in no way affects the title of his lessors who were not parties to it. Therefore, the defence which he attempts to raise wholly fails." The observations apply to this case also. It is no doubt hard that the defendant who has set up the title of the plaintiff in the suit brought against him by the Shahas should have to pay rent to them as well as to the plaintiff in respect of the 131 *bighas*.

It is not for us, however, to express any opinion as to what steps should be taken by the defendant for being relieved from such a position. Having regard to the fact that the plaintiff was no party to that suit, we must hold that the decree of the lower Appellate Court is right.

The appeal is dismissed with half costs in this Court.

B. N. & N. H.

Appeal dismissed.

(4) 19 Ind. Cas. 815; 17 C. W. N. 960.

(5) 17 W. R. 386.

MANILAL DHARAMSI v. ALLIBHAI CHAGLA.

BOMBAY HIGH COURT.
SMALL CAUSE COURT REFERENCE
No. 4 OF 1922.
June 19, 1922.
Present:—Sir Lallubhai Shah, KT.,
Acting Chief Justice, and
Mr. Justice Crump.
MANILAL DHARAMSI—APPELLANT
versus
ALLIBHAI CHAGLA—RESPONDENT.

Teji-mandi *contracts—Wagering contracts—Intention.*

Teji-mandi contracts cannot be held as wagers on account of their apparent nature and characteristics alone without any other proof of the intention of the contracting parties. The party who pleads that a *teji-mandi* contract is in the nature of a wager, must prove that fact

Jessiram Jagannath v. *Tulsidas Damodhar*, 16 Ind. Cas. 576; 37 B. 264; 14 Bom. L. R. 617, *Ramchandra* v. *Gangabison*, 7 Ind. Cas 665; 12 Bom. L. R 590, and *Manubhai* v. *Keshavji*, 65 Ind. Cas, 682; 24 Bom. L. R. 60, referred to.

Reference made by the Third Judge of the Presidency Court of Small Causes at Bombay.

Mr. *Kania*, for the Appellant.

Mr. *Kanga*, Advocate General, (with him Mr. *Petigara*), for the Respondent.

JUDGMENT.

SHAH, ACTG. C.J.—This is a reference from the Presidency Small Cause Court, Bombay, under section 69 of the Presidency Small Cause Courts Act. The question referred to us is: "Are *teji mandi* contracts to be held as being wagers on account of their apparent nature and characteristics alone without any other proof of the intentions of the contracting parties, or is evidence necessary to prove that such contracts were intended to be wagers?"

It appears from the terms of the reference that the learned Judge has felt some doubt on the point in view of the practice that is stated to be prevalent in the Presidency Small Cause Court of treating such contracts as wagers without any further proof that they are wagers. The learned Judge was of opinion that the practice was not justified and that in every case of such contracts as in every other case it must be proved whether the contracts were in the nature of wagers, that is, whether the common intention of the contracting parties at the time of the contract was to deal only in differences and under no circumstances to call for or give delivery.

In the first place, I desire to point out that this is hardly a question of law, or usage having the force of law, and I am not sure whether the reference could have been made. It was not only open to the Judge, but I think it was his duty, to decide, according to his view of the evidence in the particular case before him, giving such weight as he might have thought proper to the practice referred to as obtaining in that Court.

But as the question is referred, I would answer the question in the negative, holding that it is necessary in such contracts as in any other contract to prove the common intention of the parties as a question of fact. In my opinion, the mere fact that the contract is a *teji* contract or a *mandi* contract or a *teji-mandi* contract with double option makes no difference to this point. It may be that if a party desires to prove that a particular contract of that description was a wagering contract, he may be able to do so with slight proof; and, under the circumstances of any particular case, it may be that the Court may be able to decide, without much outside evidence, as to whether that contract was in the nature of a wager or not. But to my mind it is essentially a question of fact which must be answered on the evidence in each case; and the mere fact of its being *teji-mandi* contract is not by itself sufficient to take it out of the ordinary rule that the party, who pleads that the contract is void as it is in the nature of a wager, has to prove that fact.

The practice is probably due to certain observations in *Jessiram Jagannath* v. *Tulsidas Damodhar* (1), and in the earlier case of *Ramchandra* v. *Gangabison* (2). The observations in *Jassiram's case* (1) at page 272* clearly show to my mind that it is really unsafe to lay down any general proposition in this matter; and whatever the opinion formed by a particular Court on the evidence in that particular case may be, the only general proposition which, in my opinion, can be safely enunciated is that the fact of the contract being a wager must be proved

(1) 16 Ind. Cas, 576; 37 B. 264; 14 Bom. L. R. 617.
(2 7 Ind. Cas. 665; 12 Bom. L. R. 590.

*Page of 37 B.—[*Ed.*]

by the evidence in the case on the essential point whether the common intention of the contracting parties was to deal only in differences. It is hardly necessary to refer to any authorities on this point. Having regard to the nature of these contracts, in my opinion, it is neither possible nor desirable to lay down any general rule that they must be presumed to be wagering contracts without any proof as to the common intention of the contracting parties. There is a recent judgment of Mr. Justice Kincaid in *Manubhai* v. *Keshavji* (3), where the same view is indicated. We do not desire to express any opinion on the evidence in this case, and by answering the question referred to us, we do not mean to say anything more than this that on the evidence in the case it is for the Court to decide whether in this particular case the contracts were wagering contracts or not.

Costs to be costs in the cause and to be taxed as on the Original Side.

CRUMP, J.—I agree to the answer proposed to the question propounded by the Court of Small Causes. The difficulty that I feel in this matter is that I do not precisely apprehend what is the point of law that is submitted to us. The question as framed is: "Are agreements of *teji* and *mandi* necessarily to be held as wagers on account of their nature and characteristics alone, or is evidence necessary to prove that the contracts were intended to be wagers?"

Now, if it is to be taken that we are asked whether as a matter of law such contracts are necessarily to be held as wagers, then the answer clearly must be in the negative. For it is not even suggested that there is any rule of evidence or any other rule of law which can be held to exclude evidence as to the true nature of such contracts. It may be that, as a matter of fact, it has been found in practice that a large number of these contracts are wagering contracts, but that is no ground on which any rule of law can be based. All that can be said is that there is no legal presumption that a *teji* or *mandi* contract is a wagering contract and that it must be dealt with as any other contract, and that the rules that have been laid down for determining whether a contract is a wagering contract or not are applicable to this case just as much as to other contracts. The test is well known. Where it is shown that a common intention of the parties was that in no case delivery was to be taken or given but that in all cases differences should be paid, then the parties are wagering. It is impossible to my mind to go beyond that and it in effect furnishes the answer to the question propounded.

N. K.

Answer accordingly.

(3) 65 Ind. Cas. 682; 24 Bom. L. R. 60.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 4 OF 1921.

May 17, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

Srimati ANNAPURNA DEBYA—DEFENDANT No. 4—APPELLANT

versus

AMIYANATH BANERJEE AND OTHERS PLAINTIFF AND DEFENDANTS NOS. 1—3—RESPONDENTS.

Jurisdiction—Partition, suit for—Title, questions of, decision of—Conflicting claims as to shares, determination of—Equity and Law.

All persons who have an interest in the partition are proper parties to a partition suit and matters in controversy amongst persons so interested in the partition must be decided in the suit. [p. 486, col. 2.]

A suit for partition may and does often involve the investigation of disputed questions of title: an attempt to avoid them can only lead to needless multiplicity of litigation, and there is no reason why such questions should not be decided in the course of the suit for partition. [p. 485, cols. 1 & 2.]

ANNAPURNA DEBYA v. AMIYA NATH BANERJEE.

The Courts in India, having as they do, jurisdiction to administer both legal and equitable remedies, may, in a suit for partition, determine issues of title, investigate disputes between different parties claiming the same share, and then proceed with the partition so as to dispose of the whole controversy between them [p. 486, col. 2.]

Where there is conflicting claim to share in the land under the same right under which partition is sought the determination of the conflict is incidental to the partition and cannot be avoided before partition is directed Such a case does not fall within the category of claims utterly hostile where each demands not a share but the whole. [p. 487, col. 1.]

Appeal against the decree of the Subordinate Judge, Second Court, 24-Pergannas, dated the 18th of December 1920.

FACTS appear from the judgment.

Babu *Mohes Chandra Banerjee* (with him Babu *Rama Prosad Mookerjee*), for the Appellant.—The defendant No. 4 is the appellant. The appeal is directed against the preliminary decree in a partition suit. The facts of the case briefly are these. The properties belonged to one Girish Chandra who died in 1899 leaving a Will which directed that his properties would be taken in four equal shares by his widow, Golapmani, and three sons, Haripada, Tarapada and Hem Chandra. Haripada died in 1916 leaving his widow the present appellant, Annapurna. Tarapada and his son, Amiya, are defendants Nos. 2 and 1 respectively and Hem Chandra is defendant No. 3. The present suit for partition was brought by the testator's widow Golapmani on the allegation that Annapurna had adopted defendant No. 1, Amiya, and that Annapurna's share had vested in him. I was not originally made a party defendant but I was proposed to act as guardian *ad litem* of Amiya. On my objection, I was ordered to be joined as defendant on 28th January 1920 and Amiya's father was ordered to act as guardian on 8th March 920. I filed a written statement denying the allegation that I had adopted Amiya as my son. An issue was framed to that effect. The learned Subordinate Judge held on 1st September 1920 that the question of the validity of the adoption need not be determined in this suit and passed the preliminary decree on 18th December 1920 directing that Amiya and myself might represent Haripada's fourth share without prejudice to our respective claims. I submit the learned Judge has erred by not deciding the question of the validity of adoption. There can be no perfect decree unless the present title to the share is determind.

Babu *Dwarka Nath Chakravartty* (with him Babu *Harendra Nath Mookerjee*), for the Plaintiff—Respondent, Babu *Kshitish Chandra Chakravartty*, for Defendants Nos. 1 and 2 Respondents and Babu *Brij Mohan Mazumdar*, for Defendant No. 3 Respondent), for the Respondents.—I submit the question, as has been rightly held by the Court below, need not be gone into in a partition suit It is quite a different matter and concerns only defendants Nos. 1 and 4 which could be decided in a future suit. All the parties to the suit are not interested in the question. The question is exclusively confined to Haripada's fourth share. It will, therefore, cause grave inconvenience to the other parties which will amount to harassment. I submit on principle the decree of the Sub Judge is right.

Babu *Mohes Bhandra Banerjee* replied in brief.

JUDGMENT.—This is an appeal by the fourth defendant in a suit for partition of joint family properties. Girish Chandra Banerjee, the founder of the family, is alleged to have made a testamentary disposition on the 24th November 1899, shortly before his death. He left, as his survivors, his widow, Golapmani, and three sons, Haripada, Tarapada and Hem Chandra. He directed that his properties should be taken in four equal shares by his widow and his three sons, subject to the reservation that his widow would not be competent to sell or make a gift of her one-fourth share. The eldest son, Haripada, died on the 19th June 1916, leaving a widow, Annapurna, and three daughters. The second son, Tarapada, has a son Amiya. On the 2nd August 1919, Golapmani, the widow of the testator, instituted the present suit for partition of the estate left by her husband. She alleged that her daughter-in-law, Annapurna, had taken in adoption her grandson, Amiya, with the consequence that the share in the family estate which had devolved on Annapurna as the widow of Haripada had become vested in Amiya. Consequently, on this hypothesis, the persons interested in the joint estate, besides herself, were her sons Tarapada and Hem Chandra and her grandson Amiya; these three were accordingly joined as defendants. The re-

lationship of the members of the family will be clear from the following pedigree:

GRISH CHANDRA BANERJEE (died 1899)
Widow Golapmani, Plaintiff.

Haripada (died 19th June 1916) W. Annapurna defendant No. 4.	Tarapada defendant No. 2.	Hem Chandra defendant No. 3.
Daughters.	Amiya defendant No. 1.	

The plaintiff proposed that her daughter in-law, Annapurna, might be appointed guardian *ad litem* of the alleged adopted son, Amiya, and the usual notices were served accordingly. Annapurna then appeared and intimated to the Court on the 27th December 1919 that she herself was a co-owner in the joint estate as the widow of her husband, Haripada, who had become entitled to a fourth share under the testamentary disposition of his father. The Court thereupon directed on the 28th January 1920, that Annapurna be made a defendant. This was followed by an order on the 18th March 1920, that Tarapada, the father of Amiya, be appointed guardian *ad litem* of the infant. Written statements were filed in due course and issuses were framed. As Annapurna repudiated the alleged adoption of Amiya, an issue was framed, whether the first defendant, Amiya Nath Banerjee, was the validly adopted son of Haripada Banerjee. On the 1st September 1920, the Subordinate Judge held that the question of the validity of the adoption need not be determined in this suit, and that the partition might be effected, if the first and fourth defendants, namely, Amiya and his alleged adoptive mother Annapurna, both represented the share of Haripada either jointly or separately as they liked. On the 18th December, 1920, the Subordinate Judge made a preliminary decree whereby it was declared that the plaintiff had a fourth share, the second and third defendants a fourth share each, and the heir or representative of Haripada the remaining fourth share. He further directed that, for the present and for the purpose of this suit, the first and fourth defendants might represent this last mentioned share without prejudice to their respective claims. The fourth defendant, Annapurna, has appealed against this decree and has argued that the question of the alleged adoption, raised in the first issue, should be decided before the preliminary decree for partition is made. We are of opinion that this contention must prevail.

In a suit for partition, it is incumbent upon the Court, before the preliminary decree is made, to determine whether the properties included in the suit are the joint properties, as alleged, of the parties to the litigation, In the case before us, by virtue of the testamentary disposition of the admitted owner, the estate vested in his widow and his three sons, in equal shares. Upon the death of the eldest son, the share vested in him devolved on his widow. The plaintiff came into Court on the allegation that the share which had so devolved on the widow of the eldest son of the testator, had been divested as the result of a valid adoption made by her and had passed on to a grandson of the testator. It was on this assertion that the plaintiff did not originally bring before the Court the widow of the eldest son, who would, *prima facie* and but for the alleged adoption by her, be a co-owner in the joint estate. She intervened at the earliest possible opportunity and was rightly joined as a defendant claiming a share in the joint estate. In these circumstances, it is plain that before the partition is effected, the question of the present title to the share successively vested in the eldest son and his widow should be investigated and determined. The argument on behalf of the respondents, who objected to this enquiry, proceeded on the erroneous assumption that a question cannot be raised and tried in a partition suit unless its solution interests each of the parties to the litigation. Neither authority nor principle has been invoked by the respondents in support of this narrow and restricted view of the scope of a partition suit put forward on their behalf. In suits for partition, questions may and do frequently arise which interest only some of the parties. To take one illustration. There may be no dispute as to the extent of the share claimed by the plaintiff, while there may be a serious controversy as to the respective shares of the defendants *inter se*. One of the defendants may allege, for instance, that he had acquired a particular share as the preferential heir to a deceased member of the family; this may raise an obscure question of fact or a difficult

question of law. Or, again, a defendant may allege that he has acquired title to a share either of the entire estate or of one or more of the properties comprised therein, under a deed executed by another member; this may conceivably involve an enquiry into questions of fact and law not easy to solve. To take another illustration. It frequently happens that, in joint families properties stand in the names of female members. In a suit for partition of the family estate, the plaintiff may include such properties and join the ladies as defendants so that they may be bound by the result of the litigation; if they contend that the properties belong to them personally, the matter must be investigated and decided. To take a third illustration. Some of the properties in such a suit may be claimed as self-acquisitions by one or other of the members and all the members may not be agreed as to their true character; this may render necessary the determination of questions of title involving protracted enquiry. The substance of the matter is that a suit for partition may and does often involve the investigation of disputed questions of title and an attempt to avoid them can only lead to needless multiplicity of litigation. We do not feel pressed by the contention that if this view be adopted, grave inconvenience may be caused to some of the parties, as they will have to be present during the discussion of questions which specially affect others alone. But, as pointed out in *Umabai Mangeshrao* v. *Vithal Vasudeo Shetti* (1) and *Ramendra Nath Ray* v. *Jogendra Nath Dass* (2), the Court has ample authority to direct the successive trial of the issues separately affecting different defendants and even to record interlocutory judgments thereon to be made the basis of the final judgment at the conclusion of the trial of the whole case. The case now before us is, however, free from such difficulty, for, so far as we can gather from what has happened before us, the trial of the question of the alleged adoption is not likely to embarrass even parties other than the first and fourth defendants. The first, second and third defendants have plainly indicated their preference for the plaintiff rather than for the fourth defendant; and there can be little doubt that they are all keenly interested in the determination of the question, whether the fourth defendant has been effectively divested of the one-fourth share which originally belonged to her husband.

If the matter is examined as one of principle, we cannot discover any substantial reason, why disputed questions of title should not be decided in the course of a suit for partition of joint properties, when we have not two sets of Courts with distinct jurisdictions like those exercised by Courts of Law and Courts of Equity. No doubt, Courts of Equity, in assuming jurisdiction of the subject of partition, disclaimed the authority to determine doubtful questions in regard to the legal title. A refined distinction was sometimes made between a doubtful and a disputed title, and the question was raised whether the mere fact that the defendant disputed the title of the complainant was sufficient to oust the Court of Chancery of its jurisdiction. There are cases in the books where the broad proposition is asserted that whenever the title of the complainant is disputed or suspicious, equity will not proceed with the partition, until the dispute has been settled at law: *Slade* v. *Barlow* (3), *Bolton* v. *Bolton* (4), *Potter* v. *Waller* (5), *Rochester (Corporation of)* v. *Lee* (6), *Moore* v. *Kempton* (7), *Burt* v. *Hellyar* (8). This view has not, however, always commended itself to the Courts, which have sometimes drawn a distinction between a disputed and a suspicious title and have maintained that bare denial does not necessitate a reference to the legal tribunals, in other words, equity has jurisdition to determine whether the title is free from suspicion and to proceed whenever in its judgment the title is clear, *Lucas* v. *King* (9), *Overton* v. *Woolfolk* (10).

(1) 1 Ind. Cas. 120; 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 270.

(2) 41 Ind. Cas. 944; 45 C. 111; 21 C. W. N. 794; 27 C. L. J. 158.

(3) (1869) 7 Eq. 296; 38 L. J. Ch. 369; 20 L. T. 10; 17 W. R. 366.

(4) (1868) 7 Eq. 298*n*; 19 L. T. 298.

(5) (1848) 2 De G. & Sm. 410; 64 E. R. 183; 79 R. R. 267.

(6) (1849) 1 Mac. & G. 467. 15 L. J. Ch. 97; 41 E. R. 1346.

(7) (1870) 18 W. R. 803.

(8) (1872) 14 Eq. 160; 41 L. J. Ch. 430; 26 L. T. 833.

(9) (1854) 10 N. J. Eq. 280.

(10) (1838) 6 Dana. 374.

In the case last mentioned, it was emphasised that if a bare denial of the title authorises the dismissal of the Bill, the equitable jurisdiction is placed "at the mercy of every profligate or unconscientious defendant and renders the Court the mere ministerial agent to carry into effect the wishes of parties in cases where there were no matters of controversy between them" Apart from this, whenever a Court of Equity determines that there are serious disputes in regard to the legal title, it will not proceed until those doubts have been judicially determined and removed, and, for this purpose, will stay the suit for a reasonable time with liberty, to the plaintiff to bring such action, as he might be advised, to establish his title; *Giffard* v. *Williams* (11). The same principle has been adopted where the defendants set up conflicting titles between themselves, while the title of the complainant was clear; *Phelps* v. *Green* (12). But where the Courts which exercise jurisdiction over partition matters are entrusted with more ample powers than a Court of Equity, no necessity exists for referring questions of title for trial by some other tribunal. This was pointed out by the Supreme Court of the United States in *Parker* v. *Kane* (13). Campbell, J., observed that it was not necessary to take the opinion of a Court of Law or to stay proceedings in the partition suit until an action of law had been tried to determine the legal title where the powers of the Courts of Law and of Equity were exercised by the same persons; if between the parties to the action for partition, disputes exist as to their rights or interests in any respect, such disputes be litigated and determined in such action. This view has been elaborated in later decisions, one of which, *Baca* v. *Anaya* (14), reviews the history of the law on the subject; see also *Street* v. *Benner* (15), *Weston* v. *Stoddard* (16) and *Griffith* v. *Griffith* (17). Freeman on Co-tenancy, Chapter XXIV; Knapp on Partition, page 137. There is obviously much force in the observation of Pope, J. in *Baca* v. *Anaya* (14): "We are unable to see the hardship of a system which necessitates the settlement of all questions affecting a given piece of land in one suit, instead of remanding them to be settled by a series of suits. On the contrary, we deem it tending to that despatch and economy in the settlement of legal differences which is the desideratum of jurisprudence. It is a modern response to the ancient appeal, *interest republicæ ut sit finis litium.*" The essence of the matter is that the Court, which is one of general jurisdiction administering both legal and equitable remedies, may determine issues of title, investigate disputes between different parties claiming the same share, and then proceed with the partition so as to dispose of the whole controversy between them. In truth, the limitations attending proceedings in partition are constantly weakening, and the tendency to do full and complete justice to the parties in one action, is becoming irresistible; see Judicature Act, 1873, section 24 (7), *Gledhill* v. *Hunter* (18), *White* v. *Pingley* (19), *Mayfair Property Co.* v. *Johnston* (20). Some of the Courts of general jurisdiction in the United States have, indeed, gone so far as to hold that a person claiming to be interested in the entire premises by title paramount may intervene in a suit for partition. It is not necessary for our present purpose to maintain this position, for, apart from the question whether all persons having an interest in the land are proper parties, it is sufficient to hold that all persons who have an interest in the partition are proper parties, and matters in controversy amongst persons so interested in the partition must be decided in the suit. We need not discuss whether an adverse claimant, who has no community of interest with the parties to the suit, is in no view a co-tenant with them but stands out on his own independent right and denies all right in his adversaries, can be drawn into a partition suit for decision of the question of title

(11) (1870) 5 Ch. App. 546; 39 L. J. Ch. 735; 21 L. T. 575; 18 W. R. 776.

(12) 3 John. (Ch) 206.

(13) (1859) 22 Howard 1; 16 Law. Ed. 286.

(14) (1908) 14 N. M. 382; 94 Pac. 1017; 20 Ann. Cas. 77.

(15) (1884) 20 Fla. 714.

(16) (1893) 137 N. Y. 125; 20 L. R. A 624 at p. 629; 33 Am. St. Rep. 697 at p. 700.

(17) (1910) 59 Fla. 512; 21 Ann. Cas. 24?; 15 Enc. Pl. & Pr. 777 at p. 780; 138 Am St. Rep. 1?8; 52 South. 609.

(18) (1880) 14 Ch. D. 492; 49 L. J. Ch. 338; 42 L. T. 392; 28 W. R. 530.

(19) (1882) 21 Ch. D. 674; 51 L. J. Ch. 651; 30 W. R. 698.

(20) (1894) 1 Ch. 508; 63 L. J. Ch. 399; 8 R. 781; 70 L. T. 485.

paramount. But, in any view, the principle appears to us to be undoubtedly sound that where there is conflicting claim to share in the land under the same right under which partition is sought the determination of the conflict is incidental to the partition and cannot be avoided before partition is directed. Such a case does not fall within the category of claims utterly hostile where each demands not a share but the whole.

Our conclusion is that the preliminary decree made by the Subordinate Judge without decision of the controverted title to a fourth share cannot be supported. The appeal must consequently be allowed, the preliminary decree set aside, and the case remanded to the Subordinate Judge to be re tried in accordance with law, after determination of the question of the validity of the alleged adoption. The respondents must pay the appellant her costs in this Court. We assess the hearing fee at fifteen gold *mohurs*. The costs in the Court below will be costs in the cause.

Under section 13 of the Court Fees Act we direct that the Court-fees paid on the memorandum of appeal be returned to the appellant.

B. N. & N. H.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 188 OF 1920.

February 20, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

THE TALUKDARI SETTLEMENT OFFICER—PLAINTIFF—APPELLANT

versus

AKUJI ABHRAM MUSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Gujrat Talukdars Act (Bom. Act VI of 1888), s. 29B—Notification by Talukdari Settlement Officer—Claims, submission of—Claim already known, whether must also be submitted.

Upon the issue of a Notification under section 29B of the Gujrat Talukdars Act by a Talukdari Settlement Officer, as Managing Officer of a Talukdari estate, every person who has a claim against the estate must give a notice in writing of such claim. The fact that such officer is otherwise aware of a claim—in this case a mortgage—would not save the claimant from the consequences of the failure to give the notice required [p. 488, col. 2; p. 489, col. 1.]

Shankerbhai v *Raisingji*, 42 Ind. Cas. 908; 19 Bom. L. R. 855 and *Purushottam* v *Rajbai*, 4 Ind. Cas. 839; 11 Bom. L. R. 1358; 34 B. 142, referred to.

First appeal from the decision of the District Judge at Broach, in Suit No. 3 of 1917.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *N. K. Mehta*, for Respondents Nos. 1, 2, 3, 6, 7 and 10.

Mr. *Dhirajlal Thakore*, (with him Mr. *R. J. Thakor*), for Respondents Nos. 8 and 9.

JUDGMENT.—The suit was filed by the plaintiff as Talukdari Settlement Officer and manager of the estate of Naharsangji Mehramansingji, the Thakor Saheb of Dehevan, to get possession of certain survey numbers alleged to belong to the *Talukdari* estate. The suit property had been mortgaged in 1859 by the then *talukdar* to the predecessors in-title of defendants Nos. 1 to 7. It seems that they partitioned amongst themselves the suit property, and dealt with the suit property as if they were owners, executing various mortgage-deeds between 1895 and 1906 which resulted in 16 acres and 24½ *gunthas* becoming mortgaged to defendants Nos. 8, 9 and 10, while 1 acre and 12½ *gunthas* of the suit property remaining in possession of the second defendant. The Judge found that defendants Nos. 8 to 10 had been in possession for more than twelve years after the lands had been mortgaged to them, although there seems to be an error with regard to the mortgage of 1903 which was less than twelve years before suit. As the defendants Nos. 1 to 7, mortgagees of the *talukdars*, represented that they were owners, defendants Nos. 8 to 10 were entitled to rely upon that representation for the purposes of Art. 134 of the Second Schedule to the Indian Limitation Act. The rights of defendants Nos. 8 to 10, to whom defendants Nos. 1 to 7 executed mortgages, would be established after twelve years as against the *talukdar*, and if he wished to redeem and recover possession of the properties, he would have to pay defendants Nos. 8 to 10 the amount due on the mortgages with regard to which they had been in posses-

sion for more than twelve years. The Judge found that the plaintiff's claim to get possession from defendants Nos. 8 to 10 was bad for misjoinder of causes of action, and dismissed the suit with regard to those defendants. The only result of that would be that the plaintiff will have to file another suit against those defendants to recover possession. But, in our opinion, the Judge's decision was wrong. There is no reason why the plaintiff should not join defendants Nos. 8 to 10 in a suit against defendants Nos. 1 to 7. As he was endeavouring to get possession of all the suit properties, and the only result of defendants Nos. 8 to 10 establishing their claims under Art. 134 would be that the plaintiff, in order to get possession of the lands mortgaged to them, would have to pay the amount due on the mortgages executed by defendants Nos. 1 to 7, there is no reason why all those questions should not have been decided in one suit.

Then the Judge has allowed the plaintiff to redeem the plaint lands remaining in possession of defendant No. 2 on payment of Rs. 95 within six months.

The plaintiff appeals against that part of the decree on the ground that he issued notice under section 29B of the Gujrat Talukdars Act, and no answer to the notice was received within six months allowed by that section. The Judge says:

"In so far as defendants Nos. 1 to 7 are concerned, it is clear that during the lifetime of the father of the plaintiff the estate was in the hands of the Talukdari Settlement Officer. He had sent for the original mortgage deed and taken a copy of the deed. He became aware of the claim. It was not necessary for defendants Nos. 1 to 7 to have put in a claim again. Considering these circumstances I am of opinion that the section is not applicable to the facts of the present case."

That decision disregards the decision of this Court in *Shankerbhai* v. *Raisingji* (1) in which the plaintiff resisted the right of the Talukdari Settlement Officer to serve him with a notice under sections 202 and 79A of the Bombay Land Revenue Code on the ground that he was a mortgagee, and had represented to the Talukdari Settlement Officer that he was a mortgagee before section 29B had been added to Bombay Act VI of 1888 but the Court held that the representation by the plaintiff that he was a mortgagee was not a notice complying with the provisions of section 29B, which was not in existence at that time, and that as he had not answered to the notice issued under section 29B of the later date, his claim could not be considered.

We may also refer to *Purushottam* v. *Rajbai* (2) where it was decided that although a decree had been passed against a *talukdar*, which was being executed before section 29B was enacted, still notice of the claim was necessary after the Notification under section 29B had been issued; and the only question was whether the two written applications for the execution of the decree made after the Notification were sufficient notices in writing of the plaintiff's claim. It must be inferred from that judgment that notices were required after the Notification in spite of the fact that a decree passed against the *talukdar* was being executed.

Therefore, it would appear that although the plaintiff had knowledge of the original mortgage-deed of 1859, those who were desirous of claiming under that deed were bound to give notice in writing of their claim after the Notification under section 29B was issued.

With regard to defendant No. 2, no such notice was given by him, and, therefore, the plaintiff was entitled to possession of that part of the suit property which is in his possession without payment.

With regard to that portion of the suit property which is in possession of defendants Nos. 8 to 10, it has been argued that they had no knowledge that the property was *talukdari* property, and that, therefore, they could not have been expected to give notice of their claim when the Notification was issued under section 29B. But section 29B (2) especially provides for such a case "where the Managing Officer is satisfied that any claimant was unable to comply with the notice published under sub-section (1), he may allow his claim to be submitted

(1) 42 Ind. Cas. 908; 19 Bom. L. R. 855.

(2) 4 Ind. Cas. 889; 11 Bom. L. R. 1358; 34 B. 142

at any time after the date of the expiry of the period fixed therein but any such claim shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of such period until submission," and even if the Managing Officer is not satisfied that the claimant was unable to comply with the notice, and decides that his claim has been duly discharged it would be still open for him to claim in a suit to ask for a decision of the Court that he was unable to comply with the notice, and if the Court is satisfied that the claimant had sufficient reason for not being aware that the property, against which he had a claim, was *talukdari* property, then we have no doubt that the Court would allow the claim. But in this case defendants Nos. 8 to 10 were served with notice so far back as 1912. They were bound then to give notice of their claim against the property to the plaintiff, and to ask him to give a decision under section 29B (2). It is far too late now to ask this Court in appeal to hold that they were unable to comply with the notice published under sub-section (1) in 1905.

The result must be that the appeal succeeds and that the plaintiff is entitled to recover the suit property from the defendants in possession with costs throughout.

N. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1933 OF 1919.

February 22, 1922.

Present:- Mr. Justice Newbould and Mr. Justice Panton.

BADARUDDIN MUNSHI—DEFENDANT—APPELLANT

versus

SARAPADDIN BEPARI AND OTHERS—PLAINTIFFS AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 111A—Publication of Record of Rights—Declaratory suit—Dismissal—Cause of action—Final publication of Record—Fresh cause of action—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 120.

The plaintiffs brought a suit on the 1st June 917 for declaration that they had *raiyati* title in certain land and that they were not under-*raiyats* under the defendant as recorded in the Record of Rights which had been finally published in the Bengali year 1320. During the preparation of the Record of Rights a dispute between the plaintiffs and the defendant as to the status of the former had been decided on the 2nd July 1908. The defendant contended that limitation commenced to run from the decision of the dispute and, consequently, the suit was barred by the six years' rule of limitation contained in Art. 120 of the First Schedule to the Limitation Act:

Held, that the suit was within time, for under section 111*A* of the Bengal Tenancy Act the plaintiffs had a statutory cause of action which arose on the date of the final publication of the Record of Rights. [p. 490, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Faridpur, dated the 26th of July 1919, reversing the decree of the Munsif, Fourth Court at Madaripur, dated the 26th of November 1918.

FACTS appear from the judgment.

Babu *Atindra Nath Mukerjee* for Mr. *M. A. K. Fazl-ul-Haq*, for the Appellant.—The question to be considered in this case is one of limitation. I beg to submit that limitation should run not from the final publication of the Record of Rights but from the date of the order. I rely on six years' limitation from the date of the order and so Art. 120 of Schedule I of the Limitation Act, the suit is barred as more than six years have elapsed since the date of the decision of the dispute. I submit that the right to sue began on 2nd July 1908 and so the suit is barred being more than six years. Practically the whole matter was decided by the order of 2nd July 1908 determining that they are my under-*raiyats*.

Babu *Amitaranjan Ghose*, for the Respondents, not called upon.

JUDGMENT.—The only point that has been argued in this appeal is the point of limitation. The plaintiffs brought this suit for declaration that they had *raiyati* title in certain land and that they were not under-*raiyats* under the defendant as recorded in the finally published Record of Rights. It appears that during the preparation of the Record of Rights there was a dispute between the plaintiffs and the defendant as to the status of the former and that it was decided on the 2nd July 1908. The Record

of Rights was finally published some time in the Bengali year 1320. The suit was instituted on the 1st June 1917. The period of limitation admittedly is six years under Article 120 of the First Schedule of the Limitation Act. Consequently, if limitation commenced to run from the decision of the dispute the suit is barred, but if it commenced from the final publication of the Record of Rights the suit is within time. We think that the decision of the learned Subordinate Judge on this point is correct. As the plaintiffs are in possession of the property, either of these events would give them a cause of action, and also section 111A of the Bengal Tenancy Act gives them the right to institute a declaratory suit of the nature they have brought on the publication of the Record of Rights, or, in other words, they had a statutory cause of action which arose on the date of the final publication. The view we take is similar to the view taken by a Divisional Bench of the Patna High Court in the case of *Latafat Hussain* v. *Kumar Kaliker Nand Singh*.

The appeal is dismissed with costs.

B. N.

Appeal dismissed.

(1) 45 Ind. Cas. 432; 3 P. L. J. 361; 4 P. L. W. 303; (1918) Pat. 225.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 640 OF 1921.

March 7, 1922.

Present:—Mr. Justice Coyajee.

MARI DODDATAMMA MARKUNDI—DEFENDANT—APPELLANT

versus

SANTAYA RAMKRISHNA PAI—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), ss. 9, 56, (b)—S. 9, object of—Decree for restoration of possession—Suit by person in possession to restrain execution.

The object of section 9 of the Specific Relief Act is to discourage people from taking the law into their own hands, however good their title may be. It provides a summary and speedy remedy through the medium of a Civil Court for the restoration of possession to a party dispossessed by another leaving them to fight out the question of their respective title by a regular suit if necessary. [p 491, col. 1.]

Krishnarav Yashvant v. *Vasudev Apaji Ghotikar*, 8 B. 87 at p. 375; 4 Ind. Dec (N. S. 621 and *Wali Ahmad Khan* v *Ajudhia Kandu*, 13 A. 537 at p 562; A. W. N (1891) 196; 7 Ind Dec (N S.) 340, followed.

Dhuronidhur Sen v. *Agra Bank, Ltd*, 4 C. 880 at p. 396; 3 C. L. R. 421; 2 Ind. Dec. N. S. 241, distinguished.

Where a person obtains a decree for restoration of possession of land under section 9 of the Specific Relief Act, the person against whom it is passed and who is in possession of the land, can institute a suit to establish his title to the land and obtain an injunction to restrain the decree-holder from dispossessing him by enforcing his decree, notwithstanding the provisions of section 56, clause *b*, of the same Act. [p. 491, col. 1.]

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 151 of 1920, confirming the decree passed by the Subordinate Judge at Kumta, in Civil Suit No. 284 of 1919.

Mr. *Y. N. Nadkarni*, for the Appellant.

Mr. *G. P. Murdeshwar*, for the Respondent.

JUDGMENT.—The respondent being in possession of certain lands instituted the suit which has given rise to this appeal, to seek an injunction to restrain the appellant from dispossessing him by enforcing the decree passed in Suit No. 293 of 1917. He further asked to be restored to possession if during the pendency of this suit he is so dispossessed. The facts which have necessitated these proceedings are as follows:—

In or about March 1915 the respondent put the appellant in possession of the suit lands under a Chalgeni agreement. In 1917 the respondent obtained a decree in the Court of the Mamlatdar at Kumta in possessory Suit No. 3 of 1917 and took possession which he has retained ever since. The appellant then brought Suit No. 293 of 1917 in the Court of the Subordinate Judge of Kumta for restoration of possession, under section 9 of the Specific Relief Act, 1877. He obtained a decree in his favour, but before he could execute it the respondent instituted the present suit to establish his title to the lands and to obtain an injunction as stated above.

The lower Courts agree in holding that the respondent has established his title to the said lands. The decree passed by the Trial Court, which has been affirmed by the District Court, is in these terms:

"Plaintiff is entitled to continue to be in possession of the suit land. Defendant is

permanently restrained from obstructing the plaintiff's possession of the land on the strength of the decree in Civil Suit No 293 of 1917. The decree is inoperative and incapable of execution to that extent by virtue of this order."

It has been urged in this second appeal that this decree offends against the provisions of section 56, clause (*b*), of the Specific Relief Act. Now, the decree passed in Suit No. 293 of 1917 was clearly one contemplated by section 9 of that Act. The object of that section is to discourage people from taking the law into their own hands, however good their title may be. [*Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (1)]. It provides "a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised." *Wali Ahmad Khan* v. *Ajudhia Kandu* (2). An order or decree passed under that section is not open to appeal or to review at the instance of the defeated party; and the section expressly provides that nothing contained therein shall bar any person from suing to establish his title to such property and to recover possession thereof. It was, therefore, competent to the respondent to institute this suit to establish his title to the lands in dispute; and being in possession thereof, the only further relief which he could seek was an injunction to restrain the appellant from disturbing his possession. The terms of the decree passed by the lower Court are, in my opinion, unobjectionable.

In support of the appellant's contention, reliance was placed on the following observations in the judgment of Markby, J. in *Dhuronidhur Sen* v. *Agra Bank Ltd.* (3):

"But for one Judge to issue an injunction against a decree-holder to restrain him from executing the decree of another Judge exercising co-ordinate jurisdiction, upon the ground that the proceedings by which the decree was obtained were altogether illegal, is, as far as I am aware, a proceeding entirely without precedent, and one which it seems to me very dangerous to introduce. It has already been found difficult enough to bring litigation in this country to a termination, and if we were to grant this injunction, I am very much afraid that advantage would be taken of the precedent to prolong litigation very much further."

The decree there under consideration was not one passed under the said section 9. It is, therefore, not easy to see how the above pronouncement could apply to the facts of this case where the respondent is in effect seeking that remedy which is expressly allowed to him by that enactment. This case rather comes within the following observations in the same judgment (page 395): "In some cases a suit to reverse the order, treating it as a summary order, may be brought." The sole object and purpose of the present suit is to obtain a reversal of the order made in Suit No. 293 of 1917, treating it as of a summary nature.

For these reasons I affirm the decree of the lower Court and dismiss this appeal with costs.

N. K. *Decree confirmed.*

(1) 8 B. 371 at p. 375; 4 Ind. Dec. (N. S.) 621.

(2) 13 A. 557 at p. 562; A. W. N. (1891) 196; 7 Ind. Dec. (N. S.) 340.

(3) 4 C. 380 at p. 396; 3 C. L. R. 421; 2 Ind. Dec. (N. S.) 241.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 137 OF 1918 AND 135 OF 1919.

May 25, 1920.

Present:—Mr. Justice Richardson and Mr. Justice Greaves.

IN No. 137 OF 1918.

Kumar BIRENDRA CHANDRA SINGH—DEFENDANT No. 1—APPELLANT

versus

MAHAMMAD SOLEMAN—PLAINTIFF—RESPONDENT.

IN No. 135 OF 1919.

MANMATHA NATH MULLIK—DEFENDANT No. 1—APPELLANT

versus

MUHAMMAD SOLEMAN—PLAINTIFF AND ANOTHER—DEFENDANT No. 2—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), ss 2, 3—Bengal Land Reveune Sales Act (VII of 1868), s. 11—Holding, when becomes saleable for arrears—Premature sale invalid and ultra vires.

The effect of the Bengal Land Revenue Sales Act (XI of 1859 and Act VII of 1868 and of the Board's Notification of 6th October 1871, issued under section 3 of the Act of 1859, in relation to the time at which certain holdings become saleable for arrears, is that

no holding can be sold till after the 28th June next after the first day of the month following the month in which the revenue or rent should have been paid. [p. 492, col. 2.]

Haji Buksh Ilahi v. *Durlav Chandra Kar*, 16 Ind. Cas. 821; 39 I. A. 177: 39 C. 98 ; 16 C. W N. 842: 23 M. L. J. 205: 12 M. L. T. 385; 1912) M. W. N. 1005; 14 Bom. L. R. 1063; 10 A. L. J. 452; 16 C. L J. 620 (P. C), followed.

The date on which the amount of rent or revenue is payable depends, primarily, not on general or administrative considerations, such as the course of business in the Collectorate, or the mode in which the accounts are kept, but on the contract between the parties [p. 493, col. 1.]

A *kabuliyat*, dated the 16th November 1862, contained a stipulation that the tenant would pay the rent year by year. Under the provisions of Bengal Act VII of 1868 the tenancy was sold for arrears of revenue of 1914-15 in May 1915:

Held, that the rent was not in arrear till the 1st December 1914, and the Collector was without authority to sell before the 28th June 1915, that, accordingly, the sale held in May 1915, was invalid and *ultra vires* [p. 493, col. 2.]

In No. 137 of 1918.

Appeal against the decree of the Subordinate Judge, Second Court, 24-Parganas, dated the 31st of January 1918.

In No. 135 of 1919.

Appeal against the decree of the Subordinate Judge, Second Court, 4-Parganas, dated the 31st of January 1918, and transferred to the file of this Court by an order of the Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

The Hon'ble the Advocate General, and Babus *Joges Chandra Roy*, *Sarat Chandra Mukherjee*, *Lal Mohan Ghose*, and *Narendra Nath Mustappi*, for the Appellant.

Mr. *B. Chakravarty* and Babus *Ram Chandra Mazumdar* and *Bijon Kumar Mukherjee*, for the Respondent.

JUDGMENT.

RICHARDSON, J.—The plaintiff in the two suits out of which these appeals arise purchased holding No. 20-A in *Mahal* Panchannogram in the 24-Parganahs at a sale for arrears of revenue or rent held under Act VII of 1868, which incorporates the provisions of the Bengal Revenue Sales Act (XI of 1859). The holding is a tenure within Act VII of 1868 and the defendant in each suit is an under-tenure-holder in occupation of lands comprised in the holding. Appeal No. 135 relates to Suit No. 20 of the Court below and Appeal No. 137 to Suit No. 19.

The holding was sold on the 17th May 1915 for an arrear of Rs. 6-10 5 and the price paid by the plaintiff was Rs. 8,900.

The suits were brought to vacate the under-tenures of the defendants under section 12 of the Act of 1868 as incumbrances imposed upon the tenure after its creation or after the time of Settlement. The defendants contend in the first place that the sale was invalid inasmuch as the Collector had no authority under the law to sell the tenure when he did, and, in the second place, that their under-tenures are within the first of the Third Exception to section 12 and, therefore, protected. Before us the plea that the sale was brought about by collusion between the purchaser and the defaulter was in effect abandoned. The plaintiff won in the Court below and the defendants have appealed.

The point of the first defence is whether the sale was premature and it turns on the application of the Privy Council's decision in *Haji Buksh Ilahi* v. *Durlav Chandra Kar* (1), to the facts of the present case. Their Lordships dealt with the effect of the two Acts and of the Board's Notification of 6th October 1871, issued under section 3 of the Act of 1859, in relation to the time at which these holdings in Panchannogram become saleable for arrears. The result is that no holding can be sold till after the 28th June next after the first day of the month following the month in which the revenue or rent should have been paid.

The rents of the holdings are payable annually and the result is arrived at in this way. Determine the day on which the rent is annually payable. If not paid on or before that date the rent is in arrear on the first day of the following month (Act XI of 1859, section 2). Under the Board's Notification of 1871, the tenure-holder may save his tenure by paying the arrear on or before the 28th June next following. It is not till after that date has passed without the arrear being paid that the holding becomes saleable at public auction to the highest bidder.

In the case cited, the tenure-holder's engagement or *kabuliyat* required him to

(1) 16 Ind. Cas. 821; 39 I. A. 177: 39 C. 981; 16 C. W. N. 847; 23 M. L. J. 206; 12 M. L. T. 385; (1912 M. W. N. 1005; 14 Bom. L. R. 1063; 10 A. L. J. 452; 16 C. L. J. 620 (P. C.).

pay his rent "within the 28th day of June every year." It was held that the rent so payable in any year was not in arrear till July 1 of that year and the holding could not be sold till after June 28 of the following year.

The first question to be determined, therefore, is on what day the rent in the present case was payable.

For the plaintiff it is said that the rent was payable annually according to the Bengali year and reliance is placed on the evidence of the Collectorate Record-keeper, called by the defendants, who says that "the rent of this 55 Gram *mahal* is generally collected according to the Bengali year." In the *jama wasil baki* of the holding (Exhibit A), the years are entered as 1911-12, 1912-13 and so on. The entries may refer either to the financial year ending on the 31st March, or to the Bengali year ending about the middle of April. It is immaterial which of these years is intended. The account shows that there was nothing due at the close of 1912-13 (or 1319 B. S.). The year 1913-14 (or 1320 B. S.) opened with a "current demand" of Rs. 6-10-5 and no arrear demand. The "current demand" for that year was paid on 23rd March 1914. Accordingly, 1914-15 (or 1321 B. S.) also opened with no entry in the arrear column and an entry of Rs. 6-10-5 in the column provided for the current demand. This demand was not paid on June 28th 1914 or later, and the holding was sold in consequence in May 1915. If, as is argued for the plaintiff, the amount became due and payable on the 1st April 1914, or the 1st Baisakh, 1321, the rent was in arrear on 1st May, 1914, and the Collector was at liberty to sell it after June 28th of the same year. If, on the other hand, the amount became due and payable in or after June of 1914, the holding could not be sold till after June 28th 1915.

As the Privy Council point out, the date on which the amount was payable depends primarily, not on general or administrative considerations, such as the course of business in the Collectorate or the mode in which the accounts are kept, but on the contract between the parties. In the present case that contract is embodied in a *kabuliyat*, dated 10th November 1862, which is in the following terms:—

"This deed of *kabuliyat* is executed by Sayad Abdul Ali (a former tenure-holder) to the following effect:—

"That I have got a permanent *maurashi patta* in respect of lands measuring 17 *bighas* 5 *katas* 4 *chataks* and 10 *gundas*..... acknowledging as yearly rent thereof Rs. 20-12 annas 4 pies. I shall pay the rent year by year. Accordingly, on receiving a *patta*, I execute this *kabaliyat*. Finis. 10th November 1862."

The original holding appears to have been split up. Holding No. 20-A comprises about a third of the original area and is responsible for an aliquot share of the rent.

It will be observed that the *kabuliyat* bears an English date and that it does not expressly mention the date on which the rent is due to be paid each year. There seems no reason why it should refer to the Bengali year or the financial year or the English calendar year, rather than to the year beginning on the date it bears, the 10th November, and ending on the 9th November of the following year, which may be called the year of the tenancy. The meaning of the words as they stand is presumably that the rent should be paid year by year on the 10th November of each year. If that be so, the account would show that the rent due on the 10th November 1913, was paid on the 23rd March 1914, and that the current demand for 1914-15 was not payable till the 10th November, 1914. The rent, therefore, was not in arrear till the 1st December 1914 and the Collector was without authority to sell before the 28th June 1915. Accordingly, the sale held in May 1915 was invalid and *ultra vires* and conferred no right on the plaintiff, as the purchaser at the sale, to vacate these under tenures.

If that view be right, the defendants succeed on their first contention and it becomes unnecessary for us to consider whether the defendant's under tenures are within any of the Exceptions to section 12 of the Act of 868, a question with which the Court below seems to have dealt somewhat cursorily.

It may be added that according to the sale notice issued on 14th April 1915, under section 7 of the Act of 1859 (Exhibit 15), the sale was held "for the realization of the Government Revenue—for the year 1320 B. S. which was payable on

the 28th July 1914." On a strict construction of these words, the result would be the same as that already arrived at. The revenue, if payable on the 28th July, was in arrear on the 1st August 1914 and the holding could not be sold till after 28th June 1915. But it is probable that the notice means that the 28th July or the 28th June was the last day for the payment of revenue which was previously in arrear. That is to say, it was assumed that the revenue was due for the Bengali year 1320 and that it was payable on the 1st Baisakh 1321, an assumption, which in the view I take is inconsistent with the *kabuliyat*.

The appeals should be allowed with costs in this Court and the Court below.

GREAVES, J.—I agree.

We assess the hearing fee in appeal No. 135 at one hundred and fifty rupees.

B. N. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 377 OF 1921.

July 10, 1922.

Present:—Mr. Hallifax, A. J. C.

Chowdhri RAMPRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NATHURAM—DEFENDANT—RESPONDENT.

Evidence, admissibility of—Unstamped receipt—Secondary evidence—Payment, independent proof of.

An unstamped receipt cannot be proved at all either by primary or by secondary evidence. But in order to prove the payment, evidence other than the document is not excluded by the existence of the document. [p. 495, col. 1.]

Appeal against the decree of the District Judge, Jubbulpore, dated 20th April 1921 in Civil Appeal No. 9 of 1921.

Messrs. *J. C. Ghosh* and *N. G. Bose*, R. B., for the Appellants.

Mr. *Gupta*, for the Respondent.

JUDGMENT.—It cannot be denied that the plaintiff, Bhairon Prasad, did produce his *nakal bahi* in the first Court when he was examined as a witness. He appears to have started using it for the purpose of refreshing his memory from the entries in it, but was not allowed to do so. Whether the book was ever actually tendered to the Court itself as evidence is immaterial. It was brought into Court for use as evidence and was not allowed to be used at all. That the copies of the receipts it contains can be received in proof of the original receipts is beyond doubt, because they are secondary evidence of documents which, if they exist, are in the possession of the opposite party and that party has refused to produce them by denying their existence.

(2) The copy of the receipt for the first alleged payment of Rs. 175-1 0 cannot, however, be so used, for the reason that the copy itself recites that the original was unstamped. A statement is added that a stamp will be affixed later, but it cannot be shown that this was ever done. An unstamped receipt cannot be proved at all, either by primary or by secondary evidence. But the plaintiffs have to prove the payment not the written receipt and evidence other than the document is not excluded by the existence of the document. For this purpose it appears to me that the copy of the alleged receipt in the *nakal bahi* can be used in two ways. Any person who wrote it or read it soon after it was written and also witnessed the payment can refer to it under section 159 or section 160 of the Evidence Act. Also it appears that every receipt given by the plaintiffs was copied into this book. It is then a regularly kept account book showing all payments received by the plaintiffs, the entries being made in the form of a copy of the receipt issued by them. In this light it is admissible in evidence under section 34 of the Evidence Act. The document would, of course, have to be proved in the ordinary way and thereafter its weight as evidence would have to be estimated, but the plaintiffs have so far

not been allowed to prove it or use it at all.

(3) The objection that they are not stamped does not apparently apply to the remaining three receipts which were mentioned in the plaint, and the copies of them in the *nakal bahi* could be used in any or all of the three ways already discussed. But when the mortgagor in his pleadings denied having made any re-payment and urged that, therefore, the claim was barred by time, the plaintiffs' Pleader is recorded as having said: "Payments were made as stated in the plaint. Plaintiff claims limitation by reason of the first payment of Rs. 175-1-0 only and not by reason of any of the subsequent payments." This appears to me equivalent to a statement that the plaintiffs proposed not to trouble to prove the later payments, that is a plea that for the purposes of this case it might be taken that they were never made. That is an admission of a fact on which the plaintiffs cannot be allowed to go back. But as the evidence of each payment appears to be of almost exactly the same weight and any one of them if proved will remove the bar of limitation that cannot affect the case. Further, it is only as a removal of the bar of limitation that the plaintiffs said they would not prove the three later payments. They can still prove them as corroborating the evidence they offer in proof of the first payment.

(4) The lower Appellate Court ought, in my view of the matter of the *nakal bahi*, to have acted under rr. 27, 28 and 29 of O. XLI and allowed the production of the *nakal bahi* and evidence to prove it and any oral evidence which may come within the terms of section 159 or section 160 of the Evidence Act. The decree of the lower Appellate Court is accordingly set aside, and the case is remanded to that Court with instructions to re admit the appeal and to decide it afresh with advertence to what has been said in this judgment. Costs in this Court will follow the final result.

G. R. D.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 333 OF 1920.

March 24, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Panton.

RAMANI KANTA ROY—PLAINTIFF—APPELLANT

versus

HARA CHANDRA DAS—DEFENDANT AND ANOTHER *Pro forma* DEFENDANT—RESPONDENTS.

Landlord and tenant—Dispossession of tenant by landlord from portion of holding—Suspension of rent.

A, *B* and *C* succeeded to a tenancy. *A* who was entitled to a 12-annas share took possession of the same. The landlord, not knowing the exact shares to which the heirs were entitled, made a settlement of an 8-annas share with *B* and *C*. The effect of this settlement was that *A* was unable to realize rent from some of the under-tenants who took advantage of the situation. In a suit by the landlord to recover rent:

Held, that there was a dispossession of the principal defendant from a portion of the holding such as to cause a suspension of the rent of the same.

Appeal against the decree of the District Judge, Rungpur, dated the 10th of November 1919, reversing that of the Munsif, First Court at Gaibandha, dated the 30th of March 1916.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Manindra Nath Roy*) for the Appellant.—Plaintiff is the appellant. The appeal arises out of a suit for rent. First Court decreed the suit against all the defendants. On appeal the suit has been dismissed on the ground that there has been dispossession of the principal defendant. On 23rd May 1912 plaintiff got a rent decree against this holding against the principal defendant, Hara Chandra, that decree was set aside on the ground that the entire tenure was not included in the plaint, by the Appellate Court. On appeal to this Court it was disposed on terms of a compromise on 10th July 1916. The learned District Judge has held in the present suit that that judgment operates as *res judicata* which has been set aside by this Court. As to the merits, Maniram and Jnan were two brothers. Jnan's sons were Padma and Baul who left Brindamoyee and Baishnab. Padma died leaving defendant No. 2, widow. The present defendant is the son of the other brother Maniram. He is entitled to 8 annas. I recognised defendant and Brindamoyee in

respect of 8 annas. The defence is that Baul died owning 4 annas and that he would be entitled to same by virtue of succession. Hence my recognition of the other persons amounted to dispossession. I submit dispossession must be with respect to a third party who has been inducted after driving out the original tenant. Here the tenants were of the same family. By mistake the landlord thinks that one of them is the heir of the other. Refers to *Kali Prasanna* v. *Mathura Nath Sen* (1). There is no eviction in the present case. Refers to *Rai Charan Sar Mazumdar* v. *Administrator-General of Bengal* (2), *Annada Prosad Mukhopadhya* v. *Mathura Nath Nag* (3), *Saroda Prasad Bhattacharjee* v. *Manmotho Noth Mitter* (4). The dispossession is not alleged to have taken place after the compromise in the previous case. I submit they can at best claim abatement.

Babu *D. N. Bagchi* (with him Babu *Mohinimohan Bhattacharjee*), for the Respondents.—The appeal is concluded by findings of fact. The Court below has found that the evidence on the question of dispossession was scanty and the landlord did not produce any evidence to prove that possession was not disturbed. It has been found that the holding was split up. The entire rent would, therefore, be suspended. Refers to *Dhunput Singh* v. *Mahomed Kazim* (5), *Godai Molla* v. *Aminuddi Howladar* (6) *Upton* v. *Townend* (7). The effect of the recognition amounts to the splitting up of the tenancy and disturbance of my possession.

Babu *Jogesh Chandra Roy*, replied in brief.

JUDGMENT.—This is an appeal against the decree dismissing a suit for rent on the finding that the principal defendant had been dispossessed by the plaintiff landlord from a portion of the holding for which rent is claimed.

The facts of the case as found are as follows: The holding was originally held by two brothers, Muniram Singh and Jnan Chandra Singh. The principal defendant Hara Chandra Das is the son of Maniram; Jnan Chandra had two sons, Padma Singh and Boul Singh. Boul Singh died leaving a son Baishnab Charan and a daughter Brindamoyee Baishnab Charan died leaving Brindamoyee, defendant No. 3, surviving. Padma Singh left a widow, Kanchanmoni, who is defendant No. 2. After the death of Baishnab Charan the plaintiff made a settlement of half of the holding with Kanchanmoni and Brindamoyee. It is found by the lower Appellate Court that the principal defendant, Hara Chandra Das, is now entitled to 12 annas share of the property; but the plaintiff settled 8 annas share with the 2nd and 3rd defendants, and this settlement has led to withholding of the rent by some of the undertenants who had taken advantage of the situation. He has also found that this act of the landlord, besides interfering with the appellant's enjoyment of his property, has cast a cloud on his title.

On behalf of the appellant it is contended that the act of the landlord in affirming the possession of the 2nd and 3rd defendants, who he believed to have inherited the 8 annas of Jnan Chandra, did not amount to dispossession of the plaintiff from the 4 annas share which he inherited on the death of Baishnab Charan. But on the findings we must hold that there was actual dispossession. The lower Appellate Court has accepted the evidence of dispossession as given by the principal defendant himself: and from this evidence, which we have read in order to properly understand the judgment, it is clear that it is the defendant's case that he actually took possession of the share inherited from Baishnab Charan after Baishnab Charan's death and before the settlement made with these ladies by the plaintiff. It is also found that the plaintiff's act rendered this defendant unable to realise rent from his under tenants, for it is the defendant's evidence that the under-tenants whose rents he was unable to realize were in occupation of the land which had been in Baishnab Charan's share. On the facts found we hold that the learned District Judge was right in applying the principle that dispossession by the landlord from a portion of the holding causes suspension of rent of the holding and dismissing the suit.

We, accordingly, dismiss this appeal with costs.

N. H. *Appeal dismissed.*

(1) 34 C. 191.
(2) 2 Ind. Cas. 169; 36 C. 856; 9 C. L. J. 578; 13 C. W. N 853.
(3) 2 Ind Cas. 123; 13 C. W. N. 702; 9 C. L. J. 585.
(4) 28 Ind. Cas 371; 19 C. W. N. 870.
(5) 24 C. 296; 12 Ind. Dec. (N. S.) 864.
(6) 21 Ind. Cas. 957; 18 C. L. J. 509.
(7) (1855) 17 C. B. 30 at p. 64; 25 L. J. C. P. 44; 1 Jur. (N. S.) 1089; 139 E. R. 976; 104 R. R. 562.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 165 OF 1920.

February 28, 1922.

Present :—Mr. Justice Greaves and Mr. Justice Ghose.

Srimati SATYABHAMA SUNDARI, WIFE OF CHANDRA SEKHAR MAJUMDAR—PLAINTIFF—APPELLANT

versus

MOHAMED ESAHAK MEAH—DEFENDANT—RESPONDENT.

Interest—Bond—High rate of interest—Court not to interfere unless interest penal—Contract Act (IX of 1872), s. 74.

Unless satisfied that the rate of interest charged in a bond is a penalty within the meaning of section 74 of the Contract Act, a Court cannot interfere with the stipulated rate of interest, as it is not open to it to make a new contract between the parties. [p. 498, col. 1.]

Aziz Khan v. *Duni Chand*, 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R 1918 (P. C.) and *Balla Mal* v. *Ahad Shah*, 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.), referred to.

Appeal against the decree of the Subordinate Judge, Noakhali, dated the 26th of August 1919, modifying that of the Munsif, Second Court at Sudharam, dated the 20th of December 1917.

FACTS appear from the judgment.

Babu *Asiranjan Chatterjee* (with him Babu *Nogendranath Bose*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for enforcement of a simple mortgage executed on 8th July 1910. The principal advanced was Rs. 150, with interest thereon at 3½ per mensem with quarterly rests. The suit was in 1916. The total claim was valued at Rs. 1,000 to make it triable by Munsif. I gave up a portion of the claim. The defence was that a portion of the claim was paid and that the stipulation for compound interest was penal. First decreed the suit on appeal the Judge has held that a portion of the claim was paid and that the rate of interest was harsh and unconscionable as the very fact of giving up of a portion of the claim showed. He allowed interest at 25 per cent. He relied on *Chhallaphroo Chowdhury* v. *Banga Behary Sen* (1). That was previous to the Privy Council decisions in *Aziz Khan* v. *Duni Chand* (2), *Balla Mal* v. *Ahad Shah* (3).

Maulvi *Nurul Huq*, for the Respondents.—The Privy Council decisions are distinguishable. There the applicability of section 16 of the Indian Contract Act was under consideration. Here the question comes under section 74 of that Act. The bond was for 2 months. The provision for compound interest is clearly penal. Refers to *Krishna Charan Barman* v. *Sanat Kumar Das* (4). 'Penalty' has not been defined in the Act. Both Courts concurrently held that the rate is penal. I submit they are perfectly right.

Babu *Asiranjan Chatterjee* replied in brief.

JUDGMENT.—This is an appeal by the plaintiff against a decision of the Subordinate Judge of Noakhally modifying a decision of the Munsif. The plaintiff's suit was brought on a simple mortgage bond, the principal was Rs. 150. The defendant agreed to pay interest on the money lent at the rate of Rs. 3 2 0 per cent. per mensem, that he would pay off the money together with interest within the month of Bhadra 1317, that he would pay interest for every 3 months within 3 months, otherwise the arrears of every 3 months' interest would be regarded as the principal and the defendant would pay interest thereon at the rate mentioned in the bond. The date of the bond is the 2nd Sravan 1317. The plaintiff sued to recover Rs. 1,000, deducting Rs. 362 13 which he relinquished out of the compound interest.

The first Court decreed the suit in part allowing simple interest on the principal at 3⅛th per cent. per month from the date of the bond up to the period allowed for redemption and thereafter at 6 per cent. until realization. The decree to be satisfied within three months, in default the property was to be sold.

(1) 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311.

(2) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R 1918 (P. C.).

(3) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

(4) 34 Ind. Cas. 609; 25 C. L. J. 24; 44 C. 162; 21 C. W. N. 740.

BAPU v. BHOMJI.

The defendant contended before the Munsif that the sum of Rs. 144 had been paid by him on account of the debt. This claim the Munsif disallowed. The defendant appealed and the lower Appellate Court found that Rs. 144 had been paid by the defendant, and the Court modified the decree of the Munsif allowing interest at the rate of 25 per cent. There was no cross-appeal by the plaintiff against that part of the Munsif's judgment which disallowed compound interest. The defendant contends that the interest allowed is harsh and unconscionable and he states, relying on the provisions of section 74 of the Contract Act, that the provision for interest at the rate mentioned in the bond must be taken to be by way of penalty and accordingly we are asked to interfere with the rate of interest allowed by the Subordinate Judge. It seems to us that having regard to the two decisions of the Judicial Committee in the case of *Aziz Khan* v. *Duni Chand* (2), and in the case of *Balla Mal* v. *Ahad Shah* (3), that it is not open to us to make a new contract between the parties. Accordingly it is not open to us to interfere unless we are satisfied that the rate of interest charged in the bond was a penalty within the meaning of section 74. We have referred to the provisions of the bond and despite the argument addressed to us on behalf of the respondent it is not, I think oper, to us to hold that the provision for interest in the bond is in the nature of a penalty; consequently, I think, we must restore the decision of the Munsif subject to this that the respondent will be entitled to deduct the sums covered by Exhibits A to A 6 which the Subordinate Judge has found had been paid by borrower.

In the result the appeal succeeds and the appellant will be entitled to her costs in this Court only.

R. N.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 13-B OF 1921.

July 28, 1922.

Present:- Mr. Prideaux, A. J. C.

BAPU—DEFENDANT No. 1—APPELLANT

versus

BHOMJI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Berar Land Revenue Code, 1896, *s.* 205—*Pre-emption—Agreement to re-sell—Enforceability against pre-emptor.*

A pre-emptor's right under section 205 of the Berar Land Revenue Code cannot be defeated by the vendee's agreement to re-sell the property to the vendor, nor can the condition to re-purchase be enforced against the pre-emptor. [p. 499, col. 2.]

Ganpatsa Mahadsa v. *Joomabhai*, 2 N. L. R. 150, referred to.

Appeal from the decree of the Additional District Judge, Akola, dated the 31st March 1921, in Civil Appeal No. 391 of 1920.

Mr. *O. B. Parakh*, for the Appellant.

Mr. *A. V. Khare*, for the Respondents.

JUDGMENT.—Section 206 of the Berar Land Revenue Code, 1896, runs:—

"Whenever a co occupant in any survey number proposes to sell or to relinquish in favour of a specified person for valuable consideration, the whole or any portion of his interest in the survey-number.....he shall give notice to all other co occupants of the survey-number of the price at which he is willing to sell, or the amount due, as the case may be. Such notice shall be given through the Tahsildar, and shall be deemed to have been sufficiently served if it be posted at the Chauri or some other public place, and proclaimed by beat of drum, in the village in which the survey-number is situated."

The law provides for the right of pre emption being exercised by any co-occupant of the field in which a share is being sold and gives every co-occupant having a right of pre emption the right to bring a suit in a Civil Court to enforce such right on various grounds, one of which is that no notice was given as required by section 206. The plaintiff, in the present case, was the owner of field survey No. 39 pot *hissa* No. 2 and survey No. 66 of *Mauza* Kalambeshwar, *Taluq* Akola. He sold this land to the second defendant by a registered sale deed, dated the 1st February 1918, for Rs. 1,500 and put this defendant into possession. The first defendant, Bapuji, being a co-occupant in

field survey No. 39 sued claiming his right to pre empt in Civil Suit No. 272 of 918 and obtained a decree on the 24th April 1919, it being ordered that, on his depositing in Court a sum of Rs. 800, on account of the pre-emptive price for payment to the second defendant, Khairushah, he would be put in possession. The money was deposited and possession taken of the pot *hissa* in the beginning of the agricultural year 1919-20. The plaintiff now sues, stating that the sale of the fields to Khairushah was subject to the condition that the latter was to re-convey the said fields to the plaintiff on plaintiff paying Rs. 1,500 within three years from the date of the sale, that such a condition existed was found in the former suit, though the sale was found to be a sale out and out. Defendant No. 2, according to that condition, re-conveyed the two fields to plaintiff by a registered sale deed, dated the 24th September 1919. Plaintiff claims to become the owner of the pot *hissa* in survey No. 39 by his sale, and sues stating that Bapuji is bound by the sale having pre empted the land in dispute with notice of the condition of re-purchase. He claims the pot *hissa* and Rs. 700, the value of the produce in the year 1919-20. The contesting defendant Bapuji denied that the field was originally sold to defendant No. 2 subject to the condition alleged and pleaded that the decision of the Court in Civil Suit No. 272 of 1918 on this point was *res judicata* and bound him. Other pleas were advanced. The first Court found *inter alia* that the sale deed of the 24th September 1919 by the 2nd defendant, Khairushah, in favour of the plaintiff in respect of the land claimed had been duly established but held that that document conferred no title on the plaintiff for the simple reason that, at the time of the sale, the second defendant had no title to the said land which had passed to the plaintiff in virtue of his pre-emption decree. Plaintiff was found to have no right to the land or the value of the crops and he could not even claim possession of the land on payment of what Bapuji paid to pre-empt. The suit was dismissed. On appeal, the Additional District Judge, Akola, holds that the plaintiff should be allowed to add a prayer for specific performance of the contrast proved in the pre-emption suit. An application to this effect had been made to the Trial Court but was rejected. The Appellate Court reversed the decision of the lower Court and sent the case back for re trial. Hence the present appeal.

It is argued for the appellant that the original sale was an out and out sale and no stipulation of re sale bound the pre-emptor, that the pre emptor's right to the land came into existence with the transfer of possession. Order XX, r. 14, sub r. 1 (*b*) of the Code of Civil Procedure states that in these cases of pre-emption the plaintiff's title for land shall be deemed to have accrued from the date of the payment directed. For the plaintiff it is stated that though he cannot enforce his right of specific performance of the contract of re sale against Khairushah on the ground that he now possesses no title to the land in suit, yet he can claim specific performance against the pre-emptor, Bapuji, because he bought with knowledge of the stipulation to re-sell. It is contended that Bapuji can be treated as an assignee. It has been held that a pre-emptor's right under section 205 of the Berar Land Revenue Code cannot be defeated by the vendee re-selling to the vendor after a pre-emption decree has been passed. *Ganpatsa Mahadsa* v. *Joonabhai* (1). The observations of the learned Judge who disposed of that case meets most of the arguments advanced for the plaintiff respondent here. It has to be remembered that after the sale to Khairushah the present plaintiff was a stranger to the land and the result of a re-sale by Khairushah if he had any title to convey would be to give Bapuji another cause of action to pre-empt. As stated by Batten, A. J. C., in the case above quoted, "but to hold that a co-occupant who has voluntarily parted with the whole of his share and who has thus voluntarily constituted himself a stranger, and has by introducing another stranger brought about the state of things which the Law of Pre-emption is designed to prevent, can defeat a pre emptor by obtaining a re-conveyance from his vendee, would be to hold that a person who has once been a co occupant is in as good a position as a person who is still a co-occupant" In my opinion, no suit for specific performance could possibly lie against

(1) 2 N. L. R. 150.

the pre-emptor. It was the plaintiff's own disregard of the provisions of the Berar Land Revenue Code relating to pre emp ion that forced Bapuji into Court to claim the land as a co-occupant. The second defendant now has no title to the land. Bapuji has obtained title by paying the purchase price to the second defendant. I cannot see how that title is burdened by any condition made by the second defendant when he bought from the plaintiff. That sale itself was void against the co-occupant and any condition or stipulation in connection with it would be also void. It is difficult to see what consideration supported the agreement to re-sell. To recognise an agreement of this nature would be to defeat the prov sions of the enactment governing the Law of Pre emption in Berar. The condition of re-purchase cannot be enforced against Bapuji. His sale-deed from the second defendant gives plaintiff no cause of action, for that person had no title to the land at the date of sale. The result is that this appeal succeeds. I set aside the decree of the lower Appellate Court directing a re-trial and restore the decree of the first Court dismissing the suit. Costs of this appeal will be paid by the plaintiff-respondent.

G. R. D. & W. C. A.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1474 OF 1919.

February 2 , 1922.

Present:—Mr Justice Newbould and Mr. Justice Panton.

PROSANNA KUMAR BEDANTA TIRTHA BHATTACHARJYA—PLAINTIFF—APPELLANT

versus

MADHU BADYA AND OTHERS—RESPONDENTS.

Estates Partition Act (V B. C. of 897), ss. 7, 99—Joint estate—Partition by private arrangement—Tenure, creation of—Partition, regular, under Act—Tenure, avoidance of—Appeal, second—Finding of fact, if can be attacked on ground of insufficiency of evidence.

Section 99 of the Estates Partition Act has no application to a case where the tenure sought to be avoided was cr ated by a co-sharer in respect of land allotted to him under a private partition and which was held by him in severalty at the time of the creation of the tenure. [p. 502, col. 1.]

The main test of the applicability of section 99 is holding the land in severalty under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under section 7 of the Act [p 502, col. 2]

Noyendra Mohan Ray v. *Pyari Mohan Saha*, 30 Ind. Cas. 420; 43 C. 103; 21 C. L. J. 605; 20 C. W. N. 319, referred to.

In second appeal a finding of fact of the lower Appellate Court cannot be attacked on the ground of insufficiency of evidence. [p. 501, col. 1.]

Appeal against the decree of the Subordi nate Judge, Faridpur, dated the 14th of May 1919, modifying that of the Munsif, Second Court at Madaripur, dated the 20th of July 1917.

FACTS appear from the judgment.

Babu *Dwarkanath Chakerbutty* (with him Babus *Frojo Lal Chakerbutty*, and *Froboth Kumar Das*, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for recovery of possession. The defendant alleged to have held a tenure under a revenue paying estate which is held by a number of proprietors. The estate consists of seventy-two villages. It was recorded as *tymali* in 1863 held by a common manager. He continued in possession down to 1882. In 1899 some of the co sharers applied for partition. It was completed about 1905. During the partition proceedings, the defendants set up their title to hold under a permanent tenure created by some of the proprietors and prayed that partition might be effected on that basis. The Collector rejected their prayer. The partition proceeded on the basis of *ryotwari* rents. The first Court decreed the suit. On appeal the Appellate Court dismissed the suit holding that section 99 of the Estates Partition Act would not apply. The tenure was created in 1865. I submit section 99 of the Estates Partition Act would apply. The finding of the learned Subordinate Judge as to there having been some sort of arrangement is not warranted by evidence. There is evidence to show that common manager continued to possess till 1882. At the time of the creation of the lease the estate was unquestionably joint. Refers to sections 7,

and 99 of the Estates Partition Act. Here there was no contest about the jointress of the estate when three of the proprietors only applied for partition. The defendant's objection was then overruled. I submit the defendant cannot now say that his rights still remain on the face of the partition. Refers to *Joy Sankari Gupta* v. *Bharat Chandra Bardhan* (1), *Nogendra Mohan Ray* v. *Pyari Mohan Saha* (2). There is a difference between these two decisions. Refers to *Ananda Kishore Chowdhury* v. *Dai i Thakurani* (3), *Anand Kisore Chowdhury* v. *Dai i Thakurain* (4). The facts found by the Subordinate Judge are not sufficient to show that there was a partition within the meaning of section 7 of the Estates Partition Act. He refers to the evidence of the plaintiff. I submit that is no evidence of a previous partition. There is no finding that the lands were held in severalty in 1865. Refers to *Saibesh Chandra Sarkar* v. *Beioy Chand Mahatap* (5) decided by Chatterjee, Panton, JJ., in December 1921.

Babu *Suresh Chandra Taluqdar* (with him Babu *Nibaran Chandra Samajpati*), for the Respondents —This appeal is absolutely concluded by findings of fact. The case in *Nogendra Mohan Ray* v *Pyari Mohan Saha* (2) is clearly in point and has been decided in my favour. If your Lordships disagree with that case then you will have to refer this case to the Full Bench. The law is well settled and section 99 has no application. That decision has been uniformly followed. See *Hridoy Nath* v. *Mohobutnessa Bibee* (6), *Aimanaddi Patari* v. *Nabin Chandra Gope* (7), *Abdul Latif* v. *Amanaddi* (8). All these cases lay down that section 99 has no application where the lands are held in severalty. The evidence clearly bears out a separate possession.

Babu *Dwarkanath Chakerbutty*, in reply.—The private partition must be proved to have been effected before the creation of the tenure; upon that point there is no finding of the Judge.

[NEWBOULD, J.—Is not the fact of granting a lease sufficient to show that the lands were partitioned?]

That is evidence of separate possession. That would not take the case out of the Statute. Refers to *Anand Kisore Chowdhury* v. *Daiii Thakurain* (4). Mere separate possession would not be enough.

[NEWBOULD, J.—Under what section did the Collector overrule the defendant's objection? Does that amount to *res judicata* or some such thing?]

I do not go so far. Refers to sections 22, 23 of the Estates Partition Act. I do not think it has got the effect of a decree. It stands upon the footing of estoppel.

JUDGMENT.—This is an appeal from the decision of the Subordinate Judge of Faridpur reversing the decision of the Second Munsif of Madaripore. The plaintiff appellant was one of the proprietors of the estate which was partitioned under Act V (B. C.) of 1897. In the Sahan allotted to the plaintiffs certain land was held by the defendant in permanent tenure created by some of the plaintiffs co-sharers in the estate. The plaintiff brought the suit to get *khas* possession of this land by avoiding the tenure. The Court of first instance gave the plaintiff a decree holding that section 99 of the Partition Act was applicable. That decree has been reversed on appeal by the lower Appellate Court.

The only question in this appeal is the applicability of section 99. We hold that on findings arrived at by the learned Subordinate Judge this section is inapplicable. It is found that "by private partition among all the proprietors the defendant's landlords got the land in suit in their share and that they had no co sharers when they granted the permanent tenure right to the defendant's ancestors." This finding meets the objection that has been taken, namely, that there was no express finding that the land was held by the co-sharers in severalty when the lease to the defendants was granted. This being a second appeal this finding cannot be attacked on the ground of insufficiency of evidence. But it has been attacked on the ground that there is no evidence on the point. We have examined a copy of the evidence

(1) 26 C. 434; 3 C. W. N. 209; 13 Ind. Dec. (N. S.) 880.
(2) 30 Ind. Cas. 420; 43 C. 103; 21 C. L. J. 605; 20 C. W. N. 319.
(3) 1 Ind. Cas. 549; 10 C. L. J. 189; 36 C. 726.
(4) 28 Ind. Cas. 580; 21 C. L. J. 296 at p. 300.
(5) 65 Ind. Cas. 711; 26 C. W. N. 506.
(6) 20 C. 285; 10 Ind. Dec. (N. S.) 194.
(7) 5 Ind. Cas. 307; 11 C. L. J. 85.
(8) 9 Ind. Cas. 589; 15 C. W. N. 426.

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taken and we hold that though the evidence is scanty there is sufficient to enable the learned Subordinate Judge to draw an inference from which he might come to this finding of fact. It cannot be said that as a point of law there is no evidence to support these findings.

It is urged that as the partition by the Collector was made on the application by some only of the co-proprietors section 7 of the Act would prevent there having been a partition after there had been a previous division by private arrangement. But the private arrangement described in section 7 is not necessarily the same private arrangement that would prevent the application of section 99. From the case law on the subject it would appear that the main test of applicability of section 99 is holding the land in severalty under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under section 7. On the findings arrived at, the facts of the case seem undistinguishable from those of the case of *Nogendra Mohon Ray* v. *Pyari Mohan Saha* (2), and we cannot say that the learned Subordinate Judge committed any error in law in the decision at which he has arrived.

We accordingly dismiss the appeal with costs.

The cross-objection is not pressed. It is accordingly dismissed. We make no order as to costs in the cross-objection.

B. N. & N. H.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 10 OF 1922.

July 15, 1922.

Present:—Mr. Batten, J. C. and Mr. Hallifax, A. J. C.

ZAHROS SYED ALI—DEFENDANT No. 5—APPELLANT

versus

AHMAD SYED AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, application for appointment of—Procedure—Estate in possession of Muhammadan widow—Receiver, appointment of, whether justified—Refusal to appoint Receiver, whether bars subsequent application for appointment.

In dealing with an application for the appointment of a Receiver, the Court should examine the grounds given for such appointment, and take the pleadings of both parties on the application, and then dispose of it according to law, as laid down in O. XL, r. 1, of the Civil Procedure Code. The application should not be dismissed summarily. [p. 503, col. 1.]

There is nothing in the law, as laid down in O. XL, r. 1, of the Civil Procedure Code, which prohibits a Court from appointing a Receiver in a case under Muhammadan Law in which a widow or her heirs claim to remain in possession of the estate of her husband until her dower has been paid and the accounts have been settled, provided there are good grounds within the scope of the section for a Receiver being appointed. [p. 503, col. 2.]

The mere fact that a Receiver had not been previously appointed is not in itself a sufficient ground for refusing to appoint one at the later stage of a case. [p. 503, col. 2.]

Appeal against the order of the District Judge, Saugor, dated 4th February 1922, in Civil Suit No. 8/22 of 1906-09.

Mr. *M. R. Dixit*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—This appeal arises out of an order passed in the suit which was the subject of the appeal to the Privy Council, reported as *Fakrunissa* v. *Moulvi Izarus Sacik* (1). The appeal is against an order of the District Judge, Saugor, dated the 4th February 1922, refusing to appoint a Receiver at the request of the present appellant, the fifth defendant.

The suit was instituted in 1906 by the widow of the deceased Moulvi Zabur-ul-Islam who died in 1903. The original plaintiff, who was the widow, claimed a quarter of the estate as her share and also claimed dower which was found to be Rs. 1,25,500. This Court in June 1913 ordered the case to be remanded to the lower Court for further proceedings necessary for final decree in which accounts should be taken. The plaintiff is dead and the present respondents are her heirs. The greater part of the estate is admittedly in the possession of the respondents-plaintiffs.

The main object of the inquiry which has been going on, is to ascertain what has been the profit of the estate in the

(1) 63 Ind. Cas. 898 17 N. L. R. 72; 25 C. W. N. 866 (P. C.).

possession of the plaintiffs and their predecessor. On the 2nd September 1912 the defendants, including the present fifth defendant, applied that a Receiver should be appointed. On the 27th November 1912 it was ordered that the parties should file affidavits and this was done by the 21st April 1913. No further action was taken on the application for the appointment of a Receiver and on the 12th January 1914 the suit was dismissed.

After disposal of the Privy Council appeal the proceedings were re-opened on the 3rd May 1921, the first hearing being on the 2nd July 1921. On the 2nd December 1921 the defendants Nos. 1 to 4 applied for the appointment of a Receiver. This application was dismissed by the District Judge with the following remarks:—

"There has been no order for a Receiver since 1906 and I see no reason to appoint one now, more especially as it will encourage defendants to further delay the disposal of the case."

The *ex parte* order against the fifth defendant was set aside on the 4th February 1922, whereupon he applied for the appointment of a Receiver with an alternative to be put in possession of his share of the estate on certain terms, and another request was made in the same application relating to the plaintiffs' accounts to which no attention was paid.

It is admitted in this Court that the only order appealable is that refusing to appoint a Receiver. The reasons given by the District Judge for refusing the request of the fifth defendant are stated as follows:

"At the last hearing defendants Nos. 1, 2, 3, 4 applied for the appointment of a Receiver and it was refused. There has been no Receiver since 1906 and full detailed accounts and the account-books have been put in by plaintiffs and I can see no reason to appoint a Receiver. I, therefore, reject the application for appointment of a Receiver."

The learnad Counsel for the respondents supports the order of the District Judge by contending that, under Muhammadan Law, a widow or her heirs are entitled to remain in possession of the estate of her deceased husband until she has been paid her dower, and that, therefore, the District Judge was incompetent to put a Receiver in charge of the estate in place of the widow or her heirs until accounts had been settled and the dower declared to be paid. We can find nothing in the law, as laid down in O. XL, r. 1 of the First Schedule, Civil Procedure Code, which prohibits a Court from appointing a Receiver in a case like the present, provided there are good grounds within the scope of the section for a Receiver being appointed.

It is complained on behalf of the appellant that the District Judge has not exercised his discretion properly in refusing to appoint a Receiver and that in fact he has not exercised his discretion at all and has refused without going into the merits of the request at all. We are bound to say that there are good grounds for this complaint. The mere fact that a Receiver has not been previously appointed is not in itself a sufficient ground for refusing to appoint one now, and the District Judge seems entirely to have overlooked the fact that a request for the appointment of a Receiver was made in 1912 and the proceedings were only dropped because the suit was dismissed in January 1914. The District Judge in saying that "full detailed accounts and accounts books have been put in by plaintiffs" does not examine the question as to whether or not the accounts put in by the plaintiffs are *prima facie* satisfactory ones. The copies of the accounts, which have been placed before this Court, show net profits of Rs. 56,362 from June 1903 to June 1920, a period of 7 years. This gives an annual income of Rs. 3,256 for 67 villages, or Rs. 48 odd per village for a year. On the face of it, if the extracts shown to us are true samples of the accounts put in by the plaintiffs, there seem to be good grounds for the appointment of a Receiver. We can express no opinion on the point, but it is certainly one that ought to be taken into consideration by the lower Court. The grounds given by the appellant for the appointment of a Receiver should have been examined and pleadings of both parties should have been taken on the application, and the application for the appointment of a Receiver have been disposed of according to law as laid down in O. XL, r. 1. As it is, the application for a Receiver has been summarily dismissed

for reasons which appear to us to be unsound. The main parts of the record of the case are with the lower Court which is proceeding with the suit and we have not sufficient material before us to dispose of the application ourselves. It is, moreover, one which preferably ought to be disposed of by the District Judge himself after proper and legal use of his discretion. For these reasons, we set aside the order of the District Judge and direct that he restore to his file the application put in by the fifth defendant for the appointment of a Receiver and dispose of it according to law. The costs in this Court will be costs in the case. The Pleader's fee in this Court will be Rs. 100.

G. B. D. & W. C. A. *Order set aside.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 99 OF 1919.

April 12, 1922.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

BAI DHONDUBAI AND ANOTHER—APPELLANTS

versus

LAXMANRAO TRIMBAKRAO JAVADEKAR AND ANOTHER—RESPONDENTS.

Gift—Intention—Gift to adopted son—Adoption declared invalid—Gift, validity of, how determined—Motive of donor—Construction of document—Reference to similar documents.

Where a person makes a gift to another describing him as his adopted son and the adoption turns out to be invalid, the validity of the gift depends upon the question whether the donor merely described the donee as his adopted son or intended that the validity of the gift should be conditional on the validity of the adoption. [p 505, col. 1.]

The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. [p 505, col. 1.]

Fanindra Deb Raikat v. *Rajeswar Das*, 12 I. A. 72; 11 C. 468; 4 Sar P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.), quoted.

The Court should not strain to adopt a construction, which would defeat the intention of the testator, unless it is absolutely certain from the words of the Will that the testator intended to make the gift to the donee conditional on the adoption being valid. [p. 505, col. 2.]

A Hindu adopted his daughter's son *J.* Some nine years after the adoption he by Will made a gift of his property, "to my adopted son *J.*" After the death of the testator the adoption was declared invalid and the question was about the validity of the gift:

Held, that it was clear that the testator made the gift out of natural love and affection and that in making his Will he merely described the donee as his adopted son in the ordinary course without intending that the gift should be conditional on the validity of his adoption [p. 505, col. 2.]

Lalta Prasad v. *Salig Ram*, 1 Ind Cas. 555; 31 A. 5 at p. 6; A. W. N. (1908) 249; 5 A. L. J. 626, referred to.

The language of one instrument does not afford much assistance in the construction of another. [p 505, col. 1.]

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449. 36 I. A. 148 at p. 165; 11 Bom. L. R. 1234; 10 C. L. J. 284; 6 A. L. J. 857; 19 M. L. J. 530; 36 C. 1003; 14 C. W. N. 1 (P. C.), quoted.

First appeal from the decision of the First Class Subordinate Judge at Ahmedabad, in Civil Suit No. 552 of 1915

Mr. *Coyajee* (with him Mr. *H. V. Divatia*), for the Appellants.

Sir *Thomas Strangman* (with him Mr. *G. N. Thakor*), for Respondent No. 1.

Mr. *R. J. Thakor*, for Respondent No. 2.

JUDGMENT—This is an appeal from the decision of the First Class Subordinate Judge of Ahmedabad. The facts of the case are fully set out in the judgment. The only question that has been argued in this appeal is whether the plaintiff has proved his title to the suit house. The plaintiff claimed under the Will of his brother Janardan, who died on the 6th January 1913. Janardan had been adopted in 1892 by his mother's father, Vishnupant. In October 1901 Vishnupant made a Will and under that Will he gave a life interest in the suit house to his wife, Rakhmabai, and the remainder over to his adopted son, Janardan. Vishnupant died in 1901 and in 1903 certain disputes that had arisen between Janardan and Rakhmabai were settled by the execution of a deed of release and agreement, whereby Janardan's interest in the suit house after the death of Rakhmabai was recognised.

The only question, therefore, is whether the gift of the suit house by the Will of Vishnupant was a valid gift, and that depends on the question whether the testator merely described Janardan as his adopted son or intended that the validity of the gift should be conditional on the validity of the adoption. As was pointed out in

Abhiram Goswami v. *Shyama Charan Nandi* (1) the language of one instrument does not afford much assistance in the construction of another; and the case of *Fanindra Deb Raikat* v. *Rajeswar Das* (2) which is relied upon by the appellants, cannot afford any assistance to the Court in construing the present Will, as the words in the Angikarpatra in that case were entirely different. If we were to consider the facts in other cases, the document in *Lalta Prasad* v. *Salig Ram* (3) was almost in the exact terms of the present Will. The testator in that case gave all his property to his wife for her life and then declared that after her death Lalta Prasad, his adopted son, should be owner of the property. The learned Judges said:

"There is absolutely nothing in the Will to show that the fact of the adoption of the plaintiff was the motive or reason for the gift, and, in the absence of anything of the kind, it appears to us that, interpreting the language of the gift in its ordinary meaning, we must treat it as a gift to Lalta Prasad as a *persona designata*, and that, therefore, the gift is valid."

As was stated in *Fanindra Deb Raikat* v. *Rajeswar Das* (2) (page 89) "the distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances." It seems to us that the Court should not strain to adopt a construction, which would defeat the intention of the testator, unless it was absolutely certain from the words of the Will that the testator intended to make the gift to Janardan conditional on the adoption being valid. There is no indication that Vishnupant had any such intention. We can only presume that he had adopted his daughter's son out of motives of affection and for perpetuating his name without considering too deeply the rules of Hindu Law which invalidated such an adoption. No doubt, he hoped his family would recognise the adoption and not dispute it. But having made the adoption so far back as 1892, when he came to make his Will, it is clear that he wanted to make this gift to Janardan, and he merely described him as adopted son in the ordinary course without intending that the gift should be conditional on the adoption of Janardan being valid according to the rules of Hindu Law. He also in the Will directed that Janardan should take one-third share in the Inam property. We are not concerned with that gift but it may be pointed out that the words of that gift were somewhat different and would tend more to the construction which the appellants wish the Court to put upon the words of the gift of the house. If that difference of language has any value, it is more against the appellants, for it shows that whatever the intention of the testator might have been with regard to the share in the Inam property, at any rate with regard to the house, he intended to give it to Janardan, whatever disputes might arise in the future with regard to his adoption. It is not necessary, therefore, to say anything with regard to the effect of the compromise or arrangement which was arrived at in 1908.

For his own safety Mr. Coyajee asks us to express the opinion that the eighth issue in the suit, whether the defendants Nos. 2 to 4's plea as to the invalidity of Janardan's adoption is barred by limitation has not been considered, and we do so.

The appeal will be dismissed with costs, *i. e.*, with costs as against respondent No. 1; the other respondents to bear their own costs.

N. H.

Appeal dismissed.

(1) 4 Ind. Cas. 449; 36 I. A. 148 at p. 165; 11 Bom. L. R. 1234; 10 C. L. J. 284; 6 A. L. J. 857; 19 M. L. J. 530; 36 C. 1003; 14 C. W. N. 1 (P. C.).

(2) 12 I. A. 72; 11 C. 463; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.).

(3) 1 Ind. Cas. 555; 31 A. 5 at p. 8; A. W. N. (1908) 249; 5 A. L. J. 626.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 19-B OF 1921.

August 1, 1922.

Present:—Mr. Kotwal, A. J. C.

CHAMPAT—DEFENDANT—APPELLANT

versus

GANPATRAO—PLAINTIFF—RESPONDENT.

Berar Patels and Patwaris Law, 1900, *ss.* 6, 9, 20—*Patelship allowance, suit for share of—Jurisdiction of Civil Court.*

Under section 20 of the Berar Patels and Patwaris Law, 1900, a Civil Court has no jurisdiction to entertain a suit to enforce a claim to a share in the emoluments appertaining to the office of Patel.

Appeal from an order of the Second Additional District Judge, Amraoti, dated the 7th April 1921, in Civil Appeal No. 30 of 1922.

Mr. *R. R. Jaiwant*, for the Appellant.

Mr. *Balwantrao Tendhekar*, for the Respondent.

JUDGMENT.—Mouza Singad was a village leased out under the Waste Land Rules of 1865. In 1886 it was settled in Patelship under r. 5 of the rules for the leasing out of waste lands in Berar, 1865. The allowance annexed to the Patelship is 25 per cent on the collections of the village. The present amount of collections is Rs. 521-7-6. The allowance is thus Rs. 130-5-10. Under section 6 A (4) of the Berar Patels and Patwaris Law, 1900, the share of the allowance (which in the section is called the emoluments of the Patel), to which the defendant, who is the sharer, appointed to be the Patel is entitled, is admittedly Rs. 26. The plaintiff claims a half share in the balance of the allowance. He files this suit for Rs. 156 8 9, the total of the amount due to him for the three years ending 1919-20. It is urged, as a preliminary objection in defence, that, under section 20, Berar Patel and Patwaris Law, the Civil Court has no jurisdiction to try the claim. The Trial Court upheld the objection and dismissed the suit. The lower Appellate Court has overruled it and remanded the case. The defendant appeals against the order of remand.

Section 20 of the Patels and Patwaris Law provides that a Civil Court shall not exercise jurisdiction with respect to any claim by any person to the office of Patel or Patwari or to any emolument appertaining to the office. The question therefore, is: is the present claim one to an emolument appertaining to the office of patel? In my opinion it is. Section 6 A (4) provides that, notwithstanding anything in section 9 the balance of the emoluments shall be divided by the Patel in proportion to their shares among all sharers (including himself) in the Patelship. But I do not see how this provision modifies section 20, as the lower Appellate Court says, and vests the jurisdiction to entertain and enforce a claim to a share in the emoluments in the Civil Court. Section 6 A (4) confers a right to share in the emoluments which was negatived by section 9, but it does not do away with the exclusion of Civil Court jurisdiction provided by section 20. In my opinion, the Civil Court's jurisdiction to try the present claim is barred. The appeal, therefore, succeeds; the order of the lower Appellate Court is set aside. The decree of the First Court is restored. Costs in all Courts will be paid by the plaintiff-respondent.

W. C. A. *Appeal allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 429 OF 1921.

April 13, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

RANGASWAMI SHETTI—DECREE-HOLDER—APPELLANT

versus

SHESHAPPA MANJAPPA SHIMPI—JUDGMENT-DEBTORS—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art 182 (5)—Decree transferred to another Court—Application for further transfer made to First Court not step-in-aid of execution.

When a Court which has passed a decree transfers it for execution to another Court, an application for transfer to still another Court should be made to the Court to which the decree has already been transferred. Such an application made to the First Court cannot be treated as a step-in-aid of execution, as it ceases to be the proper Court within the meaning of Sch. I, Art 182 (5) of the Limitation Act, as soon as it has transferred the decree. [p. 507, col. 2.]

RANGASWAMI SHETTI v. SHESHAPPA MANJAPPA SHIMPI.

Maharajah of Bobbili v. *Narasaraju Peda Baliara*, 36 Ind. Cas. 682; 43 I. A. 238; 8 Bom. L. R. 909; 31 M. L. J. 310; 39 M. 649; 14 A. L. J. 129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.), followed.

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 17 of 1920, reversing an order passed by the Subordinate Judge, Sirsi, in Darkhast No. 251 of 1919.

Mr. *P. B. Shingne*, for the Appellants.

Mr. *G. P. Murdeshwar*, for the Respondent.

JUDGMENT

MACLEOD, C. J.—The plaintiffs obtained a decree in the Court of the Principal District Munsif of Salem of the Madras Presidency in 1910. After ineffective attempts at execution the decree holder applied that the decree should be transferred to the Court of the Subordinate Judge of Sirsi in the Bombay Presidency for execution. The decree was transferred in July 1914. No steps were taken in the Sirsi Court to execute the decree and the Sirsi Court returned the decree unexecuted to the Salem Court in November 1918. In 1919 the Salem Court again transferred the decree to the Sirsi Court and the present Darkhast was filed on 9th June 1919. The judgment debtor opposed on the ground that execution was barred. The question was whether an application which had been made on the 4th August 1916 to the Salem Court praying that the decree might be sent to the District Munsif of Sagaram in the Mysore State for execution was a step-in-aid in execution made to the proper Court. The District Judge, following the decison in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (1), came to the conclusion that the Salem Court was not the proper Court in which to apply to take a step-in-aid when the decree had been transferred to the Sirsi Court. Under Schedule I, Art. 182 (5), of the Indian Limitation Act the period of limitation applicable is three years from the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree, and the "proper Court" by Explanation II means the Court whose duty it is to execute the decree or order. Under O XXI, r. 10 "where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof." In *Maharajah of Bobbili* v. *Narasaraju Baliara* (1) a decree was passed by the District Court and was sent to the Court of a Munsif for execution and it was held that when the decree of a District Court had been sent, under the Code of Civil Procedure 1882, section 223, to the Court of a Munsif for execution and had not been returned to the District Court, the "proper Court" within the meaning of the Indian Limitation Act, 1908, Schedule I, Art. 185 (5), in which to apply "for execution, or to take some step in-aid of execution" of the decree was the Court of the Munsif, with the result that an application to the District Court would not prevent the time for enforcing the decree from running (under Art. 182) from the date upon which it was made.

In that case the application to the District Judge was for execution of the decree by sale of immoveable properties whereas in this case there was an application to the Court of Salem for the transfer of the decree to another Court. It seems to me to make little difference whether there is an application for execution or only an application to take a step-in-aid of execution. For it clearly seems to have been their Lordships opinion that when the Court which has passed a decree sends it for execution to another Court, then the First Court ceases to be the proper Court within the meaning of Schedule I, Art. 182 (5) of the Indian Limitation Act. Therefore, the decision of the District Judge was right and the appeal must be dismissed with costs.

SHAH, J.—I have felt some difficulty in this case. Though it is clear from the provisions of section 42, that when the decree is once transferred to another Court, that Court has the same powers in executing such decree as if it had been passed by itself. I do not find any express provision in the Code as to what procedure a party is to adopt when he wants to get the decree transferred again to another Court. There is no pro-

(1) 36 Ind. Cas. 682; 43 I. A. 238; 18 Bom. L. R. 909; (1916) M. L. J. 310; 39 M. 649; 14 A. L. J. 129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 558; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26 (P. C.).

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vision as to whether in such a case the application should be made by him in the first instance to the Court to which the decree has been transferred or to the Court which originally passed the decree, and which made the order transferring the decree for execution on the first occasion. The difficulty arises from the absence of any express provision in the Code on the point. It is possible, however, to read section 42 of the Code in a comprehensive manner, and to hold on the words of that section that even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred; and the observations in *Maharajah of Bobbili* v. *Narasaraju Baliara* (1) show that all the applications after the decree is once transferred for execution to another Court, in connection with its execution, must be made to that Court. No doubt the application in that case was for the execution of the decree, and as it was made to the Court which had already transferred the decree, it was held that the application was not made to the proper Court. The application in the present case is not exactly of that kind, and I should have been glad to see my way, if possible, to hold that another application for a transfer to a Third Court might be made to the Court which had originally passed the decree. At any rate it may be said in favour of that view that there is no express provision prohibiting such a procedure. At the same time there is much to be said in favour of the view accepted by the lower Appellate Court, and by my Lord the Chief Justice. On the whole, I think, though not without hesitation, that the application in this case to the Salem Court, which had already transferred the decree for execution to the Sirsi Court, for a transfer of the decree to another Court, cannot be treated as having been made to the proper Court and, therefore, cannot be held to be a step in-aid of execution.

N. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 13 OF 1921.

June 21, 1922.

Present:—Mr. Prideaux, A. J. C.

NARAYAN AND ANOTHER—DEFENDANTS NOS. 1 AND 2

versus

SHANKERLAL AND OTHERS—PLAINTIFFS RESPONDENTS.

Hindu Law—Gift subject to mortgage—Acceptance by donee—Donee, whether can avoid mortgage on ground of absence of legal necessity—Alienee for value, and donee of gift, difference between.

Although it is open to an alienee for value to raise the question of legal necessity, a donee who accepts a gift burdened with a mortgage cannot plead the absence of legal necessity for the mortgage. [p. 510, col. 1.]

Dalchand v *Chand Khan*, 27 Ind. Cas. 859; 11 N. L. R. 1, referred to.

Appeal from a decree of the Subordinate Judge, Wardha, dated the 12th October 1920, in Civil Suit No 34 of 1919.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *P. V Charpure*, for the Respondent.

JUDGMENT.—The plaintiffs sue on a mortgage-deed for Rs. 3,000 executed on 16th December 1908 by one Sita They claim Rs. 7,384 7-0 thereon or foreclosure of the absolute occupancy fields Nos 10 and 11 in Khel B of Mouza Khatkhed, Tahsil Wardha. These fields came to Sita who was the mother of defendant No 2 from her father, one Gajmal. Sita died on 19th April 1913. Defendant No. 1 is the son of defendant No. 2. Defendants Nos. 3 and 4 are said to be the nearest reversioners of Gajmal. On 3rd September 1919, that is, after the execution of the mortgage, Sita executed a deed of gift as regards these fields in favour of the first two defendants. The case proceeded *ex parte* against *Musammat* Jani, the second defendant; the others contested the case. The defendant No. 1 contends that as a *bandhu* he is entitled to the property. Defendants Nos. 3 and 4 claim to be the agnates of Gajmal and as such the immediate reversioners. The gift was denied by the last two defendants. The pleadings led to the following issues:—

1, Whether *Musammat* Sita executed the mortgage in suit for consideration ?

2. If so, whether Rs. 2,985 was not due by her and whether Rs. 15 was not paid in cash to her ?

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3. Whether the mortgage was validly attested ?

4. Whether the agreement to pay compound interest at 12-annas per cent. per annum was unconscionable ?

Whether it amounted to a hard bargain and should be relieved against ?

5. Whether the mortgage was justified by legal necessity, and is binding on the defendants ?

6. Whether out of the consideration Rs. 681 were borrowed for purchasing fields for the defendant No 1 and if so, how will this fact affect the liability of this defendant for the claim on the mortgage ?

7, Whether Saoji and Raojit, the grandfathers of the defendants Nos 3 and 4, were brothers of Gajmal. Whether these defendants are nearer reversioners than the defendant No. 1 ?

8. Whether Sita gifted the property to the defendant No. 1 on 3rd September 1909 ?

9. Whether the defendant was put in possession in pursuance of the gift ?

10. Whether the gift was legally valid and is binding on the defendants Nos. 3 and 4 ?

11. What amount is now due on the mortgage ?

The Trial Court's finding on the issues may be summarised as follows. That Sita executed the mortgage which was properly attested, that as regards the passing of consideration the defendants Nos 3 and 4 are held to be the heirs, while defendant No. 1 would be a mere donee and the proof of the execution of the mortgage-deed would throw on him the burden of proving that the consideration did not pass, while against the last two defendants that burden would lie on the plaintiffs. When the mortgage-deed was executed Rs. 2,985 were due from Sita on account of old debts and Rs. 15 were paid in cash to her, she thus recieved full consideration. The fourth issue was found in the nagative. Defendants Nos. 3 and 4 were found to be the next reversioners. It was found unnecessary to decide the question of gift and delivery of possession, but if necessary the Judge holds that Sita gifted the defendant No. 1 who was put in possession of the gift and the gift was thus valid, but as Sita was incompetent to gift away the property inherited from her father such gift was not binding on defendants Nos 3 and 4. It was held that the mortgage was not for legal necessity but part of it, namely, Rs. 681 were borrowed for acquiring a field for the first defendant. Not being for legal necessity, the mortgage was not binding on defendants Nos. 3 and 4, the next reversioners, but was binding on defendant No. 1, the donee. The claim for Rs. 7,38 -7 0 or, in default, foreclosure was decreed against defendants Nos. 1 and 2, whole the suit against defendants Nos. 3 and 4 was dismissed.

The present appeal against that finding is filed by defendants Nos. 1 and 2, no cross-objection has been put in and, therefore, the finding as regards want of legal necessity stands. It is here admitted that Narayan cannot be a reversioner and it is admitted that defendants Nos. 3 and 4 are, as regards this defendant, nearer reversioners. Narayan is the donee and the respondents here do not deny that possession follows the gift. It is stated that the donee could raise a plea that no legal necessity existed though no parallel case can be pointed out. Arguments in this Court narrow themselves to this, that the execution of the mortgage has not been proved nor has the receipt of consideration. The fact that Sita afterwards denied the execution of the mortgage and that it had to be proved against her in the Registrar's Court is of little value against the direct evidence there is on record. Ramchandra (P. W. No. 14), one of the attesting witnesses, swore to Sita executing the document in his presence and in that of one Janu Mahli now dead. She admitted the consideration at the time. Raghoba, her son-in law and husband of the second defendant, was present at the time. Laxman, (P. W. No. 2), is the writer of that mortgage. He also speaks to its having been executed by Sita in the presence of the attesting witnesses. Then there is evidence of one of the plaintiffs, P. W. No. 11, on the fact that the stamp of that document was purchased by Raghoba, D. W. No. 1, the father of defendant No. 1 and husband of defendant No. 2. There is no doubt that the finding of the lower Court that Sita executed the mortgage and that it was properly attested is correct. As regards the passing of the consideration, there is evidence that

Sita admitted having received it. Raghoba himself admits that he used to take money for Sita from the plaintiffs' shop. P. W. No. 11 one of the plaintiffs, P. W. No 12, another plaintiff, P. W. No. 13, plaintiffs' agent, P, W. No. 5 and copies of the account-books are sufficient to prove that the consideration for the mortgage was received by Sita. I do not think that the plea of want of legal necessity can be raised by the donee in this case, and there is some evidence to show that a portion of the consideration of the mortgage deed was expended in getting a field for Narayan. It is contended that a donee is an alienee. Section 122 of the Transfer of Property Act is quoted, also section 38 of the same Act. It is true that an alienee for value could raise the question of legal necessity. *Dalchand* v. *Chand Khan* (1). But it seems to me that the donee here accepts the gift burdened with the mortgage. The mortgage would be enforceable against the widow though it may not be enforceable except as regards that part proved to be for legal necessity against the reversioners. The question whether some of the money was expended in the purchase of a field for Narayan is not pressed and is really immaterial nor is it here argued that the interest is excessive. As already stated, the case has been contested here on the ground that the execution of the mortgage decree (deed) has not been proved nor has the receipt of consideration. I have no hesitation in finding these two facts against the present appellants. The appeal fails and is dismissed with costs. The appellants will pay the respondents' costs.

G. R. D. *Appeal dismissed.*

(1) 27 Ind. Cas. 859; 11 N. L. R. 1.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 70 OF 1920.

June 14, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

MAHADEO GOVIND SUKTANKAR—PLAINTIFF—APPLICANT

versus

RAMCHANDRA GOVIND SUKTANKAR—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 16, proviso—Jurisdiction.—Land situate outside British India—Suit for mesne profits, whether maintainable in British Court.

The proviso to section 16 of the Civil Procedure Code makes it clear that a Court in British India has jurisdiction to entertain a suit for mesne profits of land situate outside British India, where the defendant resides within the jurisdiction of the British Court. [p. 511, col. 1.]

Application against a decree of the District Judge, Belgaum, in Miscellaneous Appeal No. 10 of 1919, dismissing the appeal from a decree passed by the Assistant Judge at Belgaum, in Civil Suit No. 78 of 1919.

Mr. *G. S. Mulgaokar*, for the Applicant.

Mr. *Nilkant Atmaram*, for Opponent No. 1.

Mr. *D. R. Manerikar*, for Opponent No. 2.

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit in the Court of the Assistant Judge at Belgaum to recover mesne profits of certain land for the years 1915-16 and 1916-17. It is admitted that the land is situated in the Kurundwad State outside British India, and that the plaintiff bases his claim to mesne profits on the fact that he became entitled to such land by an award decree in 1916 and did not get possession of the lands until 1917. The defendants contended that as the suit came under section 16 (*e*) of the Civil Procedure Code, the Court had no jurisdiction. This contention found favour with the learned Assistant Judge and also with the District Judge.

Now, in the case of land outside British India section 16 has no application and we

have to fall back upon general principles in considering whether this is a suit in which a personal relief is claimed against a defendant residing within the jurisdiction of the Court.

First, it may be as well to clear the ground by disposing of certain contentions which were raised in the course of the argument as to the proper scope of section 16 of the Civil Procedure Code, sub section (*c*) and the proviso to the section. Sub-section (*c*) excludes from the jurisdiction of the Courts, outside whose local limits the property is situate, suits for compensation for wrong to such immoveable property; and the word "wrong" refers to torts affecting immoveable property such as trespass, nuisance, infringements of easements, etc. The proviso makes it clear that even although a wrong to immoveable property is alleged, yet, where the relief sought can be entirely obtained through the defendant's personal obedience, then the suit can be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. So that assuming for the moment that the suit was one for mesne profits relating to land in British India, and the land had been outside the local limits of the jurisdiction of the Court at Belgaum, still if the decree directed something to be done which could be done through the personal obedience of the defendant, such as the payment of money, then the Belgaum Court would have jurisdiction to entertain the suit.

It is admitted that the provisions of section 16 of the Civil Procedure Code are an embodiment of the provisions of the law of England on this subject. But it seems to have been suggested that the proviso enacted something different. In our opinion, there is no reason for thinking that the whole section does not follow the English Law with regard to jurisdiction in the case of suits of the nature described in section 16, and we see no reason to think that under the English Law this suit would not lie in the Belgaum Court.

Fortunately the decision of Sir Lawrence Jenkins in *Kashinath* v. *Anant* (1) is directly in point, and from that decision it is clear that the principles enunciated by the English Courts of equity apply to this case. The facts of that case were somewhat similar to these. The plaintiff sued in the Court at Nasik in British India to establish his right to a share in the income derived from certain grants of land situate outside of British India, but received by the defendant within the jurisdiction of the Nasik Court; it was held that the suit was within the jurisdiction of the Court, there being no dispute as to title. Sir Lawrence Jenkins said :

"The lower Appellate Court seems to have thought that all property which had a foreign origin was outside the jurisdiction of the Court: this, however, is not a correct view of the law. The general principle is clearly stated by Lord Cottenham in *Pollard, Ex parte, Courtney, In re* (2), where he says: 'If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act ; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities'."

It is not suggested that the law prevailing in Kurundwad State would not permit of the defendant being directed to pay the mesne profits of the land to the plaintiff to whom the lands belong. There appears to be an equity in favour of the plaintiff that the profits of those lands which were awarded to him in 1915 should not remain in the pockets of the defendant, and, therefore, there is no reason why the Belgaum Court should not have jurisdiction to administer that equity in favour of the plaintiff. We are not concerned here with the merits of the case. We think that the Court in Belgaum had jurisdic-

(1) 24 B. 407; 2 Bom. L. R. 47; 12 Ind. Dec. (N. S.) 804.

(2) (1840) Mont. & Chit. 239; 4 Deac. 27

tion to decide whether, on the facts that were placed before it, mesne profits of those properties should be ordered to be paid by the defendants to the plaintiff. The Rule, therefore, must be made absolute. The case must go back to the Court of the Assistant Judge to be dealt with on the merits. The plaintiff will be entitled to his costs in this Court and the Court below. Costs in the Trial Court will be costs in the cause.

N. H.

Rule made absolute.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 122 OF 1921.

November 3, 1921.

Present:—Sir William Ayling, KT., Offg., Chief Justice, and Mr. Justice Odgers.

THE OFFICIAL RECEIVER OF TANJORE —PETITIONER—APPELLANT

versus

M. R. VENKATARAMA IYER—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 51 (1) Exception—Civil Procedure Code (Act V of 1908), s. 73—Rateable distribution, order for—Money not drawn by creditors—Intervening insolvency of judgment-debtor, effect of—Official Receiver, rights of, to amounts ordered to be rateably distributed.

Where rateable distribution has been ordered under section 73, Civil Procedure Code, the exception to section 51 (1) of the Provincial Insolvency Act applies not only to the amount credited in favour of the attaching decree-holder but also to the amounts rateably distributed to the other decree-holders under the section. [p. 512, col. 2; p. 513, col. 1.]

Where the insolvency of the judgment-debtor supervenes before the moneys allocated for rateable distribution are actually distributed to the creditors, they do not vest in the Official Receiver, but belong to the creditors from the date of the order. The order for rateable distribution removes the money from the operation of the Insolvency Act altogether. [p. 513, col. 2.]

Howatson v. *Durrant*, 27 C. 351; 4 C. W. N. 610; 14 Ind. Dec, (N. S.) 232, referred to.

Appeal against an order of the District Court, Tanjore, dated the 23rd March 1921, in Interlocutory Application No. 337 of 1920, in I. P. No. 43 of 1919.

FACTS appear from the judgment.

Mr. *M. D Devadoss*, for the Appellant,—Under the English Bankruptcy Act and the bankruptcy procedure a claim by the judgment-debtor can be scrutinised by the Court or by the trustee in bankruptcy.

The Exception to section 51 (1) of the Insolvency Act has no application to the creditors in whose favour a rateable distribution order has been passed.

The mere order allocating the moneys to the various creditors under section 73, Civil Procedure Code, does not vest the ownership in them. It will belong to them only at the date of actual distribution. And where the insolvency occurs before that date the Official Receiver can claim the moneys on behalf of the general body of creditors.

Messrs. *K. V. Krishnaswamy Aiyar* and *N. Swaminatha Aiyar*, for the Respondents.—The English Act cannot be applied, because provisions of section 51 of the Indian Act are so different. There is no justification from the language of section 51 to restrict the application of the exception only to the attaching creditor. From the date of the rateable distribution order the ownership in the moneys allocated pass to the creditors, who cannot suffer for the intervening litigation which prevented them from taking the moneys.

JUDGMENT.—Only two points have been raised in appeal. It is contended that where rateable distribution has been ordered under section 73 of the Code of Civil Procedure, the exception to section 51 (1) of the Provincial Insolvency Act only applies to the amount credited in favour of the attaching decree holder and not to the amounts rateably distributed to the other decree holders under the section. No authority is quoted and we can find nothing in the wording of section 51 to support such a view; nor is any reason suggested for such a differentiation. The learned Counsel for the appellant wished to refer to various English rulings dealing with section 45 of the English Bankruptcy Act of 1883; but the difference between this section and section 51 of the Indian Act are so great that we feel unsafe in taking them as a guide. The other contention is that the amounts lying in Court should be treated as still the money of the insolvent, which the Official Receiver can claim for the benefit of the general body of the creditors. This contention

also we feel bound to negative. The last of the orders for rateable distribution was passed more than six years before the insolvency; and respondent was only prevented from drawing out the sums of which he was entitled thereunder by reason of litigation instituted by other creditors of Nataraja Iyer which was carried up to this Court and ultimately proved infructuous. It seems to me that from the time of the order of rateable distribution the money must be treated as belonging, not to the judgment-debtor, Nataraja Iyer, but to the decree-holder in whose favour the order was passed. Mr. Devadoss for appellant contended that the effect of a rateable distribution order is merely to allocate the money to the different suits without affecting its ownership. The latter, he says, still rests in the judgment-debtor by the sale of whose property it was allocated. I do not think this is so. The section does not speak of distribution to the credit of the different decrees, but of distribution among the decree-holders. The latter are entitled to draw it out at will; and the judgment-debtor most certainly is not. I think the money in this case must be treated as the property of the decree-holder, the present respondent, and that the Official Receiver could no more recover it from Court than he could recover from the respondent if it had actually been paid out to him by Court. Mr. Devadoss eventually admitted that he could not recover the money in the circumstances of the present case if it had passed into respondent's possession. I would dismiss the appeal with costs.

ODGERS, J.—The first point raised is on section 51 of the Provincial Insolvency Act as to whether the proceeds of execution held by various Courts as detailed in the District Judge's judgment are "assets" realised or not. In the absence of authority the executing decree-holder cannot be held to be solely entitled.

It was said there is a difference between section 73, Civil Procedure Code and section 51 (1), Provincial Insolvency Act on this point. Mr. Devadoss points to section 40 of the Bankruptcy Act of 1883, to show that completion of execution in England means a different thing to what it does here. The Indian section is by no means identical with the Statute; in fact, it differs from it in many material respects and it seems to be not only unnecessary but dangerous to hold that there may be distinction between the meaning of execution in these two sections. The point fails.

The second and more important point is this. It is said that the moneys held in Court as payable to the judgment-creditors are still the property of the judgment-debtor so as to vest in the Official Receiver on the insolvency of the former, and the fact that these sums have not yet been distributed may give the Official Receiver the right to go behind the decrees is satisfaction of which they have been paid and to see whether or not the transactions are founded on good consideration, etc. This may be so, unless the order for rateable distribution (which was admittedly made six years before the adjudication in 1919) removes the money, the subject of the order, from the operation of the Insolvency Act altogether.

Cases have been cited to the effect that if a judgment creditor wants to prove in insolvency his claim may be subject to scrutiny by the Court or the Official Receiver or Trustee in Bankruptcy; but if the matter is wholly outside the insolvency law it is clear that the Insolvency Court under its officers has no such power. In my opinion such is the case here. Section 51 provides that where execution has issued, assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition shall be protected from the operation of the Insolvency Act and the case in *Howatson* v. *Durrant* (1) shows that an order for rateable distribution stands on the same footing. It would, therefore, appear that the transaction sought to be impeached by the Official Receiver stands outside the operation of the Insolvency Act and he can neither scrutinize its legality nor have it set aside for the benefit of the general body of creditors. The judgment creditor entitled to the rateable distribution is in this respect in the same position, as if he had actually been paid out of money which was realized in execution and that being so, the Official Receiver has no right to it. The appeal must be dismissed with costs.

M. C. P. *Appeal dismissed.*

(1) 27 C. 351; 4 C. W. N. 610; 14 Ind. Dec. (N. S.) 232.

RATANBAI SHIVLAL v. SHANKAR DEOCHAND.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 265 OF 1921.

March 16, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

RATANBAI SHIVLAL LOHAR—PLAINTIFF—APPELLANT

versus

SHANKAR DEOCHAND LOHAR—OPPONENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 8, O. XVII, rr. 2, 3—Suit, hearing of, not commenced—Default in appearance on adjourned date—Dismissal of suit under O. IX, r. 8—Part heard case adjourned—Default in appearance at time fixed—Procedure—Equity considered.

Ordinarily, if on an adjourned date of hearing either or both of the parties make default in appearance the Court should proceed to dispose of the suit in one of the modes indicated in O. IX of the Code of Civil Procedure: there is no necessity whatever to have recourse to O. XVII, r. 3 of the Code. [p. 515, col. 1.]

Where the hearing of a suit has not commenced and it is the plaintiff who is in default and there is no evidence to support his case, the suit should be dismissed under O. IX, r. 8, of the Code. [p. 515, col. 1.]

Courts should exercise extreme caution when on an adjourned date the parties or any of them fail to appear. They should in the first place have recourse to O. XVII, r. 2, of the Code rather than r. 3 and even in cases where r. 3 can be considered to apply, that is, where a case has been part heard and an adjournment granted, it would not be in accordance with justice to refuse a party, who has failed to appear on the adjourned date at the time fixed but appears at a later hour, the chance of having the suit restored. If the equity of the case demands, he should certainly have an opportunity of satisfying the Court that he had sufficient cause for not appearing. [p. 515, col. 2.]

Shrimant Sagajirao v. *Smith*, 20 B. 736 at p. 743; 10 Ind. Dec. (N S.) 106, followed.

Civil extraordinary application against an order passed by the District Judge, Khandesh, in Miscellaneous Appeal No. 11 of 1920, confirming an order passed by the Subordinate Judge at Shirpur, in Civil Suit No. 674 of 1919.

Mr. *P. B. Shingne*, for the Appellant.

JUDGMENT.

MACLEOD, C. J.—This suit was fixed for hearing for the 12th March 1920. Various adjournments were granted, the last of which was for the 24th July 1920. On that day when the case was called on the plaintiff was absent and the suit was dismissed. The same day the Pleader appeared and presented an application for the restoration of the suit to the file. On the 23rd August this application was dismissed. The learned Judge said:

"The applicant's Pleader urges that the dismissal of the suit should be held to be under O. XVII, r. 2 and O. IX, r. 8, Civil Procedure Code, but it is clear that the Court has not dismissed the suit under the above provisions. The suit has been decided under O. XVII, r. 3, because the plaintiff to whom time was given failed to produce the evidence, and the provisions of O. IX do not, therefore, apply. The plaintiff's only remedy is to appeal against the decree."

The plaintiff has obtained a Rule from this Court on the 25th November 1921 calling on the defendant to show cause why the decision of the lower Court should not be reversed and a re trial of the suit directed. The decision of the learned Judge, if it were allowed to stand, would apply to every case in which there has been an adjournment before the trial of the case has actually commenced, to enable a party to produce his evidence, and the party does not appear on the adjourned date. We are constantly having cases in which the failure to distinguish between the provisions of r. 2 and r. 3 of O. XVII has caused injustice. That Order deals generally with "adjournments." Rule 1 gives the Court power to grant adjournments from time to to time provided that, when the hearing of evidence has once begun, the hearing of the suit should continue from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

Under r. 2, where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX or make such other order as it thinks fit.

Order IX deals with "appearance of parties and the consequence of non-appear-

ance." In all the cases which come under O. IX, the party against whom a decree or order is passed in default of his appearance, can apply to the Court to have the *ex parte* decree or order set aside on the ground that he can show sufficient cause for his non appearance. Ordinarily, then, if a case appears on the Board on an adjourned date for hearing, and there is default of appearance on the part of both or either of the parties, the Court must refer to O. IX so as to ascertain the proper procedure to be followed, and there is no necessity whatever to have any recourse to O. XVII, r. 3.

In this case the hearing of the suit had not commenced, and, therefore, as it was the plaintiff who was in default, and there was no evidence to support his case, the suit should have been dismissed under O. IX, r. 2.

Rule 3 of O. XVII is certainly somewhat unfortunately worded, as it may be construed as being applicable to every case in which an adjournment has been granted to a party because he has not been ready with his evidence, whether the trial has commenced or not. It would not make much difference if there were not authorities to the effect that if the case is decided under r. 3 the only remedy of an aggrieved party is by way of appeal or review. There seems to be a direct conflict between r. 2 and r. 3, because r. 2 deals with any kind of adjournment which can be ordered under r. 1 and gives the Court power to dispose of the suit as directed by O. IX in default of appearance of the parties or any of them. If the plaintiff appears and the defendant does not appear, the Court can pass a decree *ex parte* on the merits of the case as appearing from the plaintiff's evidence. If the plaintiff is absent and the defendant appears the Court shall dismiss the suit except in so far as the plaintiff's claim is admitted.

In either case the suit is disposed of or decided, but the party in default can apply to have the *ex parte* decree or order set aside on showing cause. If, then, there is a default in appearance after an adjournment, ordinarily O. XVII, r. 2, will apply, and there is no necessity to have recourse to the stricter provisions of r. 3 unless the hearing of the action has already commenced. I think r. 3 was only intended to apply to such cases, as otherwise this strange result would follow. If a case is adjourned by consent without any reason being given, and the plaintiff does not appear on the adjourned date, the suit will be dismissed and he can apply to have the *ex parte* decree set aside. If, however, the adjournment is granted on the ground that the plaintiff is not ready with his evidence and the plaintiff does not appear on the adjourned date, his suit will be dismissed; but he can only appeal or ask for a review. The ground for appeal or review will be exactly the same, *viz.*, that he had sufficient cause to account for his non-appearance; and, again, if he succeeds the result will be the same. There will be a re-hearing. If the hearing of the action has actually commenced it is another matter, though, again, the result of an appeal may be that the lower Court is directed to continue the case from the point where the plaintiff or the defendant, as the case may be, made default. It is necessary, therefore, for the Courts to exercise extreme caution when on the adjourned date the parties or any of them fail to appear. They should, in the first place, have recourse to O. XVII, r. 2 rather than r. 3, and even in cases where r. 3 can be considered to apply, that is to say, where the case has been part-heard and an adjournment granted, it would not be in accordance with justice to refuse a party who has failed to appear on the adjourned date at the time fixed, but appears at a later hour, the chance of having the suit restored. Generally, I should like to point out that, a party who has failed to appear at the time fixed for the hearing, if the equity of the case demands it, certainly should have an opportunity of satisfying the Court that he had sufficient cause for not appearing. Otherwise much delay is caused before a decision is arrived at on the merits. [See *Shrimant Sagarirao* v. *Smith* (1)].

The Rule must be made absolute, and we

(1) 20 B. 733 at p. 743; 10 Ind. Dec. (N. S.) 1061.

send back the case for trial on the merits. Costs costs in the cause.

SHAH, J.—I agree.

P. K. & W. C. A.

Rule made absolute.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 63 OF 1921.

December 1, 1921.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Venkatasubba Rao.

BEZWADA SUNDARARAMA REDDI AND OTHERS—APPELLANTS

versus

ENUGA RAGHAVA REDDI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Object of section—Decretal amount, reduction of, in appeal—Restitution, application for, by judgment-debtor—Prejudice due to error in regulating order of sale items, effect of.

The object of section 144 of the Code of Civil Procedure is to remove, by means of restitution, any prejudice due to the erroneous terms of the original decree.

Where the amount of a decree is slightly reduced on appeal and the judgment-debtor applies for restitution in respect of certain items of property which, he contends, need not have been sold at all, restitution should not be granted, as his position as regards the sale is in no way affected by the variation in the decree and the prejudice, if any, is solely due to the order in which the items of property were sold. [p. 517, col. 2.]

Syed Nathadu Sahib v *Nallu Mudaly*, 27 M. 98, *Zain-ul-Abdin* v. *Asghar Ali Khan*, 10 A. 166; 15 I. A, 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.), *Chandan Singh* v. *Ramdeni Singh*, 31 C. 499, *Sagore Mandal* v. *Mofijuddin Sardar*, 51 Ind. Cas, 959; 24 C. W. N. 50; 29 C. L. J. 486, distinguished.

Appeal against an order of the District Court, Nellore, dated 19th October 1920, in Original Petition No. 45 of 1920.

FACTS appear from the judgment.

Mr. *A. Krishnawami Aiyar* with him Mr. *Raghava Rao*, for the Appellants.—The lower Court should not have ordered delivery. Here there is no question of placing the parties in the same position which they would have occupied but for the appellate decree. The decree was slightly varied as to interest. It cannot be said that the judgment-debtor was prejudicially affected by the decree of the first Court, which could only be removed by restitution. The only prejudice of which the judgment debtor could complain was that, if certin items were postponed to the last, the decree amount would have been realised by the sale of the rest of the items. The prejudice was due to the Court's order regulating the order of sale of the items. That is not within the terms of section 144, Civil Procedure Code of 1908, which is more restricted in scope than the corresponding provision in the Code of 1882.

Mr. *O Madhavan Nair*, for the Respondents, relied on *Syed Nathadu Sahib* v. *Nallu Mudaly* (1), *Zain-ul-Abdin* v. *Asghar Ali Khan* (2), *Chandan Singh* v. *Ramdeni Singh* (3) and *Sagore Mandal* v. *Mofijuddin Sardar* (4) in support of the lower Court's order.

JUDGMENT.—Appellants in this case represent the decree-holders in Original Suit No. 24 of 1911 on the file of the Nellore District Court. Respondents are the judgment-debtors. The decree was for Rs. 5,663 6 8 with subsequent interest at 9 per cent. per annum. It was confirmed on appeal to the Court with the single modification that the rate of subsequent interest was reduced from 9 per cent. to 6 per cent. While the appeal was still pending, 19 items of property belonging to the respondents were brought to sale in execution of the decree, the amount due being notified as Rs. 7,695 The correct amount calculated according to the decree of this Court was Rs. 7,815. The total sale-proceeds aggregated to Rs. 10,357 and of the 19 items, five items were purchased by appellants for Rs. 2,719.

Respondents applied under section 144, Civil Procedure Code, for restitution by re delivery of these five items, cancelling the

(1) 27 M. 98.

(2) 10 A. 166; 15 I. A. 12; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

(3) 31 C. 499.

(4) 51 Ind. Cas. 959; 24 C. W. N. 50; 29 C. L. J. 486.

sale and the District Judge passed an order in their favour, against which the present appeal is preferred.

In our opinion the order is not justified by the terms of the section. The latter runs thus, (1) where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders including orders for the refund of costs, and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section ( ). Its object is clearly to enable the Court to place a party who has been prejudicially affected by a decree, which has been varied or reversed in his favour, in the same position as he would have occupied if the decree had stood originally in the same terms, as it stood after the variation or reversal.

To put it in another way : The prejudice to be removed by restitution must be the result of the erroneous terms of the original decree. Now, in the present case, respondents may fairly claim that as things turned out the decree amount might have been realised by the sale of the 14 items of property other than those of which they now claim re-delivery, if the items had been sold in a different order. The last item No. 19 fetched Rs. 3,600, the amount realised by the sale of the preceding items being only Rs. 6,757 which was nearly Rs. 1,000 under the decree amount. It was, therefore, necessary to proceed with the sale of Item No. 19. If the five items they claim had been put last in the list, the decree amount might have been realised without selling them. But such prejudice as respondents have suffered is due not to the variation in the decree, but to the terms of the sale order regulating the order in which the items were to be sold, and it is not alleged that respondents took any exception to this either at the time of fixing sale proclamation or at the time of sale.

Whether the amount to be realised was Rs. 7,695 or Rs. 7,495, did not affect the necessity of putting up the last item of sale. In other words, their position as regards the sale was in no way affected by the variation in the decree.

It was argued that any reduction in the amount of a decree affects the position of the judgment-debtor, inasmuch as it renders it easier for him to satisfy the decree and prevent the sale of his property in execution. No doubt, where the reduction is large this may be so, and whether it is so or not, must be a question of fact. But in the present case the reduction is so slight that it cannot be seriously contended that respondents could have satisfied a decree for Rs. 7,495 but could not raise the extra Rs. 200 and no such allegation has ever been made.

Of the cases relied on in support of the District Judge's order the first is *Syed Nathadu Sahib* v. *Nallu Mudaly* (1). The facts there were very similar to those before us; and if it had been decided under the present Civil Procedure Code, we should have felt bound to refer the matter to a Full Bench. Under the old Code (section 583) the Court was not limited, in granting such restitution as it thought fit, to placing the party in the same position as he would have occupied but for the variation or reversal of the original decree. Section 144 of the present Code gives, as has been pointed out, much more restricted power. The decision in that case may be distinguished on this ground and although, with all respect, we feel doubtful as to whether any equity in that case called for the decision arrived at, we do not feel bound to say more about it.

The Privy Council decision in *Zain-ul-Abdin* v. *Asghar Ali Khan* (2) which was relied on in *Syed Nathadu Sahib* v. *Nallu Mudaly* (1) dealt with a case in which the Court sale sought to be set aside would have been altogether unnecessary, under the modified decree, the amount found due having been realised by an earlier sale. Such a case, of course, stands on a different footing both in equity and with reference to the provisions of section 144.

Chandan Singh v. *Ramdeni Singh* (3) is another case like *Syed Nathadu Sahib* v. *Nallu Mudaly* (1) under the old Code, and although *Sagore Mandal* v. *Mofijuddin Sardar* (4) is under the present Code, it simply

follows the earlier case without reference to the change in wording in the Code.

We must, therefore, set aside the order of the District Judge, and direct respondents to pay appellants costs in both Courts.

M. C. P.

M. K.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 226 OF 1921.

March 16, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

BAI TARA—PETITIONER—APPELLANT

versus

MOHANLAL LALLUBHAI AND OTHERS—OPPONENTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 19, 25—Hindu father—Guardianship of minor son, application for—Application to be treated as one for custody.

An application under s. 19 of the Guardians and Wards Act by a Hindu father to be appointed the guardian of his minor son who is living with his mother is not competent, because, under the Hindu Law, the father is already the natural guardian of his minor son. Any such application should be treated as one made under section 25 of the Act for the custody of the minor and decided accordingly. [p. 519, col. 1.]

Mrs. Annie Besant v. *Narayaniah*, 24 Ind. Cas. 280; 16 Bom. L. R. 625; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 283; 12 A. L. J. 1155; 38 M. 807; 41 I. A. 314 (P. C.), referred to.

First appeal from the decision of the Joint Judge, Ahmedabad, in Miscellaneous Application No. 44 of 1921.

Mr. *H. V. Divatia*, for the Appellants.

Mr. *G. N. Thakor*, for Respondent No. 1.

Mr. *R. J. Thakor*, for Respondents Nos. 2 to 4.

JUDGMENT.

MACLEOD, C. J.—The petitioner filed this application under the Guardians and Wards Act to be appointed guardian of the person of his minor son, who was living with his mother, opponent No. 4, and his maternal grandfather, opponent No. 5. I may point out at once that the application ought to have been dismissed, because such an application by a Hindu father under the Guardians and Wards Act, presumably under section 19, is not competent, and a considerable amount of confusion has arisen in the course of the argument from neglecting to recognise that fact. The application should have been made under section 25 of the Guardians and Wards Act, because it is admitted that under Hindu Law the father is the natural guardian of his minor son, and he can apply to the Court, if his ward leaves or is removed from his custody, for an order for the minor's return, and the Court will, if it is of opinion that it will be for the welfare of the ward to return to his guardian, make such an order.

The facts of this case make it perfectly clear that it is not to the interests of the minor that the Court should make such an order. Unfortunately there have been disagreements between the petitioner and his first wife, with the result that for some years she has been living separate with her father and has had the custody of the boy. The petitioner has married again, and it is obvious that the boy, who was only seven years old at the time this application was made, will be much better off living with his mother than with his father. No suggestion whatever has been made as to the character of the mother, which would be good ground for taking away the boy from her tender care and handing him over to the father who would be a perfect stranger to him. The step-mother cannot be expected to be very much interested in his welfare, and the uncles and any members of the prior generation who may be living in the house will also not be likely to give this small boy the attention and sympathy which he naturally requires.

Once it is recognised that the application should have been made under section 25 of the Act, and not under section 19, which has nothing whatever to do with the case, a decision can easily be arrived at. We have nothing to do with the question whether the father is unfit to be the guardian of the person of the minor. That would only be at issue if there was an application by another person to have a guardian appointed other than the father; and we have to accept the facts as we find them, that this small boy has been living with his mother for the last five years, and apparently the father has acquiesced in that. As

my learned brother has pointed out, it is really a question what is the proper time for the father to make an application to the Court to obtain the custody of his son, and that question must depend entirely upon the further question when will it be for the interests and welfare of the minor to return to the custody of his father.

We were referred to the case of *Mrs. Annie Besant* v. *Narayaniah* (1) as being in favour of the respondents, but when that case is read, it will be found that it is entirely in favour of the appellant in this case. The father there had accepted an offer made by the defendant to take charge of his two sons for educating them in England. He was dissatisfied later on with that arrangement, so he wanted to get back the custody of his children. Their Lordships said at page 634 :*

"The real question was whether he (the father) was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education...The real question was whether in the events which had happened the plaintiff was at liberty to revoke it (the authority given by the said letter). Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence."

Therefore, treating it as an application under section 25 of the Guardians and Wards Act asking the Court to direct the return of the boy to the father, I think myself it is distinctly to the interests and welfare of the boy to remain with his mother. That, of course, will not prevent the father from making a further application at any later date when he may be able to satisfy the Court that it will then be to the interests and welfare of the minor that he should leave his mother's care and live with his father. The appeal must be allowed and the application dismissed with costs throughout. The cross-objections are dismissed with costs.

SHAH, J.—I concur in the order proposed by the Chief Justice. I desire to add that this order is made on the footing that the application made to the District Court by the father is one under section 25 of the Guardians and Wards Act for the custody of the minor. It is not necessary for the purposes of this appeal to decide the question as to whether a father can properly make an application under the Guardians and Wards Act to be formally appointed the guardian of his minor son. That was evidently not necessary in the present case ; and though the application is in form for such an appointment, it is in substance an application for the custody of the minor and must be treated and disposed of as such. On that footing the only question is, whether it is for the welfare of the minor that the existing custody of the mother should be disturbed. It is unfortunate that, owing to the differences between the father and the mother, it has become necessary to consider this question : and it is still possible that in future these differences may be made up and that the interests of the minor may be advanced by the co-operation of the father and the mother in that respect. But at present it seems to me fairly clear that it is not desirable for the welfare of the minor that the custody should be changed. The boy is of tender age and I think that at present the personal care of the mother is a paramount consideration. On that ground I agree that the present application of the father for the custody of his minor son should be dismissed.

W. C. A.

Appeal allowed.

(1) 24 Ind. Cas. 290; 16 Bom. L. R. 625; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 12 A. L. J 1155; 38 M. 807; 41 I A. 314 (P. C.).

* Page of 16 Bom. L. R.—[*Ed.*]

HABIB ALI KHAN *v.* RAM NARAYAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 5 OF 1922.

April 4, 1922.

Present :—Mr. Lyle, A. J. C.

HABIB ALI KHAN—DEFENDANT No. 2—APPELLANT

versus

Lala RAM NARAYAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Pro-note—Separate oral agreement to pay additional interest, whether provable.

Where in a suit on a promissory-note the plaintiff alleges an oral agreement to pay interest at a higher rate than mentioned in the pro-note, he is not entitled to prove the alleged oral agreement by parol evidence. [p. 520, col 2]

Ali Jawad v. *Kulanjan Singh*, 66 Ind. Cas. 131; 20 A. L. J. 247; 44 A. 421, referred to.

Appeal from a decree of the Subordinate Judge, Sitapur, dated the 16th November 1921.

Mr. *M. Wasim*, holding brief of Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was brought on a pro note executed by the two defendants for Rs. 10,000. The pro-note provided that both the defendants were jointly and severally liable and that interest should be payable at the rate of 8 annas per cent. per mensem. In the plaint it was also alleged that there was a separate agreement between the plaintiffs and the second defendant whereby the second defendant agreed to pay additional interest at the rate of 8 annas per cent. per mensem. The plaintiffs admitted that Rs. 1,000 had been realised and claimed Rs. 10,765 from the defendants and Rs. 1,465 from the second defendant alone. The first defendant paid the sum due on the pro-note into Court for payment to the plaintiffs. He pleaded that the sum of Rs. 1,000 had been paid by him on the 1st of August 1921 and the plaintiffs had agreed to wait until October before filing the suit but they filed it on the 5th of September and, therefore, they were not entitled to get costs from him. He also pleaded that the plaintiffs were not entitled to prove the alleged oral contract regarding the additional rate of interest and that he was not liable to costs. The second defendant did not appear to contest the suit.

The learned Subordinate Judge held that the plaintiffs had agreed with defendant No. 1 to wait till October before filing the suit and that he was not liable to costs. He also held that the alleged oral agreement can be proved and that the second defendant had agreed to pay additional interest at the rate of 8 annas per cent. per mensem. He has dismissed the suit as against the defendant No. 1 and has given a decree against the defendant No. 2 for Rs. ,465 and the full costs of the suit. Against this decree the second defendant has appealed, and two points only are taken in arguing the appeal. The first is, that the provisions of section 92 of the Evidence Act bar the plaintiffs-respondents from proving the alleged oral agreement. The learned Subordinate Judge has held that section 92 is not applicable. He argues that the oral contract was entered into between the plaintiffs and defendant No. 2 before the pro-note was executed, that the agreement by defendant No. 2 to pay interest at 1 per cent. constituted a condition precedent to the execution of the pro note and that proviso (3) to section 92 was applicable. It seems to me clear that that proviso has no application whatsoever to the present case. As has been pointed out in Woodroffe and Ameer Ali's Evidence Act at page 617 of the 7th Edition, this proviso is intended to embody the rule that when, at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral argument is admissible to show that the condition has not been performed and, consequently, that the written contract has not become binding. Until the condition is performed there is, in fact, no written agreement at all. This is the view expressed in a recent case by a Bench of the Allahabad High Court, *Ali Jawad* v. *Kulanjan Singh* (1). And it is quite clear that proviso (2) to section 92 of the Evidence Act cannot help the respondents who wish to prove a separate oral agreement as to the rate of

(1) 66 Ind. Cas. 131; 20 A. L. J. 247; 44 A. 421.

interest between them and the appellant. The document is not silent with regard to the rate of interest, as it distinctly states that the rate shall be 8 annas per cent. per mensem, and the oral agreement which the respondents seek to prove is clearly inconsistent with the terms of the document itself. It is, however, urged that, while under the pro-note the liability for payment of the interest as well as the principal is a joint liability of both the defendants, the second defendant only is liable under the oral agreement. This argument has no force as the liability under the pro-note is both joint and several liabilty. For these reasons, I am of opinion that the plaintiffs cannot prove the separate oral agreement on which they wished to rely.

The other point taken by the learned Counsel for the appellant was with regard to costs. Although the plaintiffs had agreed not to bring a suit against defendant No. 1 till October yet they had to bring their suit against the defendant No. 2, appellant, when they did so in order to save limitation But as the defendant No. 2 did not defend the suit it would appear that under the rules the plaintiffs are entitled only to one fourth of their costs as against him.

The result is that the appeal is allowed and the suit is dismissed as against the defendant No. 2 but the plaintiffs will be allowed one fourth of their costs in the lower Court on the sum of Rs. 10,765, the amount due under the pro-note at the time of institution of the suit. The respondents will pay the appellant's costs in this Court.

W. C. A.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 339 OF 1920.

March 17, 1922.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Hah.

K. P. FRENCHMAN—CLAIMANT—APPELLANT

versus

THE ASSISTANT COLLECTOR, HAVELI—RESPONDENT.

Land Acquisition Act (I of 1894), s. 18—Compensation, measure of—Valuation of immoveable property—Hypothetical calculations, value of—Important points that arise on compulsory acquisition.

A purchase of property by a willing purchaser from a willing seller, is direct evidence of the market-value of the property, and when Government notifies its intention to compulsorily acquire a property, they are bound to offer what was given for the property unless they are able to show conclusively that a fair value had not been given for the property. Where, however, the purchaser claims considerably more than what he gave for the property, he must show that in the neighbourhood there has been a general rise in the value of property between the date of his purchase and the date of the compulsory acquisition by Government. [p. 523, col. 1.]

The valuation of immoveable property is not an exact science and the very best efforts of an expert or a Court to fix a market value for a property can never amount to much more than a *quasi*-scientific guess which the Court should, in the case of compulsory acquisition, temper with liberality. Hypothetical calculations when put forward before a Court of first instance should be seriously considered, but they are usually of no assistance whatever in enabling it to come to a decision with regard to the market value of the property. [p. 523, col. 2.]

Where land is compulsorily acquired by Government under the Land Acquisition Act, the two most important questions that arise are :

(1) Whether the claimant has paid so high a price that a Court may consider that he has not displayed the ordinary caution which a purchaser of land should display.

(2) Whether there has been any increase in the value of property in the neighbourhood within the time which elapsed between his purchase and Government Notification, to show that the property is worth more than what he gave for it. [p. 522, col. 2; p. 523, col. 1.]

First appeal from the decision of the District Judge, Poona, in Reference No. 11 of 1919.

Mr. *Campbell*, instructed by Messrs. *Payne & Co*, for the Appellant.

Sir *Thomas Strangman*, Advocate General (with him Mr. *S. S. Patkar*, Government Pleader), for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from the decision of the District Judge of Poona in

a reference under section 18 of the Land Acquisition Act. The land in reference is a square piece of land measuring 4·77 acres with good frontages on Connaught Road and Wellesley Road. In the far corner of it there was a bungalow, which undoubtedly at the time the property was notified for acquisition on the 25th April 1919, was in a state of disrepair. The property is situated certainly near the centre of the business part of the Poona City, excluding, of course, the city proper. All round there are public offices, hotels, churches, shops and other such premises. I think, the Judge is right in saying that it is not quite in the best situation, either for being used for residential purposes or for shops which are patronised by European customers. At the same time, it cannot be doubted that the property is in the centre of what I may call the business quarter of the town.

The claimant bought the property from Mrs. Sassoon for Rs 92,500 in July 1918. Mrs. Sassoon had not been in India for some years, and her affairs were being looked after by her agents. The property had not been very well looked after. The bungalow was rented by Mr. Defreece at Rs. 150 a month, and we may safely say that, however favourable the situation of the property may have been, it does not appear from the evidence that there had been much demand for it before its acquisition. But for whatever reasons the claimant bought the property in 1918, there can be no doubt that that was a purchase by a willing purchaser from a willing seller, and it is, in the first place, direct evidence of the market-value of the property in July 1918. It would be open to the claimant to show that in this neighbourhood there has been a general rise in the value of property between July 1918 and April 1919, but he has absolutely failed to produce any evidence to show that the value of property in this neighbourhood has increased. Of course, it may be said that from the very nature of the use to which the surrounding properties are put, it would not be likely that many of these properties would come into the market. Still, if the claimant wishes to show that his property in April 1919 was worth more than what he gave for it, he would have to produce evidence to that effect.

On the other hand, it would be open to Government to show that the claimant, when he purchased the property, had taken a far too sanguine a view of its possibilities in the future. The Acquisition Officer, without considering the price which the claimant had paid for the property, has in the offer he made to the claimant done everything he could to cut down the value of the property. He has valued the bungalow on a rental of Rs. 300 a month with a life 25 years. To that he has added the deferred value of the site at the end of the period and the value of the compound 14,334 square yards at Rs. 6,000 an acre or a little more than a rupee a square yard, the whole giving a total of Rs. 55,688, to which had to be added, the 15 per cent. for compulsory acquisition. Now that was a very low offer to make to a man who had purchased the property a few months before, for Rs, 9,500. On the other hand, the claimant went to the other extreme. He produced a report by Mr. Fritchley, another by Mr. Bhedwar, and a third by Mr. Batley, all containing fantastic conglomerations of figures produced for the purpose of satisfying the Court that the property which the claimant had purchased for Rs. 92,500 in July 1918 was worth over two lacs in April 1919. They are obviously worthless.

This is one of those numerous cases which show how undesirable it is that valuations for compulsory land acquisition should be brought before a Court of Law. If this case had gone before an arbitrator, the whole of these elaborate calculations would have been swept aside in a few words. But in a Court of Law such evidence cannot be excluded and the Court of first instance has to seriously consider all the various hypothetical considerations produced on the one side or the other. Speaking for myself, in dealing with the case in appeal, it is open to us to express an opinion that all those calculations are of no assistance whatever in enabling the Court to come to a decision with regard to the market value of the land in April 1919.

The two most important questions are, (1) whether the claimant has paid so high a price that the Court may consider that he had not displayed the ordinary caution which a purchaser of land should display; (2)

whether there has been any increase in the value of property in the neighbourhood within the few months which elapsed between his purchase and the Government Notification to show that the property in April 1919 was worth more than what he gave for it. I see no reason to think that the price of Rs. 92,500 which the claimant gave for the property in July 1918 was not a fair market-value of the property. But I think he has failed entirely to prove that there was any chance of a purchaser being found in April 1919 who would give more than that price for the property. No doubt, in considering the question of value from a purely hypothetical point of view, it would be open to both sides to try and show, the one that, in whatever manner the property was developed, the property would not realize as much as Rs. 92,500, the other that it would realize considerably more. One side would be inclined to cast as much doubt as possible on the probabilities of profitable user, while the other side would endeavour to show that every portion of the property would be put to a very profitable use; so that the capital value would amount to very much more than the purchase price.

But all those considerations are purely hypothetical, and a great deal of the arguments used by the experts on both sides, the one to appreciate, the other to depreciate the value, if one took the trouble to analyse them would be found to have very little value. It seems to me that, when Government notified this property for compulsory acquisition in April 1919, they were bound to offer the claimant what he had given a few months before the property, unless they were able to show conclusively that he had not given a fair value for the property. After all, the Government have very wide powers under the Land Acquisition Act to deprive a man of his property, and it is only fair that he should be recouped on a liberal scale; any endeavours to unduly depreciate the value of properties that have to be acquired in order that Government may acquire as cheaply as possible, should be condemned equally with the exaggerated valuations put forward by claimants.

It seems to me, on a consideration of all the evidence in the case, that it all amounts to this, that the claimant has not proved that he could have realized more for this property in April 1919 than what he paid for it. The Government have not proved that if it was put in the market it would realize less. From the evidence it is difficult to see how a fair rent could have been obtained for the bungalow without spending a considerable amount in repairing and furnishing it. The property, as it stands, can best be valued at an all over rate per acre giving the fullest consideration to its situation. Looking at it in this way, the claimant paid about 16,000 rupees an acre. This on the evidence was a very fair rate and even the witness Hormasji Sorabji did not put the value of the land higher than Rs. 15,000 an acre, though he undoubtedly put an exaggerated value on the bungalow. Therefore, I think, that the claimant should be awarded Rs. 92,500 together with 15 per cent. for compulsory acquisition. I would once more refer to the futility of elaborate calculations which purport to enable one to ascertain the marketable value of property almost to annas and pies, and I would draw attention, in illustration of that, to the calculations made by the District Judge by which he arrived at the conclusion that the property was worth Rs 90,193. The valuation of immoveable property is not an exact science, and the very best efforts of an expert or a Court to fix a market value for a property like this can never amount to much more than a *quasi* scientific guess, which the Court should, in the case of compulsory acquisition, temper with liberality. Considering the appellant made a claim of two lacs even here, there will be no order as to costs.

SHAH, J.—I agree that the market value in this case should be fixed at Rs. 92,500, which is the amount paid by the claimant for this property in July 1918. I do not think that under the circumstances of this case the figures supplied to the lower Court on certain hypothetical bases afford any assistance to the Court in determining the true market value. The only safe basis which, on the facts of this case, is most favourable to the claimant, is the price which he paid for the property in July 1918. In spite of the argument of the learned Advocate-General to the contrary, there is nothing on the record of this case to show that that was not a fair market price at the time when he purchased the property. The

fact that he paid that amount is indicative of the then value of the property and unless there is any thing definite on the record to justify the result that the market value was really less than what he paid for it at the time, that argument could not be accepted.

The only question which presents some difficulty to my mind is whether the claimant is entitled to anything more than the amount which he paid in July 1918 on the ground that there was some increase in the value of the property from July 1918 to April 1919, when it was notified for acquisition. It may be that there was some rise, generally speaking, in the value of properties at Poona during that interval, but it was for the claimant to prove that during that period, *i.e.*, from July 1918 to April 1919, there had been such appreciable rise that he was entitled to some extra compensation on that account. Though I am rather inclined on general grounds to favour the view that probably there was some rise in the values of properties in this locality during that period, in the absence of any evidence on that point it is not possible to give effect to that consideration. I think, therefore, that the highest amount that the claimant could be awarded as the market value of the property is the amount which he paid in July 1918.

N. K. & W. C. A. *Award amended.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1678 OF 1919.

January 27, 1922.

Present:—Justice Sir N. R Chatterjea, Kt., and Mr. Justice Pearson.

Sreemutty NIRODE BORONI DASSI AND OTHER—PLAINTIFFS—APPELLANTS

versus

MONINDRA NARAYAN CHANDRA AND ANOTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 98, 99, 100, 101, 103—Dispossession by decree-holder or auction-purchaser—Application complaining of such dispossession—Dismissal of application for default—Suit to establish right to present possession—Limitation Act (IX of 1908), Sch. I, Art. 11 A, applicability of.

In cases coming under O XXI, rr. 98, 99 or 101 of the Code of Civil Procedure an order to be conclusive under r. 103 must be an order passed after investigation. [p. 527, col. 2.]

Where, therefore, an application under r. 100 complaining of dispossession by a decree-holder or auction-purchaser is dismissed for default without holding some sort of investigation, as expressly laid down by sub-rule (2) of r. 100 and r. 101, the special rule of limitation contained in Art. 11A of the first Schedule to the Limitation Act has no application and a suit to recover possession on establishment of title instituted more than one year after the date of the order of dismissal for default is not barred by limitation.

(Case-law considered.)

Appeal against the decree of the Subordinate Judge, Second Court, Burdwan, dated the 14th of May 1919, reversing that of the Munsif, Second Court at Katwa, dated the 31st of July 1916.

FACTS appear from the judgment.

Babu *Sarat Chandra Ray Chowdhury* (with him Babu *Haradone Chatterjee*), for the Appellants.—The plaintiffs are the appellants. The appeal arises out of a suit for establishment of title and recovery of possession. The defence was that the defendants Nos. 1—15 purchased the property in execution of a decree obtained by them against Baidya Nath Sarkar. They took possession through Court. The plaintiffs applied under O. XXI, r. 100 of the Civil Procedure Code but the application was ultimately dismissed on 14th February 1914. The present suit was brought on 27th July 1915. The first Court decreed the suit On appeal it has been dismissed on the ground of limitation. I submit the special rule of limitation as contained in Art. 11A of the Limitation Act does not apply. Our previous application was dismissed for default. There was no investigation under O. XXI, r. 100 (2) and r. 101, Civil Procedure Code. There must be some sort of investigation before the order can be treated as conclusive. Refers to *Sardhari Lal* v. *Ambika Pershad* (1), *Kunja*

(1) 15 C. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. s.) 931 (P. C.).

Behari Lal v. *Kandh Prashad Narain Singh* (2), *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhury* (3). A suit is not barred where the order was passed dismissing a case for default of appearance. Refers to *Kallar Singh* v. *Toril Mahton* (4), *Surala Subba Rau* v. *Kamsala Timmayya* (5). Art. 11A of the Limitation Act contemplates an order under O. XXI, r. 103 which expressly refers to rules 98, 99 and 101 of O. XXI, which clearly provide for investigation of the claim preferred. I submit, that under the circumstances the present suit is clearly not barred under Art. 11A of the Limitation Act.

Babu *Samatul Chandra Dutt*, for the Respondents.—Under section 283 of Act XIV of 1882 investigation was necessary under sections 280, 281 or 282. But the law under the New Code of 1908 has been changed. O. XXI, r. 63 does not mention any specific rules under which orders in claim cases are passed. Refers to *Nogendra Lal* v. *Fani Bhusan* (6), *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (7), *Satindra Nath* v. *Siva Prasad Bhakat* (8).

Article 11A of the Limitation Act applies even to cases where there has been no investigation. Refers to *Shagun Chand* v. *Shibbi* (9), *Chandi Prasad* v. *Nand Kishore* (10), *Tripoora Soonduree Debia* v. *Ijutoonnissa Khatoon* (11), *Gulab* v. *Mutsaddi* (12), *Jugal Kishore Marwari* v. *Bejoy Krishna Mukherjee* (13). Art. 11 A of the Limitation Act is very wide and does not refer to any particular section of the Code of Civil Procedure. I submit the suit has been rightly dismissed as being barred by limitation.

Babu *Sarat Chandra Ray Chowdhury* replied in brief.

(2) 6 C. L. J. 362.
(3) 34 C. 491; 11 C. W. N. 487.
(4) 1 C. W. N. 24.
(5) 31 M. 5; 17 M. L. J. 554; 3 M. L. T. 106.
(6) 44 Ind. Cas. 265; 45 C. 785; 23 C. W. N. 375.
(7) 48 Ind. Cas. 270; 41 M. 985; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292; 35 M. L. J. 335 (F. B.).
(8) 64 Ind. Cas. 713; 26 C. W. N. 126.
(9) 10 Ind. Cas. 401; 8 A. L. J. 626.
(10) 20 Ind. Cas. 369.
(11) 24 W. R. 411.
(12) 50 Ind. Cas. 748; 41 A. 623; 17 A. L. J. 674; 1 U. P. L. R. (A.) 41.
(13) 15 Ind. Cas. 683; 16 C. W. N. 882.

JUDGMENT.—This appeal arises out of a suit for establishment of right to, and recovery of possession of, the property in dispute from which the plaintiffs were dispossessed by the defendants Nos. 1 to 15 who purchased the property in execution of a decree which they obtained against one Baidya Nath Sarkar.

It appears that the defendants Nos. 1 to 15 took possession of the property in dispute through Court, and the plaintiffs applied to the Court under O. XXI, r. 100. On the day ultimately fixed for the hearing of the case, namely, on the 14th February 1914, neither the petitioners nor their Pleader appeared and the petition was accordingly dismissed for default.

The present suit was instituted on the 27th July 1915 which was more than one year after the date of the said order.

The question is whether the suit is barred by the provisions of Art. 11A of the Limitation Act (IX of 1908).

The Court of first instance decided both the questions of title and limitation in favour of the plaintiff. The lower Appellate Court has held that the suit is barred by limitation under Art. 11A of the Limitation Act.

O. XXI, r. 97 deals with a case of obstruction or resistance by any person to a holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree, and sub rule (2) of that rule lays down that the Court shall fix a date for investigating the matter and rr. 98 and 99 states what is to be done according to the result of the investigation.

R. 100 deals with the case of any person other than the judgment-debtor who is dispossessed of immoveable property by the holder of a decree for the possession of such property, or, where such property has been sold in execution of a decree, by the purchaser thereof.

Sub rule (2), rule 100 lays down that the Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

R. 101 provides that the Court, if satisfied that the applicant was in possession of the property on his own account, or on account of some person other than the judgment-debtor, shall direct that the ap-

plicant be put into possession of the property.

Then comes r. 103 which provides that any party not being a judgment-debtor against whom an order is made under r. 98, r. 9 or r. 101, may institute a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit (if any), the order shall be conclusive.

There were similar provisions in Act XIV of 1882, section 332 of which dealt with the case of dispossession of any person other than the judgment-debtor by the holder of a decree for possession, section 334 dealt with cases of obstruction to the purchaser of any immoveable property by the judgment-debtor or any one on his behalf, and section 335 dealt with cases where the purchaser of any such property is resisted or obstructed by any person other than the judgment debtor claiming in good faith a right to the present possession thereof, or where in delivering possession any such person is dispossessed.

There is no doubt that upon an application being made to the Court under O. XXI, r. 100, the Court has to hold some sort of investigation as expressly laid down by sub-rule 2 of r. 100 and r. 101.

In this case there was no investigation and the case was dismissed for default. The question is whether under these circumstances the special limitation contained in Art. 11A of the Limitation Act applies.

The provisions of O. XXI, rr. 97 to 103 are analogous to sections 278 to 283 of the Civil Procedure Code, Act XIV of 1882, (corresponding to O. XXI, rr. 53 to 63 of the present Civil Procedure Code). Those sections relate to claims preferred to attachment of immoveable property.

There have been numerous decisions on the question whether the one year's limitation under Art. 11 of the Limitation Act, (XV of 1877), apply to cases where there has been no investigation of a claim, under section 278, or objections under section 332 or 335, Civil Procedure Code (Act XIV of 1882). The decisions are not uniform.

In the case of *Sardhuri Lal* v. *Ambika Pershad* (1) in dealing with a case under section 278 of Act XIV of 1882 the Judicial Committee observed that the policy of the Act evidently is to secure the speedy settlement of questions of title, and pointed out that the Code does not prescribe the extent to which the investigation should go. That indicates that in their Lordships' opinion (as the sections expressly laid down) there should be some investigation before the order can be treated as conclusive. There are various other cases in which it has been held that there must be some investigation by the Court before the order can be held to be conclusive and Article 11 of the Limitation Act may be applicable to the case.

It is to be observed, however, with reference to claim cases, that sections 278 to 282 provided for an investigation and section 283 provided that "the party against whom an order under section 280, 281 or 282 is passed may institute a suit to establish the right which he claim to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." But the corresponding provisions of present Code of Civil Procedure (Act V of 1908) *viz.*, O. XXI, r. 63 provides that "where a claim or an objection is preferred, the party against whom an order is made, may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." It is to be observed, therefore, that whereas in section 283 of Act XIV of 1882 there was express reference to sections 280, 281 and 282 which dealt with investigation into a claim. O. XXI, r. 63 does not make any mention of any specific rules under which orders in claim cases are passed. Upon these grounds it has been held in some resent cases that there has been a change in the law and that the decisions under the old Code are no longer in force.

In the case of *Nogendra Lal* v. *Fani Bhusan* (6) it was held that where an application has been dismissed with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order The learned Judges held as follows:—"All that is now necessary is that a claim should be preferred under rule 58 and that there should be an order either allowing or rejecting it. The party against whom the order is made may then bring a suit in the language of rule 63 'to establish

the right which he claims to the property in dispute'."

The same view has been taken in the case of *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma* (7) where a Full Bench of the Madras High Court referring to the general policy of the previous Code as explained by the Judicial Committee in *Sardhari Lal* v. *Ambika Pershad* (1) said that section 283 of the Codes of 1877 and 1882 only gave a right of suit to the party against whom an order had been passed under section 280, 281 or 282 and did not provide for the case when the Court under section 278 refused to investigate the claim on the ground that it had been designedly or unnecessarily delayed. In such cases, section 283 failed to provide for the speedy settlement of questions of title raised by the claim. The learned Judges held that the intention of the Legislature was to widen the scope of the rule in accordance with the general policy of this legislation as explained by the highest Tribunal. It may be mentioned that in the case before the Madras Full Bench there was no order either allowing or rejecting the claim, and the Court directed that the allegations of the claimant would be notified to the bidders with the remark that she "did not take steps to have her claim inquired into during the last 10 months."

A similar view has also been taken in the case of *Ponnusami Pillai* v. *Ramu Ammal* (14) where it is held that, "the language of Art. 11 in the new Act is more comprehensive than that of the previous Act, and that has been construed in this Court as covering orders after full investigation as well as orders passed on default." See also observations on the point in the case of *Satindra Nath* v. *Siva Prasad Bhakat* (8).

These decisions relate to claim cases and, as stated above, they are based upon the alteration in the wording of r. 63, O. XXI as compared with section 285 of the old Code.

So far as the provisions of r. 103 are concerned, there has been no change in the Civil Procedure Code as compared with sections 332 and 335 of the old Code.

Sub-rule (2) of r. 100 and r. 101 (as also rr. 97 to 99) expressly provide that the Court shall investigate the matter and any order made under r. 101 (or r. 99) must, therefore, be the result of such investigation. When, therefore, r. 103 lays down that any party not being a judgment-debtor against whom an order is made under r. 98, r. 99 or r. 101 may institute a suit to establish the right which he claims to the present possession of the property but subject to the result of such suit (if any) the order shall be conclusive, it evidently contemplates an order passed after investigation as laid down in rr. 97 to 99 or rr. 100 and 101. The conclusiveness, therefore, attaches to an order made after investigation under those rules. The question has been considered with reference to section 335 of the old Code in the case of *Kunj Behari Lal* v *Kandh Prasad Narain Singh* (2) where the learned Judges held that "it is manifest, therefore, from the language of the Code itself, that the only order upon which the character of finality is impressed, is an order made upon inquiry" and that where there has been no investigation at all and no judicial determination and the Court without any enquiry dismissed the application for default and withdrew the proceedings, it is impossible to say that the order is of the description contemplated by section 335, and they approved of the decision in the case of *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhury* (3).

We have been referred by the learned Pleader for the respondent to the cases of *Bhagun Chand* v. *Shibbi* (9) and *Chandi Prasad* v. *Nand Kishore* (10) in support of the proposition that one year's rule of limitation has been applied even in cases where there has been no investigation. But in the first case it appears that the Pleader for the applicant appeared and stated that his client did not wish to adduce any evidence and the application was accordingly dismissed. In the second case, the Pleaders for both parties were present; no evidence was adduced and the learned Judges held that the dismissal of the petition under those circumstances could not be treated as dismissal for default of appearance. Neither of these cases, therefore, was dismissed for default.

It is also contended that the princip upon which it has been held that the limi tion of one year applies to orders passe connection with claim cases, even v

(14) 38 Ind. Cas. 937; 31 M. L. J. 247.

there has been no investigation should also be applied to a case like the present. But, as pointed out above, r. 63 does not refer to orders passed under r. 60, 61 or 62 of the Code under which the orders are made and it is upon that ground that the learned Judges in *Nogendra Lal* v. *Fani Bhusan* (6) and some other cases referred to above, held that the law had been changed.

So far as O. XXI, r. 103 is concerned there has been no change in the law. That rule like section 335 of Act XIV of 1882 refers to the previous rules, *viz.*, rr. 98, 99 and 101 under which orders are to be made after investigation. The distinction appears to be a narrow one, because orders under the claim sections have also to be made after investigation. But, having regard to the fact that although there was express reference to sections 280 to 282 in section 283, of Act XIV of 1882, there is no reference to those sections (corresponding to rr. 58 to 62) in r. 63, whereas in O. XXI, r. 103 there is express reference to rr. 98, 99 and 101 under which the investigation is to be made, and, having regard to the decisions referred to above, we are constrained to hold that in cases coming under O. XXI, rr. 98, 99 or 101, an order in order to be conclusive must be an order passed after investigation.

The next question for consideration is what constitutes "investigation," and it is a question of some difficulty in some cases.

As pointed out by the Judicial Committee (in connection with claim cases) in *Sardhari Lal* v. *Ambika Pershad* (1) the Court does not lay down to what extent the investigation should go. There seems to be a divergence of opinion as to what constitutes "investigation."

In a number of cases mostly relating to claim cases—where the claimant *did not adduce evidence* and the claim was dismissed, it was held that a suit brought more than a year after the date of the order was barred, some of the decisions were based on the ground that, where a party was allowed an opportunity of adducing evidence but failed to do so and there was an order rejecting the claim purporting to be made under section 281, there was investigation sufficient to bring the case under section 281. See *Rahim Bux* v. *Abdul Kader* (15) and the earlier cases of *Gooroo Doos Roy* v. *Sona Monee Dossia* (16) and *Sreemunto Hajrah* v. *Syud Tajooddeen* (17).

In some cases where the party was not even present as in *Tripoora Soonduree Debia* v. *Ijjatoonnissa Khatoon* (11), *Gulab* v *Mutsaddi* (12) *Jugal Kishore Marwari* v. *Bejoy Krishna Mukerjee* (13) (the last two cases being under the present Code) and *Lachmi Narain* v. *Martindell* (18) (a case under the Rent Act XII of 1881) the same principle was applied.

On the other hand, in some other cases it was held that the limitation did not apply where the order was passed dismissing the case for default of appearence [see *Kallar Singh* v. *Toril Mahton* (4) and *Sarala Subba Rau* v. *Rammsala Timmayya* (5)].

It is difficult to reconcile all these decisions. It may be said (as it was urged in some of the cases) that there is no reason why the limitation should apply where the party appears and is unable to, or does not, adduce evidence; and that the limitation should not apply where the party takes care not to come to Court on the day fixed for hearing. But a distinction has been drawn in the Civil Procedure Code between a case where it is dismissed for default, and a case where the party appears and fails to adduce evidence and the case is, in consequence, dismissed in which event the dismissal is not one for default.

It is pointed out on behalf of the respondent that Art. 11A of the Limitation Act does not refer to any section or rule of the Civil Procedure Code and is very general in its terms. It is accordingly contended that an order passed under rule 103 dismissing a case for default comes under Art. 11A of the Limitation Act.

Art. 11A refers to a suit by a person against whom an order has been made under the Code (among others) upon an application by a person dispossessed of immoveable property in the delivery of possession thereof to the decree holder or purchaser. But although the Article does not refer to any section, the order must be an order under O. XXI, r. 103. That rule expressly refers

(15) 32 C. 537.
(16) 20 W. R. 345.
(17) 21 W. R. 409.
(18) 19 A. 253; A. W. N. (1897) 60; 9 Ind. Dec. (N. S.) 166 (F. B.).

to rr. 98, 99 and 101 and these rules provide for investigation into a petition of objection. The *right of suit* is given by r. 103 only when there is any order under rr. 98, 99 or 101, and Art. 11A merely *provides for limitation* applicable to such suits. We do not think it satisfactory to hold that although the provisions relating to claims and those relating to delivery of possession are similar in nature, different periods of limitation should be applied, but, as already stated, having regard to the decisions under sections 332 and 335 and to the fact that the language of sections 332 and 335 has been retained in O. XX, r. 103, though the language of O. XXI, r. 63 has been altered from that of section 283 of Act XIV of 1882, we must hold that the order dismissing the application under O. XXI, r. 101 for default is not barred by the provisions of Art. 11A of the Limitation Act.

The appeal must accordingly be allowed. The decree of the lower Appellate Court is set aside and that of the Court of first instance restored. We make no order as to costs of this Court and of the lower Appellate Court which will be borne by each party.

Appeal allowed.

B. N.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 7 OF 1921.

January 4, 1922.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

KUNJ BEHARI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Pandit PRAG NARAYAN—PLAINTIFF—RESPONDENT.

Mortgage—Covenant postponing redemption, when amounts to clog on equity of redemption—Redemption before expiry of term, when allowed—Undue influence—Burden of proof.

A covenant postponing redemption for a long term need not necessarily of itself amount to a clog on the equity of redemption, but the effect of all the conditions in the deed must be considered as a whole, and if those conditions would result in making redemption very difficult, if not impossible, at the end of the term, a Court may ignore the covenant postponing redemption and may allow redemption at any time on such terms as it thinks fit [p. 534, col. 1.]

Durga Singh v *Nawab Mirza Muhammad Raza Husain Khan*, 25 Ind. Cas. 912; 17 O. C. 313 and *Sarabdawan Singh* v. *Bijai Singh*, 24 Ind. Cas. 705; 12 A. L. J. 927; 36 A 551, followed

Where in the case of a mortgage-deed it is shown that the mortgagee's brother was in a position to dominate the will of the mortgagor and that the terms of the deed are clearly hard and unconscionable and that an unfair advantage was taken of the mortgagor in getting him to execute the deed, the burden lies upon the mortgagee to show that undue influence, under the circumstances, was not exercised. [p. 532, col. 1.]

Appeal from a decree of the Subordinate Judge, Unao, dated the 8th September 1920.

Mr. *Bisheshwar Nath Srivastava*, for the Appellants.

Dr. *J. N. Misra* and Mr. *Ali Mohammad*, for the Respondent.

JUDGMENT.—The facts of this case are somewhat complicated. The property in suit consists of a 4 annas share in Mauza Satan in the District of Unao. It belonged to one Baldeo Bakhsh, the grandfather of Har Dayal who was defendant No. 9 in the lower Court. On the 1st of September 1868 Baldeo Bakhsh mortgaged the property with possession to one Daya Shankar. Possession was not given and in 1870 Daya Shankar brought a suit against Baldeo Bakhsh and got a decree for possession as mortgagee of 1 anna only out of the 4 annas. Daya Shankar obtained a review of judgment and on the 29th of April 1871 the original decree was amended and he was given a decree for possession of the remaining 3 annas in full proprietary right. This was clearly a mistake, as he was entitled to possession only as mortgagee, but no appeal was filed against this decree. On the 9th of February 1912 Har Dayal, the grandson of Baldeo Bakhsh, executed a mortgage deed in favour of Badri Bisal and Sheo Sahai for a sum of Rs. 4,075 out of which Rs. 2,000 were to be left with the mortgagees for redeeming Daya Shankar's mortgage. Under this deed it was provided that the mortgagor would not be entitled to redeem until after the period of 41 years. Interest was fixed at 1·8 per cent. per mensem: the profits of the property were estimated at Rs. 200 and the balance of interest amounting to Rs. 538·8·0 was to be added to the principal and was to be paid with compound interest along with the principal at the time of redemption. Badri Bisal, one of the mortgagees is the father of

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Pandit Prag Narain, the plaintiff in the present suit. On the 28th February 1912, Har Dayal alleging himself to be a minor instituted a suit through his next friend Baij Nath for cancellation of the mortgage-deed of the 9th of February 1912 on the grounds that Har Dayal was a minor at the time of the execution of the mortgage-deed and that the mortgage had been obtained by undue influence. Baij Nath applied to the District Judge on the 11th of April 1912 to be appointed guardian of the person and property of Har Dayal. In that application he stated that he was the brother-in-law of Har Dayal and was the *de facto* guardian of his person and property, and he asked to be appointed guardian by the Court in order that he might make arrangements for the payment of Daya Shankar's mortgage and for redeeming Har Dayal's property. It is admitted that Har Dayal had no property other than the 4-annas share now in suit. On the 26th of April 1912 Baij Nath was appointed by the District Judge as guardian of the property of Har Dayal and his mother desired that Baij Nath should be appointed and the application was unopposed. On the very day on which he was appointed guardian Baij Nath applied for permission to mortgage or sell some portion of the minor's property for the purpose of redeeming the mortgage held by Daya Shankar. This application was refused by the learned District Judge by his order of the 17th of May 1912. On the 29th of March 1913 the suit brought by Har Dayal through his next friend Baij Nath for cancellation of the mortgage executed by Har Dayal in favour of Badri Bisal and Sheo Sahai was compromised and Har Dayal was given a decree for cancellation of the mortgage on condition of payment of Rs. 1,300 to the mortgagees on or before the 3rd of April 1913. It is to be noted that in this compromise the plea of minority was withdrawn and Har Dayal was recognised as having attained majority, although the order of the District Judge appointing Baij Nath as his guardian had not been discharged, and according to his age given in the guardianship proceedings he could not have been more than 17 years old at the time of the compromise. It is also to be noted that the compromise was brought about by Baij Nath who stated before the Court that he had come to terms with the defendants (Exhibit 12). Two days afterwards on the 31st of March 1913 the mortgage-deed, which is the basis of the present suit, was executed by Har Dayal in favour of Jagan Nath. Jagan Nath was admittedly the brother of Baij Nath and they with their other brother, Ganga Narain, and their sons were members of a joint Hindu family. The mortgage was for a sum of Rs. 5,000 made of the following items:—

Rs. 1,200 were to be paid to Baij Nath for conducting the case of Har Dayal against Badri Bisal and Sheo Sahai.

Rs. 1,300 were to be deposited in Court for payment to Badri Bisal and Sheo Sahai in accordance with the terms of the compromise decree of the 29th of March 1913:

Rs. 2,440 were left with the mortgagee to redeem the mortgage of the 1st of September 1865 and for other costs that might be incurred in redeeming it: and the balance of

Rs. 60 was to be spent in the purchase of stamp and costs of execution of the mortgage-deed.

This mortgage-deed provided that the mortgagor would not be entitled to redeem for a period of 50 years. Interest was fixed at 12 annas per cent. per mensem; the profits of the property was estimated at Rs. 300 and balance of interest amounting to Rs. 150 was to be added to the principal and was to be paid with interest at the same rate along with the principal at the time of redemption. It will be observed that Har Dayal, the mortgagor, was under the terms of the mortgage deed to receive no portion of the consideration. On the 10th of April 1913 Jagan Nath brought a suit for redemption of the mortgage of 1865 against the representatives of Daya Shankar. He obtained a decree, paid the mortgage-money amounting to Rs. 2,232-5-0 and obtained possession of the 4 annas share now in suit. In the meantime Badri Bisal and Sheo Sahai filed an appeal in the Judicial Commissioner's Court against the compromise decree of the 29th of March 1913, and Har Dayal, who had presumably been won over by Badri

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Bisal confessed judgment and prayed that his suit should be dismissed. On the 10th of March 1915 the appeal was allowed and the suit was dismissed. Bardi Bisal and Sheo Sahai thereupon filed a suit on the 11th of May 1915 on the basis of their mortgage-deed of the 9th February 1912 for possession of the mortgaged property. Their suit was dismissed and they were directed to take the sum of Rs. 1,300 deposited in Court by Jagan Nath to their credit. That decree was confirmed in appeal by this Court. The result of all these proceedings was that Jagan Nath obtained possession as mortgagee of the 4-annas share by virtue of his mortgage of the 31st of March 1913.

On the 2nd of July 1919, Har Dayal sold his equity of redemption to Prag Narayan, the plaintiff, who is the son of Badri Bisal. Prag Narayan brought the suit out of which this appeal arises for redemption of the 4 annas share. In his plaint he alleged that the mortgage deed was not binding on Har Dayal and was, therefore, not binding on him on the grounds, among, others that the conditions in the deed were hard and unconscionable and were a clog on the equity of redemption and that the deed had been obtained from Har Dayal by the exercise of undue influence. The learned Subordinate Judge has held that the terms of the deed taken together are hard and unconscionable, that they amount to a clog on the equity of redemption and that the deed was executed under undue influence. On these grounds he has held that the plaintiff who is the representative of the mortgagor is entitled to redeem although the period fixed in the mortgage-deed has not yet expired. He has given the plaintiff a decree for redemption on payment of the principal sum of Rs. 5,000 *plus* Rs. 1,200 per annum for 3 years, that is, from the date of the deed 31st March 1913 till the end of the period fixed for payment, and he has ordered the parties to pay their own costs. Against this decree the defendants mortgagees have appealed and the plaintiff has filed cross-objections. In the appeal it is urged that the lower Court was wrong in holding that the terms in the mortgage deed amount to a clog on the equity of redemption and that undue influence was exercised and it is also urged that the costs of the suit should have been allowed to the defendants mortgagees. The only ground argued on the petition of objections is that the appellants should not have been allowed the item of Rs. 1,200 which were left with the mortgagee for payment to Baij Nath for conducting the case of Har Dayal against Badri Bisal and Sheo Sahai.

The history of the property which we have given in detail shows very clearly that Badri Bisal and Sheo Sahai on the one hand and Baij Nath on the other were very anxious to get hold of it and that Har Dayal was a pawn in their hands, sometimes under the influence of one party and sometime under the influence of the other. At first Badri Bisal and Sheo Sahai got hold of him and got him to execute the iniquitous mortgage of the 9th of February 1912 at the time when he was almost certainly a minor. Then his brother in-law, Baij Nath, stepped in and got him to bring a suit for the cancellation of that mortgage and got him to agree to Baij Nath's application to be appointed his guardian. The compromise of the 29th of March 1913 indicates that Badri Bisal and Baij Nath agree to divide the spoil, Badri Bisal taking Rs. 1,300 and letting Baij Nath get hold of the property. Immediately after that compromise Baij Nath had the mortgage-deed now in suit executed in favour of his brother, Jagan Nath, who was joint with him. Then Badri Bisal repented to his bargain, filed an appeal from the compromise decree of the 29th of March 1913, won over Har Dayal and got him to confess judgment. Badri Bisal, however, failed in his suit to obtain possession under his mortgage of 1912 and he, therefore, resorted to the expedient of purchasing the equity of redemption in the name of his son Prag Narayan. The learned Counsel for the appellants, while admitting that his clients were very eager to obtain possession of the property, argues that the conditions entered in the mortgage deed in suit are by no means unusual, that they are at any rate not nearly so onerous as the conditions of the mortgage obtained by Badri Bisal and Sheo Sahai on the 9th of February 1912 and that they cannot be held to be hard and unconscionable or to constitute a clog on the equity of redemption. It is quite true that they are not so iniquitous as

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the conditions of Badri Bisal's mortgage, but we have no hesitation whatsoever in holding that the intention of the mortgage was to ensure that the right of redemption could never be exercised and that the conditions entered in the mortgage-deed were such as would effectually prevent redemption. A covenant postponing redemption for a long term need not necessarily of itself amount to a clog on the equity of redemption, but the effect of all the conditions in the deed must be considered as a whole, and if those conditions would result in making redemption very difficult, if not impossible, at the end of the term the Court may ignore the covenant postponing redemption and may allow redemption at any time on such terms as it thinks fit [*Durga Singh* v. *Nawab Mirza Muhammad Raza Husain Khan* (1) and *Sarabdawan Singh* v. *Bijai Singh* (2)]. In the present case there was a condition in the mortgage-deed that the balance of Rs. 150 of interest should be added annually to the principal sum and that it should be paid with compound interest along with the principal at the time of redemption. A rough calculation shows that at the end of a period of 50 years the principal and interest payable to the mortgagee would amount to over a *lakh* even if we were to presume that there would be no increase in the revenue during that long period. We may note that a new Settlement falls due in 1925 and that the revenue will then be almost certainly enhanced. It is urged that there is nothing in the mortgage deed which would justify the mortgagee in refusing to receive payment annually of the excess interest of Rs. 150 and that the mortgagor would only have himself to blame if he failed to pay the interest as it fell due. The only provision in the mortgage-deed in respect of this Rs. 150 is that it shall be added to the principal amount at the end of each year and shall carry interest and compound interest and the total amount shall be paid after the expiry of 50 years. There is no provision such as is generally found in the mortgages of this nature that the interest shall be paid regularly every year and in case of default shall be added to the principal. But whether or not the mortgagor might, under the terms of the deed, be at liberty to pay the excess interest annually the mortgagee knew that the mortgagor was not in a position to do so. Admittedly the mortgaged property was the only property of which Har Dayal was possessed and he had no means whatsoever for paying the excess interest. And it is to be noted that the mortgagor was obtaining no advantage whatsoever by executing this mortgage. No portion of the consideration-money was to be paid to him. He was given only a right to redeem after 50 years, a right which in all probability he would never be able to exercise.

We are also satisfied that the learned Subordinate Judge has come to a right conclusion on the question of undue influence. There cannot be slightest doubt that Baij Nath was in a position to dominate the will of Har Dayal. On the 28th of February 1912 he had persuaded Har Dayal to file a suit for cancellation of Badri Bisal's mortgage and in that suit he was shown as the next friend of Har Dayal. In that suit Har Dayal had pleaded that he was a minor at the time of the execution of the mortgage, and although the plea of minority was withdrawn and Har Dayal himself executed the deed of compromise professing to have attained majority, yet we have the statement of Baij Nath himself that it was he who arranged the terms of the compromise with Badri Bisal (*vide* Exhibit 12 at page 27 of the paper-book). We find that Baij Nath applied to the Court on the 11th April 1912 to be appointed Har Dayal's guardian and that Har Dayal himself supported that application. Baij Nath was appointed guardian by the Court and the order appointing him guardian had not been discharged when the mortgage-deed in suit was executed in favour of Jagan Nath who is Baij Nath's brother and member of a joint Hindu family along with Baij Nath. Baij Nath as guardian of Har Dayal had applied to the Court on the 26th of April 1912 for permission to transfer this very property or a portion of it by sale or mortgage and his application was refused. If the age of Har Dayal given in the application for guardianship was correct, Har Dayal could not have been more than 17 years of age when the mortgage-deed in suit was executed. It is at least probable that he had at that time not attained the age

(1) 25 Ind. Cas. 912; 17 O. C. 313.
(2) 24 Ind. Cas. 705; 12 A. L. J. 927; 36 A. 551.

of 21, and as a guardian had been appointed by the Court he was still, in view of the provisions of the Indian Majority Act (IX of 1875), a minor. The mortgage-deed has not been attacked on this ground, probably because the plaintiff is the son of Badri Bisal who had taken the mortgage of 1912 from Har Dayal and had entered into the compromise of the 29th of March 1913 with Har Dayal as a major. As we have pointed out, it was Baij Nath who arranged the compromise of the 29th of March 1913 and the mortgage-deed in suit was executed only two days afterwards on the 31st of March 1913. These facts show beyond question that Baij Nath at the time of the execution of the mortgage was in a position to dominate the will of Har Dayal. The terms of the deed were clearly hard and unconscionable and an unfair advantage was taken of Har Dayal in getting him to execute the deed. We have shown that under the terms of the deed redemption would have been practically impossible. In addition to this, though the income of the property stated in the deed is not disputed, yet there can be no doubt that t' at income was liable to very considerable enhancement. A comparison with other *pattis* in the same *mahal* shows that the income of the property in suit ought not to be less than Rs 800, while it is stated in the deed to be only Rs. 300. The deed provides that any increase in rent shall be appropriated by the mortgagee while any increase in revenue shall be paid with compound interest thereon by the mortgagor. Further, we have shown that Har Dayal got no advantage of any kind by executing the mortgage. As we have shown that Baij Nath was in a position to dominate the will of Har Dayal and that the terms of the deed were hard and unconscionable and an unfair advantage was taken of Har Dayal the burden lay on the defendants-appellants to show that undue influence was not exercised. They have made no attempt to discharge this burden.

With regard to the question of costs it is sufficient to say that the whole history of the property shows that Baij Nath, who was joint with the mortgagee Jagan Nath, was prepared to go to any length to obtain this property. He has been found to have exercised undue influence in obtaining the mortgage deed and to have imposed terms which were hard and unconscionable and which, if adhered to, would have resulted in effectually preventing the exercise of the right of redemption, and the defendants who are now the representatives of Jagan Nath and Baij Nath have resisted the plaintiff's claim and denied his right to redeem. In these circumstances the defendants were clearly not entitled to their costs.

In support of the plaintiff's objection that he is not liable to pay the item of Rs. 1,200, which under the terms of the mortgage-deed were left with the mortgagee to be paid to Baij Nath for conducting Har Dayal's suit against Badri Bisal, it is urged that no proof has been adduced that this sum was actually spent in the conduct of the case and that the defendants failed to produce their accounts to show that the money had actually been paid. The item of Rs. 1,200 is clearly not the actual amount spent by Baij Nath in conducting the case but it is a lump sum payable according to the terms of the mortgage to Baij Nath for the conduct of the case. Har Dayal had admittedly no income. The case against Badri Bisal was contested right up to the end and a considerable amount must have been spent in conducting it. That it was conducted by Baij Nath is admitted. The plaintiff has made no attempt to show that the item is fictitious and Har Dayal himself has not been examined as a witness. It is true that the plaintiff summoned the defendant's account-books but he made no attempt whatsoever to have them produced in evidence. This plea, therefore, has no force.

The result is that the appeal and the petition of objections are both dismissed. The defendants appellants will pay the plaintiff-respondent's costs in the appeal and the plaintiff respondent will pay the defendants-appellants' costs on the petition of objections.

N. K.

Appeal dismissed.

B. B. & C. I. RAILWAY v. SAKARCHAND.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 303 OF 1921.

March 2°, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

B. B. & C. I. RAILWAY—APPLICANT

versus

SAKARCHAND KALIDAS SHAH—OPPONENT.

Railway Company—Risk Note, Form B—Consignment, loss of—Proof necessary to render Company liable.

Where, while goods are being carried by a Railway Company, a theft occurs while the train is running, the Railway Company is protected by the Risk Note. It is, however, open to a plaintiff in such a case to prove that theft did not occur in a running train or that it was brought about by the Company's servants.

Civil Extraordinary Application against the decision of the Judge of the Court of Small Causes at Ahmedabad, in Civil Suit No. 2015 of 1920.

Mr *Campbell*, instructed by Messrs. *Crawford, Bayley & Co.*, for the Applicant.

Mr. *G. N. Thakor*, for the Opponent.

JUDGMENT.—The plaintiff sued to recover for the loss of a consignment of molasses. The Judge seems to have found as a fact that there had not been a theft in the running train. Therefore, the Company could not escape the liability. But, unfortunately, the learned Judge went on to make some remarks which were not necessary for the purpose of deciding the case, and if those remarks were to stand, they might be followed in similar cases by the Subordinate Courts, and, therefore, it is necessary to remark that if there is a theft in a running train, then the Company are protected by the Risk Note. It is open to the plaintiff in such a case to prove that theft did not occur in the running train, or that the theft was brought about by the Company's servants. But if nothing more can be proved except that there was a theft in a running train, then the Company by the Risk Note, Form B, which is now before us, are protected. Rule discharged with costs.

N. K.

Rule discharged.

PARBATI v. MOHAMMAD HADI.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 34 OF 1920.

November 29, 1921.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

Musammat PARBATI, DEAD, AND ON HER DEATH SHIAM BIHARI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Saiyid MOHAMMAD HADI—PLAINTIFF AND MANNI LAL AND OTHERS—DEFENDANTS NOS 2 TO 6—RESPONDENTS

Hindu Law—Joint family—Father and son—Initial presumption of jointness—Hindu widow, possession, adverse, against—Possession, whether adverse against reversioners—Evidence, admissibility of—Copy of copy when admissible.

There is an initial presumption in favour of jointness in a Hindu family and this presumption is particularly strong in the case of a father and his only son [p. 537, col. 1.]

Possession which commences during the lifetime of a Hindu widow with a limited interest cannot be adverse to reversioners. [p. 538, col. 1.]

Where a copy of a person's statement is a copy of a copy, it is inadmissible in evidence, except when the statement has been put to the person making it and admitted as having been made by him. [p. 536, col. 2.]

Appeal from a decree of the Subordinate Judge, Hardoi, dated the 31st March 1920.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

Mr. *Niamat Ullah*, for Respondent No. 1.

JUDGMENT.—At the time of the institution of the suit out of which this appeal arises the principal defendant, *Musammat* Parbati, was in possession of the suit property and had been in possession of it for the past 25 or 26 years. She held it under two possessory mortgages of 23rd July 1884 and 17th June 1893 executed by Talib Ali in favour of her deceased husband, Dharnidhar. The plaintiff, who is the son of the mortgagor, wants to get back the property without redeeming the mortgage and for this purpose has got a deed of release from certain distant collaterals who were the reversioners of Jamnadhar father of Dharnidhar. Their case is that *Musammat* Parbati is a trespasser. Dharnidhar, according to them, was joint with his father, Jamnadhar, whom he had admittedly predeceased, and on Jamnadhar's death the rightful heir to the property was his

widow, *Musammat* Mukta, who died in 1910. *Musammat* Mukta released her rights in favour of *Musammat* Parbati. *Musammat* Parbati was in possession till 1910 in virtue of this deed of release. The present reversioners only became entitled to possession on the death of *Musammat* Ladli, daughter of Jamnadhar, in 1918. The suit is thus within time. *Musammat* Parbati has died since the filing of the appeal and is now represented by her daughter and her daughter's son. The following pedigree will serve to elucidate the facts of the case:—

SHEO SAHAI

Jamnadhar, (died 15th July 1894) =*Musammat* Mukta, (died 26th February 1910)

Gangadhar, (died 3rd July 1909).

Dharnidhar, (died 2nd August 1933) =*Musammat* Parbati, defendant No. 1, (now dead)

Musammat Ladli, (died childless 15th April 1918).

Musammat Chameli, (appellant)

Shiam Bihari, (appellant).

The learned Subordinate Judge has found for the plaintiff and decreed the suit. The appellants contest the finding on two grounds:—

1. That Dharnidhar and Jamnadhar had separated before the death of the former and that the mortgagee rights were the separate property of Dharnidhar.

2. In the alternative that *Musammat* Parbati acquired those rights by adverse possession which began on the death of Dharnidhar.

The appeallants' case regarding the deed of release executed by *Musammat* Mukta is that so far as it affected the property which stood in the name of Dharnidhar it was merely a recognition of *Musammat* Parbati's right.

As the family held a large amount of property on mortgage the question of the status of the family at Dharnidhar's death has given rise to much difficulty and formed the subject of a great deal of litigation. There have been decisions both in favour of the widow and against her. The earliest decisions of which there is any evidence was against her in the year 1897. In 1900 there was a decision in her favour. This case was referred to the arbitration of two Pleaders of the District. The opposite parties, who were residents of the same town Sandi in which *Musammat* Parbati lived, at first took the plea that Dharnidhar and Jamnadhar were joint but on the case being referred to arbitration they withdrew it and the arbitrators found on the admission of the parties that *Musammat* Parbati was the heir and representative of Dharnidhar, her husband, and as such was competent to bring the suit. In 1903 there was another suit which was also decided against her. In this case, her Pleaders in the Appellate Court (Exhibit 128) did not contest the finding that Jamnadhar and Dharnidhar were joint. In 1912 there was another suit decided in her favour, mainly on the admission of the husband of *Musammat* Ladli, who was then alive and was the next reversioner of Jamnadhar, that Jamnadhar and Dharnidhar had separated. Besides these cases in which third parties were the defendants there was one case which was actually *inter partes* but which cannot be relied on as *res judicata*, because it was decided by a Munsif who would not have been competent to hear the present suit, but which, like the other judgments, is relied on as evidence under section 13 of the Evidence Act. In that case the finding of both the Original and the Appellate Courts was in favour of the present plaintiff and against *Musammat* Parbati.

The previous judgments are of very little assistance in this case. The weight of evidence on the present record is decidedly in favour of the respondent. The evidence relied on by each side has been carefully tabulated by the learned Subordinate Judge in his judgment (pages 111 to 117 of the paper-book), and except that the respondent relies on an admission in Exhibit 60 the whole of the evidence relied on by both sides has been fully discussed by the learned Subordinate Judge. Exhibit 60 is a deed of gift executed by *Musammat* Parbati in 1915 in favour of her daughter *Musammat* Chameli, appellant No. 2, and contains an admission that with one or two exceptions mutation of all the properties, which stood in the name of Dharnidhar, was effected in favour of

Jamnadhar on Dharnidhar's death. Neither party has placed much reliance on the oral evidence. The oral evidence adduced by *Musammat* Parbati has been severely criticised by the learned Subordinate Judge and the appellants' Counsel has conceded that he cannot ask the Court to rely on it unless the Court holds that the weight of documentary evidence is in his favour.

Perhaps the two most important pieces of evidence on the side of the respondent consist of two admissions, one by *Musammat* Parbati herself and the other by her brother and general agent, Banke Lal. Both these admissions were made shortly after *Musammat* Parbati came into possession of the property. *Musammat* Parbati's admission was made in the course of her evidence recorded by commission in a case originally instituted by her husband, Dharnidhar. Jamnadhar had applied to be substituted as his legal representative and it was in connection with this application that her evidence was recorded In the statement she made she admitted that her husband and Jamnadhar were members of a joint family. *Musammat* Parbati in her evidence tried to explain away this admission by saying that Jamnadhar persuaded her to make the statement because she could not go out of her house for a year on account of her husband's death and, therefore, he must be brought on the record in order to prosecute the case for her. This explanation is not satisfactory. In the first place, nearly a year from her husband's death had elapsed when the statement was recorded. He died on 2nd August 1893 and the statement in question was made on 3rd June 1894. In the second place, it would have been perfectly easy for her to have executed a power-of-attorney in favour of Jamnadhar. In the the third place, this admission has been relied on in several previous cases to which *Musammat* Parbati was a party, and the judgments show no trace of this explanation ever having been put forward in any of those cases.

The admission by Banke Lal was made in 1895 in a Civil case in which he was appearing as *Musammat* Parbati's agent. It was to the same effect as her own admission, namely, that Dharnidhar and his father were living jointly and that there had been no division between them. He also stated that Dharnidhar was the manager. It was brought to our notice in the course of the hearing that the copy of this statement on the record was a copy of a copy. It would, therefore, have been inadmissible but for the fact that the statement was put to Banke Lal in the course of his examination in the Court below and he admitted having made it. He offered no explanation of the contradiction between this statement made shortly after the death of the person concerned and the evidence which he had been giving in this suit.

The deed of release executed in favour of *Musammat* Parbati by *Musammat* Mukta on 3rd September 1854 has been relied on by both parties. It recites that Dharnidhar was owner and in possession and manager (*muntazim*) of all the family property and the active member and head of the family. He has died without leaving any male issue and the executant's husband, Jamnadhar, is also dead. There is no one remaining in the family except the executant herself and her daughter-in-law, *Musammat* Parbati. The latter is in possession of the property and to prevent disputes it has been agreed by their mutual consent that she should continue in possession and manage it. *Musammat* Mukta undertakes to make over to her all documents such as mortgage deeds, etc., whether they stand in the name of Jamnadhar or Dharnidhar. On the same date *Musammat* Parbati executed a deed of maintenance in favour of *Musammat* Mukta guaranteeing the latter Rs. 100 a year for maintenance in consideration of the fact that *Musammat* Mukta had executed a deed of relinquishment of the property "in which she had a right of inheritance, being the property left by her husband and son." The language of the deed of relinquishment is ambiguous but the words 'manager (*muntazim*) and head of the family (*ogwokar*)' are suggestive of a joint family and there is this important consideration in favour of this view.

The case now set up by the defendant is that a separation had taken place in 1876, seventeen years before Dharnidhar's death, and that there had been an actual division of all the property. If this story had been true what necessity was there for *Musammat* Mukta to execute a deed of relinquishment of property of which Dharnidhar had been

in separate possession for many years and as to which the right of his widow could not possibly be disputed. If, on the other hand, the family really was joint up to Dharnidhar's death and after her death and that of her husband *Musammat* Mukta wished her daughter-in law to have the property, the execution of the deed of relirquishment was a perfectly natural act. The language of the deed of maintenance, moreover, is quite inconsistent with the theory of separation. That deed recites that *Musammat* Mukta has given up her rights of inheritance in the property of her husband and her son. If Dharnidhar had separated from his father, *Musammat* Mukta could have no right of inheritance in his property seeing that he left not only to widow, *Musammat* Parbati, but a daughter also. If, on the other hand, the family was joint, *Musammat* Mukta as the widow of the last surviving member was entitled in law to the whole of the family property. There is also an initial presumption in favour of jointness in a Hindu family and this presumption is particularly strong in the case of a father and his only son. The improbability of separation is also increased, as the learned Subordinate Judge points out, by the fact that Dharnidhar must have been very young when separation is said to have taken place. Even if the evidence on which the learned Subordinate Judge relied in fixing Dharnidhar's age does not enable to fix it with absolute exactness, Dharnidhar can hardly have been more than eighteen or nineteen at most in the year 1876.

The previous judgments and the terms of the deed of release have already been discussed. Excluding these the only important evidence relied on by the appellants to rebut the strong evidence on the other side consists of—

1. The fact that *Musammat* Parbati's name was recorded as owner in the *khewat* and the mutation proceedings in connection therewith.

They also rely on the fact that *Musammat* Parbati obtained a Succession certificate as heir of Dharnidhar and was substituted as his successor in certain pending suits.

2. An admission by the present plaintiff made in the year 1900, Exhibit A6.

3. The fact that on the same date two mortgage-deeds were executed by the same person, one in favour of Jamnadhar and the other of Dharnidhar.

The only *khewat* entries which can be of any value in support of the defendant's case are those in which her name was recorded prior to the execution of the deed of release. After the execution of that deed she was entitled to possession whether her husband and Jamnadhar were joint or separate. Only two instances have been proved in which she obtained mutation in the lifetime of Jamnadhar and the terms in which Jamnadhar supported her application are very significant (Exhibits A7 and A8). In both cases he stated that he did not wish mutation being made in his own name because he was very old. This clearly implies that he was entitled to get his own name recorded had he so desired. The Succession Certificate and the cases in which *Musammat* Parbati was brought on the record as her husband's legal representative were all after Jamnadhar's death.

The alleged admission of the plaintiff is contained in his deposition in the mutation case regarding two plots Nos. 30 and 31 of the Kasba Sanci which are now in dispute. Mutation of the 10 *biswas* share had been effected in 1876 but not of these two plots. Mutation in respect of these plots having been applied for in 1900 notice was issued to the plaintiff as mortgagor and he stated that as Dharnidhar, the mortgagee, was dead and Parbati was his widow and mutation by right of inheritance had not so far been effected in her favour her name might now be entered. This cannot fairly be treated as constituting an admission that any separation had taken place between Dharnidhar and his father.

The fact that two mortgage-deeds, Exhibits A56 and A57, were executed on the same date by Ali Mohammad, one in favour of Jamnadhar and the other of Dharnidhar, is of very little value as evidence of separation. Dharnidhar was in all probability a minor at the time and there are many reasons which may lead a father to take a mortgage in the name of his minor son instead of in his own. Any value which the document in favour of Dharnidhar might otherwise have had as supporting the defendant's case is destroyed by the fact that the deed itself shows that the advance in respect of which

the mortgage was executed had been made by Jamnadhar.

The only other plea which remains to be considered is that of adverse possession. Possession which commences during the lifetime of a Hindu widow with a limited interest cannot be adverse to the reversioners. The case argued before us has been that adverse possession commenced on Dharnidhar's death in 1893. Even if *Musammat* Parbati was in actual possession of the property it would be very difficult to hold, in the absence of any express declaration by any of the parties interested, that her possession was adverse to that of her father-in-law in whose house she was living. It is, however, not proved that she was in possession. The only evidence relied on in this behalf consists of the two statements of Jamnadhar in the mutation cases already referred to, Exhibits A7 and A8, which relate to property not in suit in which he says he allows her to get mutation because he himself is old, and three witnesses whose evidence has not been accepted by the Court below and is entirely worthless.

The appeal fails on both issues and it is hereby dismissed with costs.

N. K.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

May 15, 1922.

Present:—Viscount Cave, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Sri CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL—PLAINTIFF—APPELLANT

versus

VEERAMA REDDI *alias* MOOKA REDDI—APPELLANT—DEFENDANT—RESPONDENT.

Inam *grant*—Varam—*Presumption*—Inam, *meaning of*—*Intention of donor*—Zemindar, *who is*—*His right to possession of land, how determined*—*Madras Estates Land Act (I of 1908)*—*Affirmation of old customary law*—*New right, creation of, by Act to settle disputes between landlord and tenant*—*High Court, power of, to determine issue or remit case for finding on that issue*—*Entire evidence before Court*—*Question of onus academical.*

There is no presumption of law that an *inam* grant of a village is *prima facie* a grant of *melvaram* right only or of both *melvaram* or *kudivaram*. Each case must be considered on its own facts, with special regard to the evidence and circumstances therein. [p. 547, col. 1.]

Seturatnam Aiyar v. *Venkatachala Gounden*, 56 Ind. Cas. 117; 47 I. A. 76; 43 M. 567: (1920 M. W. N. 61; 22 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 47[2]; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485 (P. C.), *Suryanarayana* v. *Patanna*, 48 Ind. Cas. 869; 45 I. A. 209; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L J. 585; 21 Bom L. R. 547; (1919) M W. N. 463 (P. C.) and *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu*, 51 Ind. Cas. 304; 46 I. A. 128; 43 M. 166; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R 925; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129 (P. C.), referred to.

Muthu Goundan v. *Perumal Iyen*, 63 Ind. Cas. 790; 44 M. 588; 40 M. L. J. 429; 18 L. W. 483; (1921) M. W. N. 263; 29 M. L. T. 398, dissented from.

The term "*inam*," an Arabic word meaning a reward, does not give any indication of the intention of a donor. [p. 545, col. 1.]

Prima facie a Zemindar or Polygar is a rent receiver and his right of direct possession of lands is confined to his "private lands" and old waste lands and does not extend to *raiyati* lands. [p. 545, col. 1.]

In declaring the rights of occupancy *raiyats* and emphasizing the distinction between a landlord's "private lands" and "*raiyati* lands", the Madras Estates Land Act affirmed the old customary law that has always been recognised by the British Administration. Apart from the rules relating to procedure and jurisdiction of Revenue Courts, it created one new right in order to settle the constant disputes between landlords and tenants and gave occupancy rights to all *raiyats* in occupation of lands within an "estate" at the time it was passed. It also declared and gave statutory recognition to existing rights and status. These remarks do not apply to *raiyatwari* tracts in the direct possession of Government which are let out to *mirasidari* or hereditary *raiyats* for purposes of cultivation. [p. 544, col. 2; p. 545, col. 1.]

A High Court has the power of determining an issue, left undetermined by a lower Appellate Court, on the evidence on the record or of remitting the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence if they choose to do so. [p. 548, col. 2.]

Where the entire evidence on both sides is once before a Court, the question as to onus becomes purely academical. [p. 547, col. 1.]

Seturatnam Aiyar v. *Venkatachala Gounden*, 56 Ind. Cas 117; 47 I. A. 76; 43 M. 567; (1920) M. W. N. 61; 22 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485 (P. C.), referred to.

Appeal against the judgments and decrees of the Madras High Court (Sadasiva Aiyar and Napier, JJ.) in Second Appeal No. 515 to

518 and 544 of 1909, dated the 17th August 1915, partly confirming, reversing and varying the judgments and decrees of the District Judge, Trichinopoly, in Appeal Suit, Nos. 39 to 43 of 190-, dated the 28th October 1908, partly confirming, reversing and varying the judgments and decrees of the District Munsif, Kulitalai, in Original Suit Nos. 676, 677 and 720 to 722 of 1904, dated the 28th September 1907.

JUDGMENT.

AMEER ALI.—These several consolidated appeals arise out of five suits brought by the plaintiff on the 27th July 1904 in the Court of the District Munsif of Kulitalai in the Madras Presidency, in his capacity of head of a Mutt, to eject the defendants from the lands in their occupation in the village of Karappudayanpatti, which he alleged belonged to his Mutt. The defendants in the suit are cultivating tenants holding separate lands unconnected with each other. Accordingly, separate suits were brought against them.

The plaintiff's case is that in the year 1743 the Polegar of Turaiyur, who owned the estate within which the village is situated, granted to the head of the Mutt at the time the village in question; and that since then the successive holders of the office have been in possession and enjoyment not only of the right to the receipt of the dues payable by the tenants to the landlord, usually called in the Madras Presidency the *melvaram*, but also of the right to the actual occupancy of the lands technically called the *kudivaram*.

The five suits that were brought in the Munsif's Court were numbered 676, 677, 720, 721 and 722 of 1904. In Suit No. 676 the plaintiff alleged that the particular tenant, for whose ejectment he was suing, held the land in dispute under a *muchilika* executed by the defendant's predecessor on the 18th June 1880, by which he bound himself to surrender the land in his occupation on failure to pay rent. In Suit No. 720 the plaintiff's action related to two items of land in respect of which he alleged that the defendant's father had executed two *muchilikas* on the 9th April 1894, and the 2nd June 1894, respectively. With regard to Suits Nos. 721 and 722, the plaintiff's suit rests on his general allegation that as under the grant he is entitled to both the rights he claimed in the land—*viz.*, the right to receive the rent as well as the right to occupy the lands—he was entitled to eject the defendants, who were tenants at-will. In Suit No. 722 he appears to have also set up an oral lease. In Suit No. 677 the plaintiff relied upon a *muchilika* executed on the 24th July 1893, by the defendant's brother.

The defendants in all the cases denied the right of the plaintiff to eject them from the lands in their occupation and under their cultivation; they alleged that he was only entitled to the *melvaram* and not to the *kudivaram*, and that they and their predecessors had held their lands from times immemorial and possessed and exercised the full rights of occupancy tenants to the knowledge of, and with the acquiescence of, the plaintiff and his predecessors: They further charged that the *muchilikas* produced and relied upon by the plaintiff were fabricated documents concocted for the purpose of destroying their old and hereditary right in the lands in their occupation.

Upon these allegations the parties went to trial. The District Munsif framed two principal issues which were common to all the cases, *viz*:—

(1) Whether the plaintiff is entitled to the plaint land (that is, the land in suit) itself or only to the *tirva* (rent) thereon?

(2) Is the defendant entitled to the occupancy right in the land by custom and prescription?

The other issues related to the genuineness of the *muchilikas* and to the amount of rent, etc.

The first two issues being common to all the suits, by consent of parties the five actions were tried together, and, as the Trial Judge states at the beginning of his judgment, the whole evidence was adduced in Suit No. 676, and was "used as evidence in all the connected suits."

The *inam* grant on which the plaintiff's claim rests is Exhibit "A." After reciting by whom and to whom the gift is made, the document proceeds thus:—

"The village gifted to our Swami out of our several villages is Karappudayanpatti, to the north of Upiliyapuram, east of Vayirichettipalayam, south of Kottapatti and west of Sokkapuram. As we have gifted

it most willingly to the Swami, you shall for ever have dominion over and enjoy the wet and dry lands, tope, well, betel garden etc, water, tree, stone, treasurers, etc., found therein and live happily. Further, what we command to be done for the Guruppoja day is this. We command that Guruppooja shall be conducted by collecting at the rate of 4 measures of grain per plough in respect of Agrabaram, Sarwamaniyam, Umbalam etc, including wet and dry lands in the whole of our Turaiyur State. You shall accordingly conduct Guruppooja every year and shall not omit to collect at the rate of 4 measures of grain in respect of dry and wet lands also in the whole of Turaiyur State. You shall enjoy the whole of Karuppudayanpatti village. Further, you shall, as ordered by our predecessors, receive always Mahamai and allowance of rice and money for extra expenses. The Andeanam shall, in continuous succession, have dominion over and enjoy for ever the village, Guruppooja Kattalai, rice allowance, etc. He who helps this charity by thought, word or deed, will be blessed with happiness and live long in the same manner as one who establishes temple of several crores of Siva-lingams in such holy places as Benares, Chidambaram. Tiruvalur, Arunachelam, Srikalahasti, Conjee, Kalugungundram, Kumbakonam, Rameswaram etc"

The grant was recognized by the *inam* authorities in 1865. But the *inam* proceedings furnish no indication regarding the extent of the rights covered by it. Both sides in support of their respective contentions produced a mass of evidence, which the District Munsif, in a singularly well balanced and exhaustive judgment, has analysed with great industry. He held on the evidence that the defendants had proved they had been in occupation of their respective lands from very early times, and had been dealing with them as lands in which they had full occupancy rights, that they had been selling, mortgaging, making improvements, and that when any portion of the same was taken up for public purposes, they had claimed and received compensation from Government. He held further that the plaintiff had utterly failed to show that the defendants had been let into possession by his predecessors or by himself, or to rebut the testimony they had produced in establishment of their right of occupancy. His main judgment is in Suit No. 676. He also found that the documents the plaintiff had produced in support of his claim, together with the *muchilikas* on which he relied in the three cases, had been fabricated with the object of destroying the tenants' right in their lands. He accordingly dismissed the five suits save and except as regard certain claims for rent.

The plaintiff appealed to the District Court of Trichinopoly against the District Munsif's decrees, and these appeals were numbered as follows:—Appeal No. 39 of 1908 (Suit No. 676); Appeal No. 41 of 1908 (Suit No. 720); Appeal No. 42 of 1908 (Suit No. 721); Appeal No. 43 of 1908 (Suit No. 722); Appeal No. 40 of 1908 (Suit No. 677).

It is necessary to give the numbers of the appeals as well as of the suits, in view of the complication that enters into the determination of the cases owing to the course the proceedings took in the subsequent stages.

In Appeal No. 39 (Suit No. 676) the Officiating District Judge, Mr. Thornton, dismissed the appeal on the ground "that he did not consider the plaintiff had established he was entitled to both the *varams* in all the cultivated lands in the village, nor had he proved the terms of their tenancy". In Appeal No. 40 (Suit No. 677), in which the plaintiff had put forward a *muchilika* numbered in the Munsif's Court as Exhibit "O," the District Judge set aside the decree, and in reversal of the Munsif's order made a decree in favour of the plaintiff for ejectment of the tenant. In Appeal No. 41 (Suit No. 720) he agreed with the Munsif as to item covered by *muchilika* "O1", and accordingly dismissed the plaintiff's appeal with respect to that item, but he differed from the Munsif as to the item covered by *muchilika* "O2," and accordingly decreed ejectment in respect thereof. In Appeals Nos. 42 and 43 (Suits Nos. 721 and 722) he affirmed the Munsif's decrees.

Both parties appealed to the High Court against the decrees, which operated severally against them. By the time the appeals reached the High Court, the Madras Estates Land Act (I of 1908) had come into force, and, accordingly, the defendant, against whom a decree for ejectment had been made by the Officiating District Judge and who was appellant in Second Appeal No. 541 of 1909

filed on the 27th September 1910, an additional ground of appeal against his order.

All these second appeals came on for hearing before the High Court on the 14th August 1911, but in view of the provisions of section 6 of Act I of 1903 and the contentions of the parties, the learned Judges considered it necessary to obtain from the Officiating District Judge a finding on the following point:—

"Whether the grant to the plaintiff was of the land revenue or of the *kudivaram* also?" Opinions have no doubt been expressed in the judgments of the lower Courts on the point, but the question was never tried with reference to section 6 of the Madras Estates Land Act. Section 6 will be referred to later on.

The cases accordingly went back to the Officiating District Judge who returned the appeals to the High Court with the following "finding":—

"But it seems to me that, seeing that Exhibit 'A' purports to grant all the land in the village absolutely to the plaintiff's predecessor-in-title, and that the plaintiff is admittedly entitled to both *varams* in 70 *cawnies* while there are no tenants on 77 of the remaining 185 *cawnies* in the village, the burden lies on the defendants to show that their predecessors in-title were cultivating tenants at the time of the grant [see also *Indety Okina Nagadu* v. *Ketu Konchi Venkatasubbaya* (1)], and that, in the absence of proof of this, there can be no presumption that there were any cultivating tenants in the village at the date of the grant, or that the Zamindar was not the owner of both *varams* in the land comprised in the grant. My finding on the issue sent down with reference to section 6 of the Madras Estates Land Act, therefore, is that the grant to the plaintiff was an absolute grant of all the land in the village, and was not a grant of the land revenue alone to a person not owning the *kudiwaram* therof.

On the return of this "finding" to the High Court, the learned Judges considered it neither satisfactory nor sufficient. They express their views in the following terms:—

"The learned District Judge has not, so far as it appears to us, considered all this mass of evidence, and he seems to have based his conclusion on the language of Exhibit 'A' and on certain presumption which according to him arises from the facts that the plaintiff is admittedly entitled to both *varam* in 70 *cawnies* of land in the village and that about 77 other *cownies* are waste. He throws the burden on the defendants to prove that their predecessors-in-title were cultivating tenants at the time of the grant. We are not disposed to express any opinion on the question of presumptions, because, as a matter of fact, there is considerable evidence upon which the points in issue can be decided one way or the other. But we wish to point out that there is no burden on the defendants to show that their predecessors-in-title were cultivating tenants at the time of the grant. If they succeed in showing that at the time of the grant the land was in the occupation of cultivating tenants, that might be sufficient to raise a presumption in their favour. We would, therefore, ask the District Judge to return a fresh finding, on the issue remitted to him, and he will also return a finding on the second issue in the case, namely, 'Is the defendant entitled to the occupancy right in the land by custom or by prescription?"

The Officiating District Judge does not appear to have applied his mind to the determination of the question involved in the second issue. it was now expressly and clearly brought to his notice.

On the return of the cases to the Officiating District Judge, that officer, even with the fresh evidence the plaintiff was allowed to produce, found himself unable to come to any definite conclusion. The end of his judgment shows that he was not clear at all in his mind as to the conclusion to be derived from the evidence, and he expressed his difficulty in the following words:—

"I do not see, therefore, how it is possible to say whether the grant to the plaintiff was of land revenue or of *kudivaram* also."

With these remarks the appeals were re-submitted to the High Court.

Upon the return of the appeals to the High Court the learned Judges again found that neither had the evidence been properly considered, nor had the issue to which the attention of the Officiating District Judge had been expressly called been determined, and they expressed their view as follows:—

(1) 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376.

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"We are not disposed to express any opinion on the question of presumption *because as a matter of fact there is considerable evidence upon which the issue can be decided one way or the other.*

The finding again submitted by the District Judge after this remand order does not at all show that the District Judge addressed himself seriously to a consideration of the mass of evidence considered by the District Munsif. The Judge says he is 'in a position of some difficulty' and in a short paragraph (paragraph 3 of the finding paper) says that it is not possible to say one way or the other on that point. We are unable to accept the findings and we request the present District Judge to submit fresh findings on the two issues mentioned in the second remand order after detailed consideration of the evidence and with reference to the above remarks, irrespective of the question of onus and presumption.

The case had accordingly to be remitted once more to the District Court for a proper finding. By that time the permanent incumbent of the office, Mr. Harding, seems to have resumed work. He considered the case on the evidence irrespective of any presumption, and on the 30th September 1914, embodied his conclusions into definite findings of fact as required by the High Court. He found on the evidence, in agreement with the District Munsif, that the defendant-tenants had been in occupation of the lands for a very long time, that they had been dealing with their holdings and the lands in their occupation as tenants entitled to occupancy rights, that they had been transferring their holdings, partitioning the same among themselves, making improvements on the land, receiving compensation for land taken up from their holdings by Government, and that the plaintiff had not only utterly failed to rebut the inference arising from those facts, but had fabricated the documents with which he came to support his claim. He accordingly returned the appeals with the finding as follows:—

"11. It is unnecessary to say more. A Zemindar could only gift the *melvaram* of occupied and both *varams* of unoccupied lands, and we find in actual fact that the holdings and dealings have been as they must be if that supposition is correct. From 1829 onwards, the *raiyats* or tenants in many cases have partitioned their properties or sold them to Government or to one another, and plaintiff has accepted these things from 1870 onwards at any rate. Plaintiff now holds *kudivaram* rights in many lands not by his grant but by some subsequent acquisitions. But he never held it in suit lands which are neither *pannai* nor waste, and in 1901 he was found by the Deputy Collector to be illegally taking possession of lands and this was upheld by the High Court. He is no doubt trying to get the *kudivaram* of the whole village, but his claim thereto is entirely baseless.

I find that the grant was of the *melvaram* only of occupied lands and of both *varams* of unoccupied lands. Defendants or their predecessors have always had the occupancy rights in their holdings, and were not affected by the gift from the Zemindar to the *inamdar*."

The learned Judges of the High Court, upon the return of the above finding, held as follows:—

"It must be conceded in favour of the plaintiff that we expected the learned District Judge to discuss the evidence at somewhat greater length than he has done, we having indicated in our remand order that the District Munsif had devoted about 85 paragraphs to the consideration of that evidence, and that we required to be reasonably satisfied that the conclusions of the learned District Judge are arrived at after a careful consideration of the whole evidence.

"But we do not think that we are entitled to hold that full consideration has not been bestowed by the District Judge on the whole evidence before he arrived at the findings now submitted by him, and we, therefore, accept the same.

"The result is that Second Appeals Nos. 515 to 518 will stand dismissed with costs, while Second Appeal No. 544 of 1909 will be allowed with costs in this and in the lower Appellate Courts.

From these decrees the plaintiff has now appealed to His Majesty in Council, and it is contended on his behalf that the High Court acted without jurisdiction in remitting the appeals to the District Judge for a proper finding. The argument proceeds on the same misapprehension of the law, as was pointed out by the Board in the case of *Seturatnam Aiyar*

v. *Venkatachala Gounden* (2). It is to be observed that the Indian Legislature, in its anxiety to prevent the High Court from being inundated with second appeals in trifling matters, has provided in section 100 of the Civil Procedure Code that such appeals shall lie to the High Court only on the following grounds:—

"(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:—

(*a*) the decision being contrary to law or to some usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law,

(*c*) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

At the same time, in order to avoid gross miscarriage of justice resulting from the omission by the lower Appellate Court to determine any issue of fact or to come to a definite conclusion on a set of facts, it has made two distinct provisions. By section 103 the High Court itself is vested with the power, when the evidence on the record is sufficient, to determine any issue of fact necessary for the disposal of the appeal but not determined by the lower Appellate Court.

By r. 25, O. XLI, it is further provided:—

"Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required:

And such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor."

The High Court had thus the power of determining the issue left undetermined by the Officiating District Judge on the evidence on the record, or of remitting the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence if they chose to do so. The learned Judges of the High Court chose the latter, which, under the law, was fully within their competence. The case was remitted three times because the Officiating District Judge in the first instance misunderstood the order of the High Court, and in the second instance expressed himself as unable to come to a definite conclusion. The High Court did not in the present case, as in *Seturatnam Aiyar* v. *Venkatachala Gounden* (2) remand it under O. XLI, r. 23, Civil Procedure Code but under r. 25. The remarks that follow in the judgment in *Seturatnam Aiyar's case* (2) explain the reason why the remand in that case, as in the present, became necessary.

"In the opinion of the learned Judges of the High Court," say their Lordships, "the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights."

As already observed, the Madras Act I of 1908 had come into force on the 1st July of that year, whilst the appeals in these cases were pending before the High Court. In view of the plaintiff's contentions, which have travelled over a wide range, and also of the question relating to the grant, it becomes necessary to examine briefly the provisions of the Statute. The preamble states the object of the enactment in the following words:—

"Whereas it is expedient to amend and declare the law relating to the holding of land in estates in the Presidency of Madras, it is hereby enacted as follows, etc."

(2) 56 Ind. Cas. 117; 47 I. A. 76; 43 M. 567; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 15 A. L. J. 707; 25 C. W. N. 485 (P. C.).

Clause (*d*) in section 3 defines the expression "estate" in the Act to mean—

"Any village of which the land revenue alone has been granted in *inam* to a person not owning the *kudivaram* thereof provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village".

Section 3 gives a definition of the words "private land" as meaning the "domain or home-farm land" [expressions borrowed from English Law] of a land-holder, by whatever designation known, such a *kambattam*, *khas*, *sir* or *punnai* It defines the words '*raiyat*" and "occupancy *raiyat*", and declares "*raiyati* land" to mean "cultivable land in an estate other than private land" This definition includes other varieties of land to which no specific reference is necessary.

It also defines "old waste" as meaning any land in the estate which, not being private land,

"(1) has at the time of letting by the landholder been owned and possessed by him or his predecessors in-little for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act, or

"(2) has at the time of any letting by the landholder after the passing of this Act remained without any occupancy rights being held therein at any time within a continuous period of not less than ten years immediately prior to such letting."

Section 8 deals with what is called "the merger of occupancy right. It declares:—

"(1) Whenever before or after the commencement of this Act the entire interests of the landholder and the occupancy *raiyat* in any land in the holding have become united by transfer, succession or otherwise in the same person, such person shall have no right to hold the land as a *raiyat*, but shall hold it as a landholder; but nothing in this sub section shall prejudicially affect the rights of any third person."

And clause (3) provides:—

"The merger of the occupancy right under sub-sections (1) and (2) shall not have the effect of converting *raiyati* land into private land."

Section 10, clause 1, declares that "all rights of occupancy shall be heritable, and shall be transferable by sale, gift or otherwise".

Clause 2 provides:—

"If a *raiyat* dies intestate in respect of a right of occupancy and without leaving any heirs except the Crown, his right of occupancy shall be extinguished, but the land in respect of which he had such right of occupancy shall not cease to be *raiyati* land."

Section 13 declares the right of the occupancy *raiyat* to make improvements of the land in his occupation or "in respect of his holding."

Coming now to section 6, clause (1), it runs thus:

"Subject to the provisions of this Act, every *raiyat* now in possession or who shall hereafter be admitted by a landholder to possession of *raiyati* land not being old waste situated in the estate of such landholder, shall have a permanent right of occupancy in his holding, but nothing contained in this sub section shall affect any permanent right of occupancy that may have been acquired in land which was old waste before the commencement of this Act".

Chapter XII of the Act deals with the landlord's private land. Section 181 provides that nothing in the previous sections will confer a right of occupancy in the landlord's "private lands", but that nothing in that section shall prevent a landholder from converting his private land into *raiyati* land. Chapter XIV provides that no contract between the landlord and a *raiyat* shall take away the right of an occupancy *raiyat* or limit his right to use the land as provided by law.

In declaring the rights of the occupancy *raiyats* and emphasizing the distinction between the landlord's "private lands" and "the *raiyati*" lands, the new Act affirmed the old customary law that had always been recognized by the British Administration. Apart from rules relating to procedure and the jurisdiction of the Revenue Courts, it created one new right in order to settle the constant disputes between landlords and tenants

which had been going on for nearly a century; it gave occupancy rights to all *raiyats* in occupation of lands within an "estate" at the time of the passing of the Act. It also gave some security to non-occupancy *raiyats* in the enjoyment of their lands. In other respects, generally speaking, it declared and gave statutory recognition to existing rights and status. One important feature of the Act is worthy of note: it throws into relief the component parts which, from immemorial times, go to constitute a village; *first*, the lands in the direct cultivation of the proprietor (called by various names); *second*, lands occupied by tenants or *raiyats*, and *third*, old waste lands over which by custom the landlord possessed certain specific rights now crystallized in the Statute. These remarks do not apply to *raiyatwari* tracts in the direct possession of Government which are let out to *mirasidari* or hereditary *raiyats* for purposes of cultivation.

The existence in a village of *pannai* lands, in which the tenant cannot acquire occupancy rights except by contract, connote the existence of lands in which he can acquire such rights by prescription.

In the present case the grant itself does not convey in express terms the *kudivaram* to the grantee. Nor does the term *inam*, an Arabic word meaning "a reward," give any indication of the intention of the donor, even if he had the right to bestow it on the donee. *Prima facie* a Zamindar or Poligar is a rent-receiver, or, to use the language of section 4 of Act I of 1908, he has the right to collect the rent from his tenants. *Prima facie*, his right of direct possession of the lands is confined to his "private lands" and the old waste land; it does not extend to "*raiyati* land."

The place of the cultivating *raiyats* in the agricultural economy of Southern India is thus described in a Proceeding of the Board of Revenue of Fort St. George (Madras), dated 5th January 1818.*

"The universally distinguishing character, as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil, so long as they render certain portion of the produce of the land, in kind or money, as public revenue; and whether rendered in service, in money, or in kind, and whether paid to Rajahs, Jagirdars, Zamindars, Polygars, Motahdars, Shrotriemdars, Inamdars or Government officers, such as Tahsildars, Amildars, Ameens, or Tanadars, the payments which have always been made by the *raiyats* are universally termed and considered the dues of the Government."

It has been urged on behalf of the plaintiff that the onus was wrongly placed upon him, and in support of this contention the judgments of this Board, in *Suryanarayana* v. *Patanna* (3) and in *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu* (4) were relied upon.

In the first case the grant appears to have been made somewhere in the fourteenth century of the Christian era, and it was conclusively proved, on behalf of the plaintiff in that suit, that he and his predecessors had since then been in actual occupation of the lands, extending over centuries; they had further produced documents showing they had been actually cultivating the land. It was also established from the *inam* Register that the grant not only included the revenue but also the soil. The Munsif had found on these facts in favour of the plaintiff, but his judgment was reversed by the District Judge, whose decree was affirmed on second appeal by the High Court. The Board upon a review of the facts established in the case declared that it could not under the above circumstances be assumed that the grant was only a grant of the King's share in the produce of the soil, and did not include the *kudivaram*. It was a presumption which was certainly not warranted by the facts of the case.

In the subsequent case of *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu* (4) it was again found upon the evidence that the grant included the *kudivaram*. Their Lordships say in their judgment delivered by Viscount Cave:—

"There is not in any of the documents above referred to any trace of a claim by any

*Ms. copy of the India Office.

(3) 48 Ind. Cas. 683; 45 I. A. 209; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463 (P. C.).

(4) 51 Ind. Cas. 304; 46 I. A. 123; 43 M. 166; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 1683; 1124 C. W. N. 129 (P. C.).

person other than the *inamdar* to a permanent right of occupancy; and the fact that by the terms of the grant the grantee is desired to cultivate the lands, and that he is referred to as residing in the village, tend to show that no such right existed in any other person.....And when the subsequent history of the estate comes to be examined, it is found to be wholly inconsistent with the existence of any permanent occupancy rights. Tenancies have been continually granted by the *inamdars* for short periods and at variable rents. When tenancy lands were compulsorily acquired by Government and compensation was paid to the *agraharamdar*, no claim to compensation was put forward by the tenants. In the year 1904 all the tenants formally relinquished their lands to the plaintiff and put them in his possession, and from that date until tenancies were granted in the year 1907 the property remained vacant."

In the view of those facts the Board overruled the objection that the Civil Court had no jurisdiction to entertain the suit, and that under the provisions of section 189 of the Act the Revenue Courts only had the power to deal with the matter. In dealing with the judgments of the District Judge and of the High Court, their Lordships observed that the two Appellate Courts in India had acted on a supposed presumption of law that an *inam* grant of a village, particularly if made to a Brahman, is *prima facie* a grant of the *melvaram* right only and does not include the *kudivaram*, and they pointed out that in the previous case, already referred to [*Suryanarayana* v. *Patanna* (3)], it was held that no such presumption exists. And then they add :—

"Each case must, therefore, be considered on its own facts; and in order to ascertain the effect of the grant in the present case, resort must be had to the terms of the grant itself and to the whole circumstances as far as they can now be ascertained."

The question came up again for consideration before the Board in the subsequent case of *Setharatnam Aiyar* v. *Venkatachala Gounden* (2) to which reference has been made before. That was a suit for ejectment by a *mirasidar* against the tenants in occupation of the lands in a village granted to him many years ago. As already observed, the *mirasidar* is himself is cultivating *raiyat*, and the land which is granted to him is for purposes of cultivation in a *raiyatwari* tract. The defendants contested the claim for ejectment, and alleged that they possessed occupancy rights. A considerable body of evidence was produce on both sides. The District Munsif dismissed the suit, holding that the defendants had established their prescriptive occupancy rights in the lands in their occupation and under their cultivation. The Munsif found that the plaintiff's claim to eject the defendants from the lands in actual cultivation was "barred," but decreed the claim in respect of the pasture land. The decree of the District Munsif was set aside by the District Judge, as he considered the question for consideration in the case was "whether the defendants had shown that the plaintiff or his predecessor-in-title had contracted the right of tenancy should be changed into a right of permanent occupancy." And his conclusion was that "in those circumstances I think it clear that the defendants have not established any contract on the part of the plaintiff or his predecessor in title to convey to them a right of permanent occupancy," and he had accordingly decreed the plaintiff's claim for possession of the suit lands. On the appeal of the defendants, the High Court set aside the decision of the District Judge and remitted the case for a finding on the real point involved in the determination of the case. The learned Judges considered that the question which the District Judge had to consider was whether "on the admitted and undoubted facts of the cases, and the evidence on both sides, the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy." On the return of his finding the learned Judges of the High Court found that he had omitted to consider the question that he had been remitted to him. The following remarks are pertinent to the present case. The learned Judges observed :—

"The District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court, again assumed that the defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy."

Without, however, remitting the matter for a proper finding, the High Court proceeded themselves to determine, upon the evidence on the record, the issue. To use the words of Sir Lawrence Jenkins, who delivered the judgment of the Board :—

"If and so far as this was an issue of fact—a point on which it is not necessary to express a definite opinion in the circumstances of this case—the Court had power to deal with it under section 103 of the Civil Procedure Code, 1908."

The conclusion of the High Court was that the defendants had established occupancy rights in the land they held; and this Board affirmed its decree.

It will be noticed that neither in the case of *Suryanarayana* v. *Patanna*(3) nor in *Seturatnam Aiyar* v. *Venkatachala Gounden* (2) is there a suggestion of a presumption in favour of the *inamdar* or *pattadar* on the one side or of the *raiyat* on the other. It was further distinctly point out in *Upadrashta Venkata Sastrulu* v. *Dvi Sathavamudu* (4) that—

"Each case must, therefore, be considered on its own facts; and in order to ascertain the effect of the grant in the present case (that is the case with which the Board was dealing) resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained."

A Full Bench of the Madras High Court, however, has in a recent case *Muthu Goundan* v. *Perumal Iyen* (5) held that underlying the exposition of their Lordships such an initial presumption is to be inferred. Their Lordships cannot help observing that in drawing this inference the learned Judges are clearly in error. Each case must be dealt with upon its own facts with special regard to the evidence and circumstances therein.

When the entire evidence on both sides is once before the Court the debate as to onus is purely academical. On this point they desire to associate themselves with the observation of the Board in *Seturatnam Aiyar* v. *Venkatachala Gounden* (2): "The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them."

(5) 63 Ind. Cas. 790; 44 M. 588; 40 M. L. J. 429; 13 L. W. 483; (1921) M. W. N. 263; 29 M. L. T. 398.

Dealing now with the facts of the present case, there is first the grant in favour of the plaintiff-appellant, the terms of which have already been set out. It does not in express terms grant to the *inamdar* both rights, *melvaram* and *kudivaram*. It speaks of other villages held by the grantor which it might be inferred from the document were occupied by tenants, nor does it expressly say that only the *melvaram* right was granted to the donee. The defendants contended that they had been from time immemorial in possession of their holdings. They alleged they had been transferring their holdings, whole or in part, from time to time; that the lands had descended to their heirs in succession, and the descendants of the transferees were in possession; that they had partitioned the holdings amongst themselves; that they had made improvements, sunk wells and erected buildings thereon for husbandry and dwelling purposes, and have received compensation when any portion of their holdings were taken by Government for public purposes. Under these circumstances it became essential to have the evidence on both sides in support of the propositions they advanced, and to draw therefrom the right inference. Both sides, as already stated, produced a volume of evidence. The District Munsif considered it in the most exhaustive manner. He found that the village that had been granted to the plaintiff covered three classes of lands; one was in his own possession and cultivation, another was waste or pasturage, and the third was in the occupation of tenants. He found also that the plaintiff had for a number of years been fabricating evidence to defeat the rights of the tenants, and had in the course of the trial suppressed material evidence. He found, further, that the defendants had fully established their contentions that they had been in possession and occupation from before 1829 at least; they had dealt with those lands as occupancy *raiyats*, partitioning their holdings, transferring and mortgaging them with the knowledge and acquiescence of the plaintiff and his agents; and that they had, in fact, received compensation for lands taken up by Government for part of their holding which had been acquired for public purposes. From these facts and circumstances he drew the inference that the defendants had fully established their prescriptive rights of occu-

pancy, and accordingly dismissed the suits by the plaintiff. His conclusion amounts to this, that, assuming that the onus was on the defendants, they had fully discharged it.

The Officiating Judge, Mr. Thornton, on appeal was apparently bewildered by the volume of decided cases, often inconsistent with each other, of his own High Court, and, therefore, unable to come to a definite conclusion on the facts as established by evidence; he accordingly dealt with the appeals, principally on the basis of onus and presumption.

A part of his judgment in Suit No. 676 (Appeal No. 139 of 1908), throws light on some of the salient facts of the case:—

"9. I do not think the mere circumstance that the plaintiff admittedly enjoys both *varams* in the whole of the wet land, considering the very small proportion this bears to land under cultivation in the village, is by any means a conclusive argument in his favour. A proprietor almost invariably has some *pannai* land, and there is no reason why in the case of the plaint village the wet land granted to the plaint *mutt* should not have been the Zemindar's *pannai* at the time of the grant. The village consists of 255 *cawnies*, of which 22 *cawnies* are *poramboke* and 55 *cawnies* waste, and even including the land for which *muchilikas* have been executed on the terms of a year to year tenancy, the plaintiff is not shown to have both *varams* in more than about 70 *cawnies* of the cultivable lands. As the District Munsif points out, the plaintiff's predecessor-in title cannot have obtained greater rights from the Zemindar in respect of the tenants who were in possession at the time of the copper-plate grant than he enjoyed himself, and it is not suggested the Tirayur Zemindar owned both *varams* in other villages in his *zemin*, nor is there anything to show that he was entitled to greater rights in the plaint village than in other villages. Nor can the existence of *muchilikas* for about 16 *cawnies*, of which 4 *cawnies* are described in the plaintiff's *adangal* (Exhibit VII) as *Mettam Sontham*, offer any evidence as to plaintiff's rights in other lands in the village. The *muchilikas*, Exhibit N series, are almost all dated after 1893, and little value can attach to documents which came into existence long after the dispute about occupancy right had arisen.

"10. I do not think the defendants can properly be described as *puravkudis*, as contemplated in *Thiagara a* v. *Giyana Sambandha Pandara Sannadhi* (6), for both in the present case and in the connected case, with the exception of the tenant who cultivates the land included in the registers of Uppiliapuram village, the tenants are all residents of the neighbouring village of Koppampatti, of which the plaint village is shown to form part in the Settlement Register of 1896 (Exhibit XXI). Again, though the rates of rent may be higher in the plaint village than in neighbouring villages now it is clear from Exhibit B (1)—the *inam* Register of 1864—that the rates were fixed at the average rate prevailing in the neighbouring villages, and I agree with the District Munsif in thinking plaintiff can derive but little support from Exhibit E. J. and H. Lastly, with regard to the land taken up by Government for the road: though the plaintiff received the full value of 96 *kulis* under Exhibit K, it is doubtful whether Exhibit K (1), which comprises the much large extent of 2 *acres* 78 *kulis*, relates to both *varams*. The recital in the document is that compensation is settled at Rs. 100 on account of income and *tirwa* lost to the plaintiff, and it is suggested by the plaintiff's Vakil that the expression income and *tirwa* should be construed to mean both the *kudivaram* and *melvaram*. But I see no reason why this should not have been more definitely expressed had it been intended to award compensation for both *varams*, and the expressions used may, as urged by the defendant's Vakil, be construed with equal fairness to mean that compensation was paid only for the *melvaram*. I do not consider the plaintiff has established he is entitled to both *varams* in all the cultivated lands in the village, and as he has not proved what the terms of the tenancy are under which the defendants have cultivated the plaint land, I dismissed the appeal with costs throughout."

In his consideration of the *muchilikas* which he, differing from the Munsif, considered to be genuine, he gave little attention to the reasons the lower Court had assigned for considering them to be fabricated. In these circumstances the High

(6) 11 M. 77; 4 Ind. Dec. (N. S.) 54.

Court deemed it necessary to call upon the Officiating District Judge to record another finding on the evidence. The case had to go back twice for the purpose, and in the result Mr. Thornton expressed himself unable to come to any definite conclusion. The High Court were compelled to send down the case again, and it was then taken up by the permanent incumbent, who came to a definite conclusion upon the evidence on the record, and that finding has been affirmed by the High Court.

The case has now been before three Courts in India, and all the Courts have come to the conclusion upon a full consideration of the evidence and all the circumstances that the plaintiff does not possess the *kudivaram* which he claimed against the defendants, in respect of the lands in their occupation. The defendants have shown conclusively how they have been dealing with the property for at least a hundred years. They have also shown (and the Munsif has dealt with the subject most exhaustively) that they had received compensation from the Government for lands taken out of their holdings for public purposes. The plaintiff's evidence has been found to be mostly false or fabricated. In this view of the case their Lordships do not consider it necessary to express any opinion as to whether Act I of 1908 applied to rights in litigation at the time of the passing of the Act. The defendants clearly acquired their occupancy rights by prescription long before the Statute came into force.

Under these circumstances their Lordships think that the conclusion of the High Court is correct, and that these consolidated appeals should be dismissed. In accordance with the terms under which special leave to appeal was granted, the appellant will pay the respondents' costs as between solicitor and client. Their Lordships will, therefore, humbly advise His Majesty accordingly.

N K. *Appeal dismissed.*

Solicitor for the Appellant:—Mr. *Douglas Grant.*

Solicitors for the Respondents:—Messrs. *Chapman Walker & Shephard.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 39 OF 1920.

November 29, 1921.

Present :—Mr. Daniels, A. J. C. and Mr. Lyle, A. J. C.

Saiyed MOHAMMAD HADI—PLAINTIFF—APPELLANT

versus

Musammat PARBATI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, assignee of—Accretions—Voidable transaction—Parties, position of.

The position of an assignee of a Hindu widow in possession of the estate of her deceased husband is the same as that of the widow, so that where he omits to recover any sums due to the estate during the lifetime of the widow, they become an accretion to the estate and the right to recover them passes to the reversioners. [p. 551, col. 1.]

Isri Dutt Koer v. *Hansbutti Koerain*, 10 C. 324 at p. 335; 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. S.) 217 (P. C), followed.

A voidable transaction is good as against third parties till it is set aside but as regards the person who has the right to avoid it, it is in a state of suspense until the option is exercised. If he avoids it, it is treated, as against him, as void from the outset. [p. 551, col. 1.]

Appeal against a decree of the Subordinate Judge, Hardoi, dated the 31st March 1920.

Mr. *Niamat Ullah*, for the Appellant.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Respondents.

JUDGMENT.—This is a cross-appeal by the plaintiff, Saiyed Mohammad Hadi, against the same judgment which was the subject of Appeal No. 34 of 1920 [*Parbati* v. *Mohammad Hadi* (1)] already decided by us. The following pedigree will serve to elucidate the facts.

SHEO SAHAI

- First wife = Jamnadhar (died 15th July 1894) = *Musammat* Mukta, (died 28th February 1910).
  - *Musammat* Ladli, (died childless, 15th April 1918).
  - Dharnidhar (died 2nd August 1893). = *Musammat* Parbati, defendant No 1, (now dead).
    - *Musammat* Chameli, (respondent No. 1)
      - Shiam Bihari, (respondent No. 2.)
- Gangadhar, (died 3rd July 1909).

The facts have been stated in our judgment in Appeal No. 34 of 1920 [*Parbati* v.

(1) 68 Ind. Cas. 534; 9 O. L. J. 304.

Mohammad Hadi (1)]. It will be sufficient to say here that the suit was one for possession of property of which *Musammat* Parbati, the principal defendant in the Court below, claimed to be in mortgagee possession as heir of her husband, Dharnidhar. *Musammat* Parbati died after the decision of the suit and is now represented by her daughter and daughter's son. The property was originally mortgaged in favour of Dharnidhar by the plaintiff's father, Talib Ali. He has obtained a release of the mortgagee rights from the reversioners of Jamnadhar, father of Dharnidhar, and claims to be entitled as full owner. It has been found by the Court below, and the finding has been affirmed by us in Appeal No. 34 of 1920 [*Parbati* v. *Mohammad Hadi* (1)], that the mortgaged property was the joint family property of Dharnidhar and Jamnadhar, that after Dharnidhar's death, Jamnadhar became full owner of it by right of survivorship, that *Musammat* Mukta, widow of Jamnadhar, succeeded to the property as a Hindu widow on the death of the latter, that she relinquished her rights by a deed in favour of *Musammat* Parbati, and that the latter was in possession of the property in virtue of this relinquishment until *Musammat* Mukta's death in 1910. On *Musammat* Mukta's death *Musammat* Ladli, daughter of Jamnadhar, became entitled to the property. She, however, made no attempt to claim it up to the time of her death on 15th April 1918. It was only on this event that the present reversioners became entitled. The deed by which they released their rights in favour of the plaintiff was executed on 15th January 1919. The learned Subordinate Judge has decreed the plaintiff's claim subject to payment to the defendant of a sum of Rs. 5,425 consisting of Government Revenue paid by *Musammat* Parbati from 3rd September 1894, the date of the deed of release executed by *Musammat* Mukta, down to the date of recovery of possession by the plaintiff. It is this part of the decree which the plaintiff contests in appeal. He also contests the rejection of his claim for mesne profits. He claimed mesne profits only from the death of *Musammat* Ladli, the amount claimed being the small sum of Rs. 200.

The learned Subordinate Judge has considered separately :

(*a*) the period from the deed of release executed by *Musammat* Mukta down to her death in 1910, and

(*b*) the period from *Musammat* Mukta's death to the date of the recovery of possession by the plaintiff.

As regards period (*a*), he holds that *Musammat* Parbati was in lawful possession as mortgagee under the deed of relinquishment and, therefore, entitled to claim all amounts paid as revenue as salvage payments under section 72 of the Transfer of Property Act. As regards period (*b*), the theory on which he proceeds is that a transfer by a Hindu widow is only voidable and not void and, therefore, the defendant was holding, as the Subordinate Judge puts it, "under a qualified title" until actually turned out by the plaintiff. It may be noted here that these amounts were not claimed by the defendant in her pleadings under section 72 of the Transfer of Property Act but under the terms of the mortgage-deed. At the time of the execution of the original mortgage no revenue was assessed on the land. The deeds provided that if revenue should be assessed in future the mortgagor would pay it and would not be entitled to redeem without so paying it. It has been contended that this amount was not made a charge on the property but having regard to the condition that the mortgagor should not be entitled to redeem the property without paying this amount we have no doubt that it was the intention of the parties that it should be a charge.

The learned Subordinate Judge has fallen into several errors in dealing with this part of the case. In the first place *Musammat* Parbati cannot claim this amount of Rs. 100 apart from the special stipulation in the mortgage-deed. She was in possession of the property and the enjoyment of its profits. She was the person primarily responsible for payment of the revenue under section 76 (*c*) of the Transfer of Property Act. She can have no more claim to appropriate the income without paying the revenue than can any other mortgagee in possession.

Musammat Parbati is, therefore, thrown back on the special stipulation in the mortgage-deed. According to that stipulation the only person who can recover the amount is the mortgagee. But *Musammat* Parbati was no longer the mortgagee when the suit was

brought. She ceased to be such at latest when *Musammat* Ladli died. While she was in lawful possession as mortgagee holding the estate of *Musammat* Mukta she might have recovered it. As she did not do so, the amount becomes an accretion to the estate and the right to recover it passed to the reversioners along with the right to recover the mortgage money under the principle laid down by the Privy Council in *Isri Dutt Koer* v. *Hansbutti Kcerain* (2).

The principle laid down by the Subordinate Judge in dealing with period (*b*) is also erroneous. A voidable transaction is good as against third parties till it is set aside but as regards the person who has a right to avoid it, it is in a state of suspense until such party exercises his option. If he avoids it, it is treated as void from the outset as against him. It is on this principle that mesne profits are always allowed in a suit by the reversioners to recover property from a transferee from a Hindu widow after her death. That mesne profits can be claimed in such a case was decided by the Privy Council in *Bhagwat Dyal Singh* v. *Debi Dayal Sahu* (3). Whether the plaintiff can claim mesne profits for the period between *Musammat* Ladli's death and the deed of release in his favour depends on the terms of that deed. The deed in this case gave him the right to recover them.

For these reasons we allow the appeal and modify the decree of the Court below by giving the plaintiff an unconditional decree for possession together with mesne profits to the amount claimed with full costs in both Courts.

N. H.

Appeal allowed.

(2) 10 C. 324 at p. 335; 10 I. A. 150; 13 C. L. R. 413; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. s.) 217 (P. C.).

(3) 35 C. 420; 10 Bom. L. R. 230; 12 C. W.N. 393; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49; 35 I. A. 48 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 957 OF 1918.

March 31, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

GURDIT SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat ISHAR KUAR—PLAINTIFF—RESPONDENT.

Custom—Succession—Self-acquired property—Sonless proprietor—Daughter whether excluded by collaterals—Gill Jats *of Amritsar District*—Riwaj-i-am *of* 1865, *how far evidence of custom*—*Property originally ancestral, purchase of, by collateral*—*Legal inferences from facts, if may be examined in second appeal.*

Where property, originally ancestral, is acquired by a collateral, other than by descent or through relationship to a common ancestor, it loses its ancestral character in the hands of the collateral. [p. 552, col. 1.]

Among Gill *Jats* of the Amritsar District daughters are not excluded by collaterals from succeeding to the self-acquired property of a sonless proprietor. [p. 552, col. 2.]

Ordinarily, daughters exclude collaterals in succession to self-acquired property, the onus of proving a custom opposed to the general custom is, therefore, on the collaterals. [p. 552, col. 2.]

The value of the *Riwaj-i-am* of 1865 is considerably minimised by the fact that it did not lay down what the custom was but what the compilers thought it to be. [p 552, col. 2.]

Dial Singh v *Dewa Singh*, 5 P. R. 1885, relied upon.

Legal inferences drawn from facts may be examined in second appeal [p. 552, col. 1.]

Ramgopal v. *Shamsghatoni* 20 C. 93 (P. C.); 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. s.) 63, followed.

Second appeal from a decree of the Additional District Judge, Amritsar at Gurdaspur, dated the 20th November 1917, affirming that of the Subordinate Judge, Second Class, Amritsar, dated the 16th November 1916.

Dr. *Gokal Chand Narang*, for the Appellants.

Mr. *Tirath Ram*, for the Respondent.

JUDGMENT.—The plaintiff in this case is one *Musammat* Ishar Kaur, the daughter of Santa Singh. She sued the collaterals of her father in the sixth degree for possession of the estate left by her father who died on the 24th April 1915. The Trial Court found that half of the property left by Santa Singh was ancestral and half was self-acquired. It was also found that according to the custom by which the parties, who are Gill *Jats* of the Amritsar District, are bound, the daughter excluded the collaterals

in succession to the self acquired property but was in her turn excluded by the collaterals *qua* the ancestral property of Santa Singh. The collaterals appealed against the decision and the learned District Judge dismissed their appeal, agreeing with the Trial Court both as to the nature of the property left by Santa Singh and as to the custom by which the parties were bound. The learned District Judge, however, granted a certificate under section 41 (3) of the Punjab Courts Act, 1914, on the question of custom. Armed with this certificate, the collaterals have come up to this Court in second appeal, and on their behalf we have heard Dr. Gokal Chand Narang while Mr. Tirath Ram has addressed us on behalf of the respondent, *Musammat* Ishar Kaur.

The first point for determination is whether the land left by Santa Singh was ancestral or self-acquired. It has been urged that the finding of the Courts below on this question is one of fact which cannot be examined in second appeal. Dr. Narang, however, contended that he was not attacking the finding of fact arrived at but the inferences drawn from that finding by the lower Appellate Court. *Ramgopal* v. *Shamskhaton* (1) is an authority for the proposition that legal inferences drawn from facts may be examined in second appeal. In the present case, however, we are unable to see any reason for thinking that the Courts below have drawn any unwarranted inferences. It appears that in 1865 Nidhan Singh, the father of Santa Singh, and Ganda Singh, his second cousin, were in possession of all the property, with which we are at present concerned, in equal shares. On the 31st May 1881, Ganda Singh sold his half share to Santa Singh, who was then a minor, for Rs. 440. The Courts below have held that Santa Singh having acquired this land, other than by descent or through his relationship to the common ancestor, it must be regarded as his self-acquisition and that although the property was ancestral originally, on coming into Santa Singh's hands it lost its ancestral character. Dr. Narang has drawn our attention to *Taj Muhammad* v. *Islam* (2) and other rulings which, however, we need not discuss, as, in our opinion, the conclusion arrived at by the Courts below is warranted and we are unable to say that it is in any way erroneous. We hold, therefore, that the view taken by the Courts below as to the character of the land is correct.

There remains the question of custom. On this point Art. 23 of Rattigan's Digest lays down that, according to the general custom of the Province, a daughter excludes collaterals in succession to self-acquired property. It would, therefore, be incumbent on the collaterals to prove a custom opposed to this general custom. In order to do this they have referred to the *riwaj-i-am* of the Settlement of 1865 in which it was stated that a proprietor could not make a gift of even his self-acquired property to his daughter. Our attention was also drawn to the evidence of a certain number of witnesses who have stated that in this village daughters do not succeed to self-acquired property. Dr. Narang contended that an entry in the *riwaj-i-am* was *prima facie* evidence of a custom and referred to *Beg* v. *Allah Ditta* (3). The value of the *riwaj i-am* of 1865 as a piece of evidence, however, is considerably minimised by the fact that in *Dial Singh* v. *Dewa Singh* (4) in referring to this very *riwaj i-am* it was said that it did not lay down what the custom was but what the compilers thought it ought to be. Again, we find that in the Settlement of 1914, when a new *riwaj i am* was compiled, it is stated that a gift to a daughter can be made of ancestral or self-acquired property to a certain extent—*vide* answer to Question 117. In these circumstances, we are of opinion that the collaterals have failed to prove a custom by which they exclude daughters from succeeding to the self-acquired property of a sonless proprietor. We accordingly dismiss this appeal with costs.

R. N.

Appeal dismissed.

(1) 20 C. 93 (P. C.): 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63.

(2) 21 Ind. Cas. 631; 1343 P. L. R. 1913; 95 P. R. 1913; 230 P. W. R. 1913.

(3) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 812; 44 C. 744; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

(4) 5 P. R. 1885.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 19 OF 1922.

May 11, 1922.

Present :—Mr. Ashworth, J. C.

Musammat GANGA JALI—APPLICANT—APPELLANT

versus

THE PERSON OF DIP NARAIN—OPPOSITE PARTY—RESPONDENT.

Guardian and ward—Court's duty—Minor's welfare.

In matters of guardianship the main question for a Court is the welfare of the child and it need not assign the personal guardianship of the child to a person merely because, in other respects, he has the best title to be guardian.

Appeal against an order of the District Judge, Gonda, dated 23rd February 1922.

Mr. *Ali Mohammad*, for the Appellant.

Mr. *S. N. Roy*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Gonda directing that Dip Narain, a minor son of Kamta Prasad, aged 27 months, shall be subject to the guardianship of Ramphal, the father by adoption. The adoption is admitted but it is urged by the appellant that the only thing that should be considered by this Court is the real welfare of the child which, it is maintained, will be best attained by leaving him in the charge of his mother. There can be no question of the correctness of the proposition of law that the main question for the Court in matters of guardianship is the welfare of the child and that the Court need not assign the personal guardianship of the child to the person who in other respects has the best title to be guardian. On behalf of the respondent it is urged that the residence of a minor with the adoptive parents was a part of the consideration for their adoption of a son, and that unless serious ill-treatment or incompetency on their part is proved, they are the proper guardians. Reliance is placed on *Lakshmibai* v. *Shridhar Vasudeo Takle* (1), which ruling was followed by this Court in Select Cases of the Judicial Commissioner's Court, *Basanta* v. *Babuji* (2). No ill treatment has been proved or alleged before this Court. Moreover, the facts of the case preclude the argument, it seems to me, that the minor will be better off

(1) 3 B. 1; 2 Ind. Dec. (N. s) 1.
(2) Sel. Cas. 217.

with the mother. It appears that, after the adoption had taken place and the child had gone to the adoptive father, the mother of the child in the course of being pregnant with a second child became strongly desirous of having her child back. With this object in view the real parents filed a criminal application under section 100, Criminal Procedure Code, for restoration of the child. An agreement was entered into that, so long as the natural mother remained pregnant, she should be allowed to have the child for 15 days in each month while the adoptive father would have it for the other half of the month. The adoptive father allowed the child to go after retaining him for 15 days to the real parents but they refused to abide by their part of the bargain and send him back. Consequently, the present application became necessary. In these circumstances, it does not lie in the mouth of the natural parents to say that the child is not well looked after. The fact that the mother wants the child is no reason for allowing the request. The natural parents should have thought of this before agreeing to the adoption. I see no reason to interfere with the order of the District Judge and dismiss this appeal with costs.

N. K.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2173 OF 1917.

February 22, 1922.

Present :—Mr. Justice Le-Rossignol and Mr. Justice Abdul Qadir.

SHADI—PLAINTIFF—APPELLANT

versus

Musammat JEONI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Widow—Partition.

A widow governed by agricultural custom and having only a life-estate in the land left by her husband is entitled to claim partition in cases in which she cannot secure the full enjoyment of her rights otherwise. [p. 554, col. 2.]

Abdul Qadir v. *Musammat Rabia*, 41 Ind. Cas. 473; 4 P R. 1917 Rev.; 1 P. W. R. 1917 Rev, referred to

SHADI v. JEONI.

Second appeal from a decree of the District Judge, Jullundur, dated the 25th June 1917, affirming that of the Subordinate Judge, First Class, Jullundur, dated the 16th January 1917.

Mr. *Kanwar Narain*, for the Appellant.

JUDGMENT.—The sole question in this second appeal is whether a widow governed by agricultural custom and having only a life-estate in the land left by her husband is entitled to claim partition under any circumstances?

In this case one Shadi sued *Musammat* Jeoni, widow of his brother, for a declaration that on account of unchastity she was not entitled to hold her deceased husband's property and that, in any case, she was not entitled to obtain her share of the joint holding by partition. The Trial Court found that no unchastity was proved and decided the case against the plaintiff on that point. With regard to the widow's right to ask for partition, the decision was in favour of the widow on the authority of *Bhag Bhari* v. *Wazir Khan* (1). The plaintiff appealed and his appeal was rejected by the learned District Judge who agreed with the Court of first instance on both the above points. It was contended before him that the onus of proving that a widow has by custom a right to claim partition should have been laid on the widow and was wrongly placed on the plaintiff and a reference was made to a decision of the Punjab Chief Court, *Parshotam* v. *Raj Devi* (2), where it is laid down that in a suit in which a widow claims partition, and the parties are governed by custom, the onus lies on the widow of proving that she can claim partition. The plaintiff has now come up to this Court on second appeal through Mr. Kanwar Narain who advances the same contention before us.

We think there is no force in this appeal. In the first place, it may be pointed out that *Parshotam* v. *Raj Devi* (2) cannot help the appellant, because it relates to a case in which the suit claiming partition was brought by a widow. What happened here was that the widow applied to the Revenue Authorities for partition and it is her husband's brother, the present plaintiff-appellant, who was referred to a civil suit. Moreover, in the case before us, the *riwaj-i-am* of the Jullundur District, to which the parties belong, is in favour of the defendant, and in view of that the Trial Court was perfectly justified in placing the onus on the plaintiff to prove that the widow was not entitled to obtain partition. The *riwaj-i-am* clearly states that a widow can get her husband's share in a joint estate partitioned.

Section 111 of the Land Revenue Act makes it clear that the widow, as a joint owner of the land (though possessed of limited ownership rights) is entitled to apply for partition. This principle is recognised in *Abdul Qadir* v. *Musammat Rabia* (3) by the learned Financial Commissioner who has held that a widow has a *locus standi* under section 111 of the Punjab Land Revenue Act to apply for partition. He, no doubt, favours the view that under Customary Law ordinarily a widow would not be entitled to get partition because of the limited nature of her estate, but a reference to paragraph 15 of Rattigan's Digest of Customary Law shows that she may at times obtain a separation of the share to secure her a full participation of the profits in cases in which she cannot secure the full enjoyment of her rights otherwise. This is exactly what it appears that she desired in this particular case, when she applied for partition. As stated by the Trial Court the object of her husband's brother seems to be to keep her out of her due share of produce. Under these circumstances we think that the plaintiff's suit has been rightly dismissed by both the Courts below, and, agreeing with them we dismiss this appeal with costs.

N. H.

Appeal dismissed.

(1) 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912.

(2) 19 Ind. Cas. 702; 219 P. L. R. 1913; 129 P. W. R. 1913.

(3) 41 Ind. Cas. 473; 4 P. R. 1917 Rev.; 1 P. W. R. 1917 Rev.

BIJAI BAHADUR SINGH *v.* MATHURA SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 23 OF 1922.

May 8, 1922.

Present:—Syed Wazir Hasan, A. J. C.

BIJAI BAHADUR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MATHURA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Will in favour of wife, devising milkiat *of property—Absolute estate—*'Malik,' *meaning of—Custom—Exclusion of daughters, whether amounts to their exclusion from mother's or maternal grandmother's property—Strict proof of custom necessary.*

Where a Hindu makes a Will in favour of his wife wherein it is stated that she is the *malik* of the property devised and has interest of *milkiat* in the same, she acquires an absolute estate in such property under the Will. [p. 555, col. 2.]

The word "*malik*" is not a term of art, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. [p. 556, col. 1.]

Bhaidas Shivdas v. *Bai Gulab*, 65 Ind. Cas. 974; 26 C. W. N. 129; 6 L. W. 42; 20 A. L. J. 29; 42 M. L. J. 385; 49 I. A. 1; 35 C. L. J. 314; 24 Bom. L. R. 551; 41 B. 153 (P. C.), followed.

Sasiman Chowdhurain v. *Shib Narayan Chowdhury*, 66 Ind. Cas. 94; 26 C. W. N. 425; 15 L. W. 434; 43 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; 49 I. A. 25; (1922) M. W. N. 368 (P. C.), referred to.

The existence of a custom of the exclusion of daughters and their issue from inheriting their father's or maternal grandfather's property, as the case may be, does not lead to a necessary inference of the exclusion of the same from their mother's or maternal grandmother's property, without strict proof of such a custom. [p. 556, col. 1.]

Brij Indar Bahadur Singh v. *Rance Janki Koer*, 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 763; Bald. 148; 3 Suth. P. C. J. 474; Rafique & Jackson's P. C. No. 48 (P. C.) and *Badri Narain Singh* v. *Thakurain Harnam Kuar*, 40 Ind. Cas. 555; 4 O. L. J. 238 at p. 239, referred to.

Appeal from a decree of the District Judge, Fyzabad, dated the 18th October 1921, modifying that of the Subordinate Judge, Sultanpur, dated 17th March 1920.

Mr. *Ali Mohammad*, for the Appellants.

Mr. *Aditya Prasad*, for Respondents Nos. 1-3.

JUDGMENT.—The facts are few and simple. The property in suit belonged to one Kalka Singh, a member of the Bhole Sultan clan, mostly to be found in the District of Sultanpur in the Province of Oudh. He died many years ago and the exact date of his demise is not known. He was succeeded by his widow, *Musammat* Hansa Kunwar, in virtue of a Will of the 15th August 1832, which Kalka Singh had executed in her favour. On the death of *Musammat* Hansa Kunwar, the property came into the possession of Mathura Singh and Kalu Singh, sons of *Musammat* Jadunath Kunwar, one of the daughters of Kalka Singh, and of *Musammat* Sartaji, who is the widow of Hanuman Bakhsh Singh, deceased, who was the son of another daughter, *Musammat* Nawela, of Kalka Singh. Mathura Singh, Kalu Singh and *Musammat* Sartaji are the chief defendants in the suit. The plaintiffs-appellants are the reversioners of Kalka Singh. The other defendants in the case are transferees of certain portions of the property in suit from *Musammat* Hansa Kunwar.

The case of the plaintiffs as presented before the lower Courts was that the Will of the 15th August 1832 conferred no more than a Hindu widow's estate on *Musammat* Hansa Kunwar and that the issue of daughters are excluded from inheriting Kalka Singh's property because of a custom of exclusion of such persons from such property obtaining in the clan of Bhole Sultan. The defense was that the Will conferred an absolute estate on *Musammat* Hansa Kunwar and that, consequently, the property which was devised to her by the Will became her *stridhan* property and further that there was no custom in the tribe of Boole Sultan which had the effect of excluding the daughters and their issue from inheriting their mother or grandmother's property as the case may be. The two points which arose out of the parties' case as stated above have been decided by both the lower Courts against the plaintiffs appellants and in favour of the defendants respondents.

On the first point, the learned Pleader, who appeared to support the appeal before me, did not address any argument and accepted the finding of the Courts below. The language of the Will in question leaves no room for doubt that Kalka Singh intended to confer an absolute estate on *Musammat* Hansa Kunwar. The material words used therein for the purpose of indicating the nature of the estate devised to *Musammat* Hansa Kunwar are that she was "*malik*" of the property devised and that she had the interest of "*milkiat*" in the same. In a recent decision of their Lordships of the Privy Council in

the case of *Bhaidas Shivdas* v. *Bai Gulab* (1) Lord Buckmaster said with regard to the word *malik*:—"It is not that the word is a term of art, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be; and in the context of the present Will their Lordships think that the estate was absolute." In the setting in which the words quoted above appear in the Will before me I have no doubt that they indicate that the nature of the estate devised was an absolute one. In another decision of the same Tribunal of a date later than the one just referred to all the precedents bearing on the interpretation of those words have been considered by Sir John Edge in his judgment in the case of *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury* (2). I hold, therefore, in agreement with the Courts below that *Musammat* Hansa Kunwar acquired an absolute estate in the property in suit under the Will of her husband dated the 15th August 1882.

On the second point, the Courts below have held that the custom of exclusion of daughters and their issue from the patrimony of their father is established as existing in the Bhole Sultan clan, but that no custom of the exclusion of them is proved to be prevalent in the same clan as regards the separate property of the mother. The learned Pleader argued chiefly with reference to the evidence in the case that the custom of the exclusion of daughters and their issue from inheriting their father or maternal grandfather's property, as the case may be, leads to a necessary inference of the exclusion of the same from their mother or maternal grandmother's property. I am not prepared to accept this reasoning as an adequate substitute for strict proof of the custom in question. The view which I take is supported by the observation of Sir Barnes Peacock in the judgment of the Privy Council in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (3). His Lordship is reported to have said as follows:—"The Judicial Commissioner, however, was of opinion that the plaintiff had failed to prove the special usage and custom which he had set up, and that there was no sufficient evidence to warrant the Courts excluding daughters from the succession. Their Lordships concur in that view, and are of opinion that there was no sufficient evidence to prove the custom set up. Beyond all doubt there was no such custom proved as regards the separate or absolute property of a woman." In that case the property in dispute was held to have belonged to the mother of the defendant-respondent as her absolute property and the remark quoted above was made with reference to the evidence led by the plaintiffs to prove the custom of exclusion of daughters from inheriting father's property. The same view was taken in a recent decision of a Bench of this Court in case of *Badri Narain Singh* v. *Thakurain Harnam Kuar* (4).

A subsidiary point was taken in appeal before me to the effect that besides the two items of property which the Court below has held as not covered by the Will of Kalka Singh and with regard to which the appellants have been given a decree there are some other properties of the same nature. On examining the terms of the Will and the nature of the properties, I am of opinion that there is no force in the contention. The description of the property devised as given in the Will of the 15th August 1832 is of the widest character and would clearly include the property which the appellant's Pleader urges are not comprised therein.

The appeal, therefore, fails and is dismissed with costs.

N. K.

Appeal dismissed.

(1) 65 Ind. Cas. 974; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 49 I. A. 1; 35 C. L. J. 314; 24 Bom. L. R. 551; 46 B. 163 (P. C.).

(2) 66 Ind. Cas. 193; 26 C. W. N. 425; 15 L. W. 434; 42 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; 49 I. A. 25; (1922) M. W. N. 368 (P. C.).

(3) 5 I. A. 1; 1 C. L. R. 318; 3 Sar. P. C. J. 763; Bald. 149; 3 Suth. P. C. J. 474; Rafique & Jackson's P. C. No. 48 (P. C.).

(4) 40 Ind. Cas. 555; 4 O. L. J. 233 at p. 239.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 959 OF 1918.

March 21, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Campbell.

NARINJAN SINGH AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Diwan CHARN DAS—DEFENDANT —RESPONDENT.

Redemption of Mortgages (Punjab) Act (II of 1913), s. 12—Redemption proceedings—Possession delivered to mortgagor by Collector's order—Suit by mortgagee for mere *declaration, if maintainable—Appeal—Objection to form of suit, whether can be raised in appeal for first time.*

Where by an order under the Redemption of Mortgages (Punjab Act, the mortgagor obtains possession of the mortgaged property on payment of a sum fixed by the Collector, the mortgagee, if aggrieved by the order, can, under section 12 of the Act, sue for a mere declaration without suing for possession.

An objection as to the form of the suit which is not raised in the Courts below, cannot be raised in appeal.

Second appeal from a decree of the District Judge, Sialkot, dated the 14th January 1918, affirming that of the Subordinate Judge, First Class, Sialkot, dated the 15th August 1917.

JUDGMENT.—The brief facts of the case, out of which the present second appeal arises, are as follows :—

On the 16th August 1889, *Diwan* Lachhman Das, father of the persent defendant-respondent, mortgaged some 39 *ghumaons* of land to *Bhai* Sobha Singh, plaintiff-appellant, for Rs. 600. It was agreed that the produce of the land was to be taken by the mortgagee in lieu of interest on Rs. 300, while the remaining Rs. 300 was to carry interest at the rate of 2 per cent. per mensem, that the mortgagor was not entitled to redeem the land before the expiry of ten years and that on his failing to redeem the land in the month of *Magh* after that year the land would be considered as sold to the mortgagee. The defendant's father did not pay the mortgage money and the plaintiff on his part, took no steps for foreclosure under the terms of Regulation XVII of 1806. On the 14th February 1917, the defendant applied under section 4 of Act II of 1913 for redemption of the land. The Assistant Collector held that the defendant was entitled to redeem the land on payment of Rs. 1,392, *i. e.*, Rs 600 principal and Rs. 792 interest on Rs. 300 for eleven years at the stipulated rate. The plaintiff then brought the present suit for a declaration that the defendant was not entitled to redeem the land except on payment of Rs. 600 principal and Rs. 1,980 interest due from the date of the execution of the deed up to the date of the institution of the suit. The Courts below held, following *Balanda* v. *Fateh Din* (1), that the plaintiff was only entitled to eleven years' interest and dismissed the suit.

The plaintiff has filed a second appeal to this Court and it is urged on his behalf (1) that the terms of the mortgage-deed show that it was the intention of the parties that interest should continue to be paid even after the due date and up to the date of redemption, and (2) that, even if no such agreement can be implied, then, in accordance with the decision of the Full Bench in *Motan Mal* v. *Muhammad Bakhsh* (2), the mortgagee is entitled to *post diem* damages which should be calculated at the rate of interest agreed upon in the deed.

In the first place, we find it necessary to refer to an objection raised by Counsel for the respondent as to the form of the suit. He urges that as the defendant has got possession of the land after redemption, the plaintiff should have sued either to be again put in possession until payment of the full amount claimed by him, or for recovery of the sum to which, he alleges, he is entitled. Now, there was no objection raised in the Courts below as to the form of the suit, and we, therefore, do not think that such an objection should be allowed at the present stage. Moreover, section 12 of the Redemption of Mortgages Act, II of 1913, lays down that any party aggrieved by an order made under sections 6, 7, 8, 9 or 11 of the Act may institute a suit to establish his right in respect of the mortgage. This clearly indicates that an aggrieved party may institute a suit to have his right declared. No doubt the plaintiff might have sued for possession of the land, but, having regard to the clear wording of section 12 of the Act, we consider that he was entitled to sue for a mere declaration.

(1) 25 Ind. Cas. 504; 57 P. R. 1914; 256 P. L. R. 1914; 177 P. W. R. 1914.

(2) 66 Ind. Cas. 771; 3 L. 200; 4 U. P. L. R. (L.) 55 (F. B.).

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The terms of the mortgage-deed show that the mortgage was for ten years and that it was also stipulated that the mortgagor could not redeem until the month of *Magh*. The date of the mortgage is 16th August 1889, and, therefore, there could be no redemption before about the 12th January 1900, or nearly $10\frac{1}{2}$ years after the date of the execution. We cannot suppose that the parties to the deed intended that interest should not be payable for the whole of this period though it exceeds the ten years fixed in the deed. It was also stipulated that interest should be paid for the year of grace allowed by Regulation XVII of 1806 and that at the time of redemption the mortgagor was to pay the cost of repairs of a well together with interest thereon. *Diwan* Lachhman Das was not an ordinary Zemindar but a man of intelligence and wealth and must have perfectly understood the terms of the deed. His son, the defendant, is a Pleader. After a careful consideration of the terms of the mortgage-deed, we are clearly of opinion that the parties intended that interest should not cease upon the arrival of the date fixed for redemption, but should continue until redemption. Under these circumstances, there is no necessity for us to refer to the decision of the Full Bench in the case of *Motan Mal* v. *Muhammad Bakhsh* (2) referred to above. We hold that the plaintiff is entitled to a decree as claimed, namely, that he is entitled to receive from the defendant prior to redemption a sum of Rs. 2,580.

We accordingly accept the appeal, and, setting aside the decree of the lower Appellate Court, give the plaintiff a decree as above together with costs in all Courts.

R. N. & W. C. A. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONENR'S COURT.

SECOND CIVIL APPEAL No. 14 OF 1922.

March 31, 1922.

Present :—Pandit Kanhaiya Lal, J. C.

BHAIRON—DEFENDANT—APPELLANT

versus

BALAK—PLAINTIFF—RESPONDENT.

Tenancy—Tenant-at-will, mortgage by—Mortgage, whether void ab initio*—Landlord, position of—Suit for redemption, maintainability of.*

A mortgage by a tenant-at-will is not binding on a landlord, but it is open to the latter to recognise it by accepting rent from the mortgagee during the currency of the tenancy Such a mortgage is not *ab initio* void and a suit to redeem it is maintainable [p. 559, col.]

Tika v *Sheo Narain*, 31 Ind Cas. 426; 9 O C, 117; 3 O. L J. 175, *Rampher Singh* v. *Ram Khelawan Singh*, 2 O. C. 252, *Janyi Ram* v *Chaudhuri Sheoraj Singh*, 30 Ind. Cas 284; 2 O. L. J. 838, *Sheikh Jawahar* v. *Sheikh Nazir*, 21 Ind Cas 960; 18 C. L J. 512 and *Jang Bahadur* v. *Rae Raja*, 7 O. C. 265, referred to.

Where a tenant effects a mortgage with possession of his tenancy holding and subsequently sues for redemption, it is not open to the mortgagee to plead that the mortgagor was not competent to mortgage the tenancy and that no suit for redemption lay. [p. 559, col 2.]

Appeal from a decree of the Subordinate Judge, Barabanki, dated the 25th October 192 , confirming a decree of the Munsif, Ramsanehighat, dated the 18th July 192 .

Mr. *B. N. Chakbast*, for the Appellant.

M *Ram Bharose Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage of a tenancy holding made by Sarju, the father of the plaintiff, in favour of Bhairon, the defendant appellant. The mortgage was made on the 10th May 1898 for Rs. 59 and the mortgagee was given possession over the holding forthwith. The contention of the mortgagee is that the mortgagor was not competent to mortgage the tenancy and that no suit for redemption would, therefore, lie. That contention was repelled by the Courts below and cannot be accepted here.

In the case of an occupancy tenant the law imposes a restraint on alientation, but in the case of an ordinary tenant-at-will the law merely permits the landlord in certain contingencies to terminate the tenancy in the manner laid down in section 53 of the Oudh Rent Act (XXII of 1886).

Section 4 restricts the right of a landlord to eject a tenant on grounds other than those recognised by law in spite of anything in the contract to the contrary. If the tenant contravenes any terms recognised by law or does anything forbidden by law he is liable to ejectment under section 62. Till the landlord exercises that right, the tenancy continues, and his mortgagee or sub lessee continues in possession, but he cannot acquire under section 68 the rights referred to in section 67, to which a tenant is entitled. If a tenant dies, his rights are to a certain extent heritable and his heirs-at-law can step into his shoes during the currency of the tenancy within the limits prescribed by sections 47 and 48. A mortgage by a tenant at-will is not binding on the landlord, but it is open to the landlord to recognise it by accepting rent from the mortgagee during the currency of the tenancy. Such a mortgage is not *ab initio* void and a suit for its redemption is maintainable.

The learned Counsel for the defendant-appellant relies on the decision in *Tika* v. *Sheo Narain* (1), but in that case no question about the validity of a transfer really arose, for the landlord had recognised the transferee and granted him a lease in his own right, and a suit filed by the transferee for possession against the transferor was decreed. In *Kampher Singh* v. *Ram Khelawan Singh* (2) where a person who obtained a decree from the Settlement Court giving him a heritable but not a transferable right of occupancy in some land had sold a portion of his holding to another person and his son subsequently filed a suit against the latter for possession, it was held that the restriction on the right of transfer contained in the decree of the Settlement Court was intended for the benefit of the landlord and his heirs and not for the benefit of the tenant or his legal representatives. In *Jangi Ram* v. *Chaudhuri Sheoraj Singh* (3) it was held that a mortgagee could not go behind the mortgage to dispute the mortgagor's right to enforce redemption. In *Sheikh Jawahar* v. *Sheikh Nasir* (4) it was similarly held that a person who was a transferee from a tenant of a non-transferable holding could not be heard to say that his transferee had not a right to transfer the holding or to transfer his rights therein to the plaintiff. In *Jang Bahadur* v. *Rae Raja* (5) a distinction was drawn between the right of a landlord to question a mortgage made by an occupancy tenant having a non transferable right of occupancy and the right of such an occupancy tenant to derogate from his own grant and to claim possession of the holding mortgaged on the ground that the mortgage was illegal. Section 6, clause (*i*), of the Transfer of Property Act (IV of 1882) permits a transfer to be made where it is not opposed to the nature of the interest created thereby and excludes from its operation only such rights of occupancy as are non-transferable Section 62 of the Act gives, in the case of a usufructuary mortgage, a right to the mortgagor to recover possession of the mortgaged property on payment or tender of the money due on the mortgage. It is not open to the mortgagee to plead that a mortgage was invalid or to set up a right by trespass if he originally obtained possession under the mortgage, that is by license and permission of the mortgagor.

The appeal fails and is dismissed with costs.

N. K.

Appeal dismissed.

(1) 34 Ind. Cas. 426; 19 O. C. 117; 3 O. L. J. 175.
(2) 2 O. C. 252.
(3) 20 Ind. Cas. 234; 2 O. L. J. 835.
(4) 21 Ind Cas. 960; 18 C. L. J. 512.
(5) 7 O. C. 265.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 3 OF 1922.

July 2, 1922.

Present:—Mr. Batten, J. C.

ABDULLA KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JALAM SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66—*Auction*

ABDULLA KHAN v. JALAM SINGH.

sale—Agreement with auction-purchaser to purchase property sold—Specific performance.

The provisions of section 66 of the Code of Civil Procedure must be strictly construed. [p. 561, col. 2.]

A suit by a plaintiff claiming specific performance of an agreement to sell, made by a purchaser at an auction-sale, cannot be described as a suit brought on the ground that the purchase was made on behalf of the plaintiff, because, in such a case, the purchase is made on behalf of the purchaser with whom the title remains until the plaintiff obtains specific performance of the contract. [p. 561, col. 2.]

Therefore, section 66 of the Civil Procedure Code does not preclude a suit to enforce specific performance of an agreement made either prior or subsequent to the purchase by the auction-purchaser to sell the property to the plaintiff when the purchase-money has been entirely found by the defendant and where there is no allegation that without the enforcement of the agreement to sell, the property is actually the property of the plaintiff, that is, that it was bought by the defendant *benami* for the plaintiff [p. 561, cols. 1 & 2]

Appeal from an order of remand passed by the District Judge, Nimar, on the 20th January 1922, in Civil Appeal No. 168 of 1921.

Mr. *V. R. Panjit*, R. B. for the Appellants.

Dr. *H. S. Gour*, for the Respondent

JUDGMENT.—The plaintiff sued for specific performance of a contract for sale alleged to have been entered into by the defendant No. 1 with him, or, in the alternative for refund of the money which he alleged to have paid as part consideration of the sale. The plaintiff's case as stated in the plaint is, that he wished to purchase certain property which was to be sold at an auction. For certain reasons, it was not considered advisable that the plaintiff should appear as a bidder and the defendant No. 1 agreed to purchase the property himself and to sell it, after the sale was confirmed, to the plaintiff for cash consisting of the purchase-money and expenses. The property was accordingly so purchased by the defendant No 1 and after the sale was confirmed the defendant No. 1 again agreed to sell the property to the plaintiff but not for cash as originally agreed but on certain other terms specified in the plaint.

The First Court dismissed the suit as being contrary to the provisions of section 66, Civil Procedure Code, and, as regards the claim for refund, it held that the plaintiff could not recover the money, as the object of the agreement was unlawful with reference to the provisions of section 23 of the Contract Act. It is the plaintiff's case that the purchase-money was, in the first instance, to be paid and was paid by the 1st defendant.

On appeal the learned District Judge held that the suit could not be brought on the original agreement prior to the sale set out in paragraph 2 of the plaint. He says: "The suit based solely upon that agreement, even though it be thrown into form of a suit for specific performance for a contract for sale would be barred by the section 66: for, as the Privy Council judgment in *Ramathai Vadivela Mudaliar* v. *Peria Manicka Mudaliar* (1) points out, the distinction between a purchase on behalf of another and a purchase coupled with an undertaking to convey to another at the price of purchase is somewhat nrarow, and if the agreement entered into before the auction stood alone there would be considerable force in the contention that the purchase was merely made *benami*." But the learned Judge held with reference to paragraphs 4 and 5 of the plaint, where a subsequent agreement after the sale to defendant No. 1 is set out as follows: "This is an allegation of a distinct subsequent agreement to sell and to deliver possession. It is upon the truth or falsity of this allegation that the maintainability of the suit must depend. In the Privy Council case cited above fresh agreements were made after the sale and it was held that such agreements, although carrying out agreements made before the sale, could be sued upon and were not barred by section 66." The District Judge, therefore, remanded the case for a decision as to whether or not there had been a subsequent agreement as alleged by the plaintiff, in which case the suit would be maintainable.

(1) 56 Ind. Cas. 395; 43 M. 643 at p. 649; 24 C. W. N. 699; 18 A. L. J. 584; 28 M. L. T. 13; 39 M. L. J. 11; 12 L. W. 1; (1920) M. W. N. 389; 2 U. P. L. R. (P. C.) 90 and 172; 47 I. A. 108 (P. C.).

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As regards the second point as to whether any refund of money alleged to have been paid as consideration for the re sale is due, the learned Judge held: "that while section 66 bars the suit to prove *benami* character of certain transactions it does not make these *benami* transactions illegal," and he, therefore, held that the consideration, if any, could be recovered under section 65 of the Contract Act. An appeal has been made to this Court against the order of remand. It is contended that there was even according to the plaintiff's allegations no fresh agreement after the confirmation of the auction sale, and that, even if there was, the plaintiff had not relied on it, since, in paragraph 6 of the plaint, he asks for a relief on the ground of the original agreement. I have carefully considered the allegations set out in paragraphs 4 and 5 of the plaint and agree with the learned District Judge that they do amount to allegations of a fresh contract in supersession of the original contract. Though the plaintiff has not expressly asked for a relief in relation to the fresh contract, the facts entitling him to such relief are fully set out in the plaint and the plaintiff should not be non suited merely because of the inartistic method in which his pleas were made in the Mofussal Court. The further ground of appeal that the suit for refund of the consideration in case the other relief is not granted is very wisely not pressed, the lower Appellate Court having taken a correct view of the law. It will, of course, have to be decided whether, even on the plaintiff's own case the money which he claims can really be called consideration in respect of the agreement set up.

The learned Counsel for the respondent supports the order of the lower Appellate Court remanding the case by urging that the learned District Judge wrongly decided that the suit as brought on the original agreement does not lie because it is contrary to the provisions of section 66, Civil Procedure Code. No reported case has been brought to my notice in which it has been held that section 66 precludes a suit to enforce specific performance of an agreement made prior to the purchase by the auction-purchaser to sell the property to the plaintiff when the purchase-money has been entirely found by the defendant and where there is no allegation that without the enforcement of the agreement to sell, the property is actually the property of the plaintiff, that is to say, that it was bought by the defendant *benami* for the plaintiff. The observations of their Lordships of the Privy Council quoted by the learned District Judge were *obiter* and we do not know what the decision of the case would have been if there had been no subsequent agreement. Their Lordships upheld the Full Bench decision of the Madras High Court in *Amrutam Venkatappa* v. *Vavilala Jalayya* (2) that an agreement to sell subsequent to the confirmation of the auction sale is not inconsistent with the auction-purchaser's own title, but rather the reverse. Their Lordships did not deal with the plea discussed in the earlier part of the judgment, as on the facts it did not arise. The learned Judges of the Madras High Court observe: "The finding is that the defendant agreed that the property should be purchased in the name of the defendant and that one half of it should be conveyed by the defendant to the plaintiff after the sale certificate had been obtained. This, in our opinion, is not a *benami* transaction at all." These observations are also *obiter*. A provision like section 66 of the Civil Procedure Code must be strictly construed and it appears to me that a suit claiming specific performance of an agreement to sell made by a purchaser cannot be described as a suit brought on the ground that the purchase was made on behalf of the plaintiff. The purchase is made on behalf of the purchaser with whom the title remains until the plaintiff obtains specific perfomance of the contract. The object of the section appears to be to prevent the Executing Court being led to believe that a person who is not the purchaser is the purchaser. I am, therefore, of opinion that if the plaintiff proves the original contract and fails to prove the subsequent contract he is entitled to fall back on the original contract.

The appeal is dismissed with costs.

R. N. *Appeal dismissed.*

(2) 51 Ind. Cas. 111; 42 M. 615; 9 L. W. 593; 26 M. L. T. 40; (1919) M. W. N. 355; 37 M. L. J. 98 (P. C.).

PRANRAM MOOKERJEE *v.* JAGADISH NATH RAY.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 98 OF 1920.

April 22, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

PRANRAM MOOKERJEE—DEFENDANT—APPELLANT

versus

Maharajkumar JAGADISH NATH RAY—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 89, 115, 116, 132—Suit for accounts—Limitation—"Moveables," if includes money—Termination of agency—Question of fact—Omission to render accounts—Refusal.

Art. 89 of Sch. I to the Limitation Act, applies to a suit for accounts by a principal against his rent collector as the term "moveable property" in that Article includes money. [p. 563, col. 1.]

Madhusudan Sen v. *Rakhal Chandra Das Basak*, 30 Ind. Cas 697; 43 C. 248; 19 C. W. N. 1070; 22 C. L. J. 552, *Venkatachalam Chetty* v. *Narayanan Chetty*, 26 Ind. Cas. 740; 39 M. 876; 28 M. L. J. 140, *Nobin Chandra Barua* v. *Chandra Madhab Barua*, 36 Ind. Cas. 1; 44 C. 1; 24 C. L. J. 509; 20 M. L. T. 420; 21 C. W. N. 87; 14 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L J. 886; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.), *Shib Chandra Roy* v. *Chandra Narain Mukerjee*, 32 C. 719; 1 C. L. J. 232 and *Hafezuddin Mandal* v. *Jadu Nath Saha*, 35 C. 298; 12 C. W. N. 820; 7 C. L. J. 239, referred to.

To make Art. 116 of Sch. I to the Limitation Act applicable, it must be shown, as provided in Art. 115, that the suit is of a nature not specifically provided for in the Schedule. [p. 563, col. 1.]

The question whether an agency has terminated within the meaning of Art. 89 of the Limitation Act is a question of fact. [p. 564, col. 1.]

Venkatachalam Chetty v. *Narayanan Chetty*, 26 Ind. Cas. 740; 39 M. 876; 28 M. L. J. 140, *Nagappa Chettiar* v *Chidambaram Chettiar*, 36 Ind. Cas. 812; 31 M. L.J. 687; (1916) 2 M. W. N. 361; 4 L. W. 455, *Muthiah Chettiar* v. *Chithambaram Chetty*, 38 Ind. Cas. 780; 31 M. L. J. 688; 4 L. W. 456; (1916) 2 M. W. N. 362, *Muthiah Chetty* v. *Alagappa*, 45 Ind. Cas. 430; 41 M. 1 and *Kuppusamy Aiyar* v. *Veerappa Chettiar*, 37 Ind. Cas. 876; 5 L. W. 375, referred to.

An omission to render accounts where accounts are demanded may operate as refusal. [p. 564, col. 1.]

Madhusudan Sen v. *Rakhal Chandra Das Basak*, 30 Ind. Cas. 697; 43 C. 248; 19 C. W. N. 1070; 22 C. L. J. 552 and *Bhabatarini Debi Chowdhurani* v. *Sheikh Bahadur Sarkar*, 53 Ind. Cas. 675; 50 C. L. J. 90, referred to.

When a suit for accounts is decreed, the accounts are not necessarily restricted to the three years preceding the institution of the suit or three years preceding the termination of the agency. But where by reason of the happening of events the claim for accounts up to a certain date is barred by limitation at the date of the institution of the suit, the defendant can only be called upon to render accounts only in relation to transactions which took place after that date. [p. 564 col. 2.]

Sures Kanta Banerjee v. *Nawab Ali*, 29 Ind. Cas. 848; 21 C. L. J. 462; 20 C. W. N. 356, referred to.

Obiter.—Where immoveable property is hypothecated to secure the performance of an obligation undertaken by an agent, a suit by the principal may in essence be regarded as a suit to enforce a charge on immoveable property within the meaning of Art. 132 of Schedule I to the Limitation Act and may, consequently, be governed by the period of 12 years provided by that Article. [p. 563, cols. 1 & 2.]

Appeal against a decree of the Subordinate Judge, Dinajpur, dated the 30th April 1920.

Babus *Bipin Behary Ghose* and *Rupendra Kumar Mitter*, for the Appellant.

Babus *Dwarka Nath Chuckerbutty* and *Taraeswar Pal Chowdhury*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendant in a suit for accounts. The case for the plaintiff was that the defendant was employed as his rent-collector from the 12th December 1907 to the 11th October 1915, although no written agreement was executed and registered till the 5th October 1909. He prayed that a preliminary decree might be passed directing the defendant to submit a correct account during his term of office and that a final decree might be passed for the amount found due from the defendant on examination of the accounts. The substantial defence was two-fold; namely, first, that the claim was barred by limitation and, secondly, that in so far as the claim might be found to be not barred by limitation, the accounts had been duly rendered. The Subordinate Judge has decreed the suit and has directed the defendant to render accounts for the period between the date of his appointment and the date of his dismissal. He has further directed that a Commissioner be appointed to determine, on the examination of the accounts, what amount the defendant would be liable to the plaintiff. On the present appeal, the defendant has contended that the claim is barred by limitation; and that, in any event, the Subordinate Judge should have held that accounts had been duly rendered.

Art. 89 of the Schedule to the Indian Limitation Act provides that a suit by a principal against his agent for moveable property received by the latter and not accounted for must be instituted within three years from the date when the account is, during the continuance of the agency, demanded and refused or where no such demand is

made when the agency terminates. Art. 115 provides that a suit for compensation for the breach of any contract, express or implied, and not in writing registered and not herein specially provided for, must be instituted within three years from the date when the contract is broken, or (where there are successive breaches) from the date when the breach in respect of which the suit is instituted occurs, or, where the breach is continuing, from the date when it ceases. Art. 116 provides that a suit for compensation for the breach of a contract in writing registered must be instituted within six years from the date when the period of limitation begins to run in respect of a suit brought on a similar contract not registered. It was argued at one stage that inasmuch as the contract of agency in the present case was in writing registered, Art. 116 was applicable. But there is no foundation for this contention. To make Art. 116 applicable, it must be shown, as provided in Art. 115, that the suit is of a nature not specifically provided for in the Schedule. Art. 89, however, plainly applies to a suit of this description, as the term "moveable property" includes money. *Madhusudan Sen* v. *Rakhal Chandra Das Basak* (1), *Venkatachalam Chetty* v. *Narayanan Chetty* (2), *Pichu Vadhiar* v. *Secretary of State* (3), and, consequently, excludes the operation of both Art. 115 and Art: 116. This view is supported by the decision of the Judicial Committee in *Nobin Chandra Barua* v. *Chandra Madhab Barua* (4), which reversed the decision of this Court in *Chandra Madhab Burua* v *Nabin Chandra Barua* (5). A similar view had been taken in the cases of *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (6), *Hafezuddin Mandal* v. *Jadu Nath Saha* (7), *Madhusudan Sen* v. *Rakhal Chandra Das Basak* (1) and *Venkatachalam Chetty* v. *Narayanan Chetty* (2). This principle is applicable, as appears from the decision of the Judicial Committee in *Nabin Chandra Barua* v. *Chandra Madhu Barua* (4), as also from that of this Court in *Bhabatarini Debi Chowdhurani* v. *Sheikh Bahadur Sarkar* (8), even though the contract provides that the accounts are to be rendered from year to year. No doubt, where immoveable property is hypothecated to secure the performance of an obligation undertaken by an agent, a suit by the principal may in essence be regarded as a suit to enforce a charge on immoveable property within the meaning of Art. 132 of the Schedule to the Indian Limitation Act and may consequently be governed by the period of 12 years provided by that Article. The present case, however, is not of that description, and the question of limitation must be answered with reference to the terms of Art. 89, which contemplates two distinct starting points, namely, first, when the account is, during the continuance of the agency, demanded and refused, time runs from the date of refusal; and, secondly, where no such demand is made, time runs from the date of termination of agency, and it is plain that there may be cases where only one of these contingencies has happened. On the other hand, there may be cases where both the contingencies may have happened. It is plain from the evidence that both the contingencies have happened here, there has been a demand and refusal and there also has been a termination of the agency. The results which may be reached in such a case by the application of the two tests would not necessarily be identical. In the case before us, it is clear that on the 21st April 1914 the plaintiff demanded accounts from the defendant. The demand was embodied in a letter addressed by the officer of the plaintiff to the defendant in the following terms: "You will clear your account by submitting to the Sadar office the account papers relating to your works up to 1320 B. S. within 30th Baisak. In default take notice that fine will be imposed from the 1st Jaistha.' The demand in essence was for accounts to be submitted up to the 12th April 1914 on or before the 13th May 1914. The evidence makes it abundantly plain that the accounts were not rendered as demanded. Consequently there was a refusal, because as was pointed out in *Madhusudan Sen* v. *Rakhal*

(1) 80 Ind. Cas. 697; 43 C. 248; 19 C. W. N. 1070; 22 C. L. J. 552.
(2) 26 Ind. Cas. 740; 39 M. 376; 28 M. L. J. 140.
(3) 38 Ind. Cas. 986; 21 M. L. T. 71; (1917) M. W. N. 20; 5 L. W. 654; 40 M. 767; 18 Cr. L. J. 426.
(4) 36 Ind. Cas. 1; 44 C. 1; 24 C. L. J. 509; 20 M. L. T. 430; 21 C. W. N. 97; 14 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L. J. 886; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.).
(5) 18 Ind. Cas. 735; 40 C. 108; 17 C. L. J. 103.
(6) 32 C. 719; 1 C. L. J. 232.
(7) 85 C. 298; 12 C. W. N 820; 7 C. L. J. 279.
(8) 53 Ind. Cas. 675; 30 C. L. J. 90.

Chandra Das Basak (1), which was followed in *Bhabatarini Debi Chowdhurani* v. *Sheikh Bahadur Sarkar* (8), an omission to render account where the account is demanded may operate as refusal. It need not be disputed that, as pointed out in *Madhusudan Sen* v. *Rakhal Chandra Das Basak* (1), and *Bhabatarini Debi Chowdhurani* v. *Sheikh Bahadur Sarkar* (8) where the agent in answer to the demand promises to submit the accounts later, his conduct cannot be deemed to amount to refusal. But in the case before us, there was a demand made by the plaintiff on the defendant to render accounts; the defendant did not comply with the demand; his conduct consequently amounted to refusal. The first contingency mentioned in the third column of Art. 89 consequently happened and the suit in so far as it claims accounts from the defendant up to the 12th April 1914 must be deemed barred by limitation as it has been instituted after the lapse of three years from the date of refusal, that is, the 13th May 1914.

The second contingency mentioned in the third column has also happened, because the agency has been terminated. This is a question of fact, as explained in *Nagappa Chettiar* v. *Chidambaram Chettar* (9), *Venkatachalam Chetty* v. *Narayanan Chetty* (2), *Muthiah Chettiar* v. *Chithambaram Chetty* (10) *Muthiah Chetty* v. *Alagappa Chetty* (11), *Kuppusamy Aiyar* v. *Veerappa Shettiar* (12) and is proved beyond doubt by the letter of the 11th October 1915 which was addressed by an officer of the plaintiff to the defendant, and was in the following terms: "You are dismissed from the post of Tahsildar of Pargana Pustail and Gavraha and Dakhina Runjan Basu is transferred from the post of Tahsildar of Kushidanga and is placed in charge of your office and you are hereby ordered to make over the charge of the original papers, etc., in your custody to the said Basu, to submit the charge sheet signed by both of you and the cash found at your disposal to the Sadar Kutchery at Headquarters Kumartalah and to render your accounts up to date. Remember that you do not fail in this." The suit was instituted on the 27th August 1918, that is, within three years from the date of dismissal. Consequently, the plaintiff is entitled to accounts from the defendant other than the accounts demanded on the 21st April 1914. The suit is thus in time for the accounts from the 13th April 1914 to the 11th October 1915. In this connection we have to consider whether the defendant can be called upon to pay to the plaintiff money which might have been found due if accounts could have been ordered up to the 12th April 1914. In our opinion, the answer must be in the negative. No doubt, as was pointed by this Court in the case of *Suresh Kanta Banerjee* v. *Nawab Ali* (13), when a suit for accounts is decreed, the accounts are not necessarily restricted to the three years preceding the institution of the suit or three years preceding the termination of the agency. But in the present case we have already held that by reason of events which have happened the claim for accounts up to the 12th April 1914 had become barred by limitation at the date of the institution of the suit. Consequently, the defendant can be called upon to render accounts only in relation to transactions which took place after the 12th April 1914 up to the 11th October 1915 when he was dismissed from service.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge varied. The decree will direct that the defendant do render accounts from the 13th April 1914 to the 11th October 1915. We may add that in this view it is not necessary to discuss the question whether the accounts had been rendered for the period antecedent to the 12th April 1914. But the respondent admitted that accounts had been rendered and adjusted up to the 13th April 1909; so that in any event the claim for accounts from the 12th December 1907 to the 13th April 1909 was bound to fail. The appellant is entitled to his costs in this Court but the order for costs made by the Court below will stand: such costs as may be incurred after remand will abide the result.

BUCKLAND, J.—I agree.

R. N. & W. C. A. *Appeal allowed in part.*

(8) 31 Ind. Cas. 812; 31 M. L. J. 687; (1916) 2 M. W. N. 361; 4 L. W. 455.

(9) 36 Ind. Cas. 812; 31 M. L. J. 687; (1916) 2 M. W. N. 361: 4 L. W. 455.

(10) 38 Ind. Cas. 720; 31 M. L. J. 698; 4 L. W. 456; (1916) 2 M. W. N. 362.

(11) 45 Ind. Cas. 430; 41 M. 1.

(12) 87 Ind. Cas. 875; 5 L. W. 875.

(13) 29 Ind. Cas. 848; 21 C. L. J. 463; 20 C. W. N. 356.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 206 OF 1921 AND CIVIL MISCELLANEOUS PETITION 1408 OF 1921.

August 11, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

C. KUPPUSWAMI MUDALIAR AND OTHERS—APPELLANTS

versus

Y. SUBRAMANIAM CHETTIAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O. XL, r. 1—Scheme suit—Trustee appointed by Temple Committee, supersession of—Receiver, appointment of, pending suit.

The Court has power, in a scheme suit under section 92, Civil Procedure Code, to supersede a trustee appointed by a Temple Committee, and, though there is no prayer to that effect in the plaint, to appoint a Receiver in his place during the pendency of the suit.

Veeraraghava Thathachariar v. *Krishnaswami Thathachariar*, 7 Ind. Cas 900; 20 M. L. J. 638; 4 M. L. T. 88, relied on.

Appeal against an order of the Court of the Subordinate Judge, Madura, dated the 30th April 1921, in I. A. No. 180 of 1921, in Original Suit No. 63 of 1921 and petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to pass orders directing that further proceedings in the matter of the appointment of Receiver in Original Suit No. 63 of 1921 on the file of the Court of the Subordinate Judge, Madura, be stayed pending disposal of Civil Miscellaneous Appeal No. 206 of 1921, preferred to the High Court against the order appointing Receiver in the said Original Suit No. 63 of 1921.

Messrs. *T. Rangachariar*, *T. V. Gopalaswami Mudaliar* and *T. Nallasivan Pillai*, for the Appellants.

Messrs. *T. R. Venkatarama Sastriar*, *K. V. Krishnaswami Aiyar*, *A. Krishnaswami Aiyar*, *N. Swaminatha Aiyar*, *K. Rajah Aiyar*, *K. Balasubramania Iyer*, *T. M. Ramaswami Aiyar* and *V. Ramaswami Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—We have heard argument at considerable length on the facts and law involved in this appeal. But, as the majority of the issues raised will require consideration at the trial of the suit by the lower Court, we enter on no detailed discussion of them.

There is, we think, no doubt that the lower Court had power to supersede first defendant, notwithstanding that he was appointed manager by the Temple Committee and was only removeable after regular enquiry. Such action was approved in *Veeraraghava Thathachariar* v. *Krishnaswami Thathachariar* (1) in similar circumstances against a trustee and manager, who was, no doubt, hereditary but who also would be removeable only in the same way.

As regards the facts, we have been taken carefully through the history of first defendant's incumbency and, in particular, of the last ten days, during which the important Chithrai festival should have been celebrated, and, in our opinion, it is just and convenient in the interests of the public, whom the plaintiffs represent, and of the institution that the immediate management should be in other hands and should, so far as the circumstances permit, be under the supervision and control of the Court during the pendency of the suit.

We, therefore, dismiss the appeal and the connected petition, except that we add to the lower Court's order appealed against the provision already made in our order of 11th May 1921 on Civil Miscellaneous Petition No. 1618 of 1921 for the maintenance, subject to the Receiver's right and duty to consult the Court, when necessary, of his subordination to the Temple Committee.

Appellants will pay respondents' costs in the appeal.

RAMESAM, J.—I agree. The case in *Veeraraghava Thathachariar* v. *Krishnaswami Thathachariar* (1) shows that in a suit under section 92 of the Code of Civil Procedure, though there is no prayer to remove a trustee, a Receiver might be appointed during the pendency of the suit. The reason is, that, in this class of suits, it is not merely the defendants' rights that are the subject of consideration by the Courts but the interests of a public institution of far greater importance than the defendants' rights. It may be that the power of a Temple Committee to remove a trustee appointed by them is limited but it does not follow that a Court's powers over the trustee are similarly fettered. Having regard to all the facts placed fully before us, I concur with my learned

(1) 7 Ind. Cas. 900; 20 M. L. J. 638; 4 M. L. T. 88.

brother in thinking that the Receiver should continue to be in charge of the institution till the suit is disposed of. I agree with the order of my learned brother.

M. C. P.

W. C. A. *Decree varied.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 50 OF 1918.

February 9, 1920.

Present :—Sir Henry Drake Brockman, KT., J. C.

GULAB THAKUR—DEFENDANT No. 1—APPELLANT

versus

FADALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 18, 21, 32 (5)—Relevancy of statement about relationship—Means of special knowledge—Statement by deceased person as to his adoption while small child—Admission under s. 18, relevancy of—Hindu Law—Adoption of great-grand-father's great-grandson, validity of.

The statement of a person made when he was thirty-six years of age that he was adopted when he was four years old is admissible in evidence after his death to prove the fact of his adoption under section 32 (5) of the Evidence Act, as he possessed the special means of knowledge about the relationship required by the section. The fact that the person making the adoption died while the person adopted was too young to remember him would not be material as the latter would surely be able to declare positively that he had been adopted from that acquaintance with the history of his family which he would necessarily possess. [p. 567, col 2.]

Section 18 of the Evidence Act does not by itself make relevant the admissions therein mentioned. [p 570, col. 1.]

Under Hindu Law the adoption of a cousin standing in the same degree from the common ancestor, such as paternal great-grandfather's great-grandson, is not invalid. [p. 572, col. 1.]

(Case-law discussed.)

Obiter.— One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested even though that other was his own father. [p. 570, col. 1.]

Bhagwanta v. *Sukhi*, 22 A. 33; A. W. N. (1899) 159; 9 Ind. Dec. (N. S.) 1064, *Govinda Pillai* v. *Thayammal*, 28 M. 57; 14 M. L. J. 209, followed.

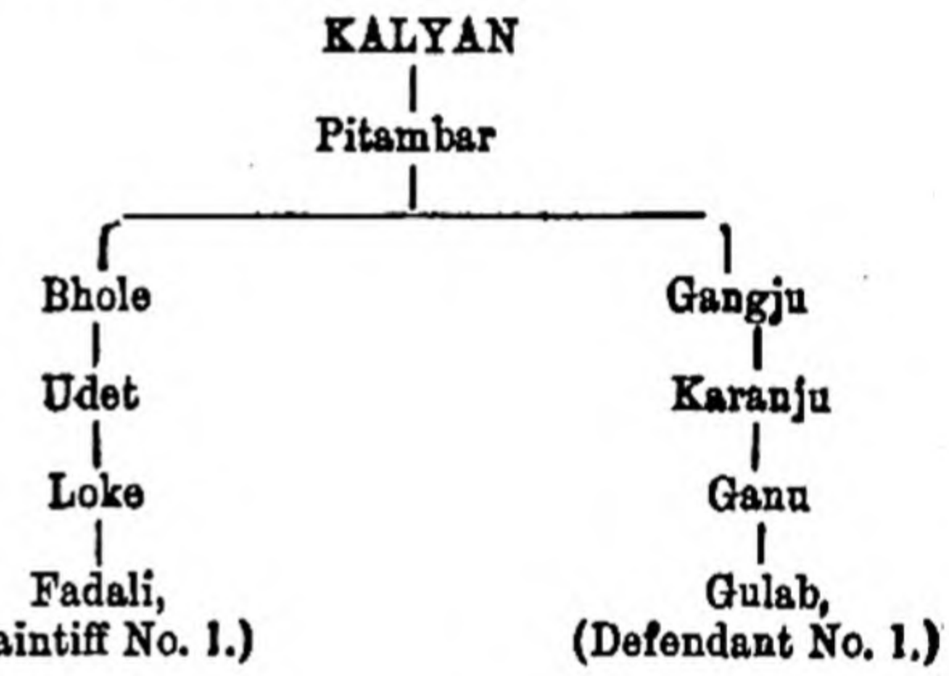
Appeal from the decree of the Additional District Judge, Saugor, dated 22nd February 1918, in Civil Suit No. 3/62 of 1917.

Dr. *H. S. Gour*, for the Appellant.

Mr. *P. S. Kotval*, for the Respondents.

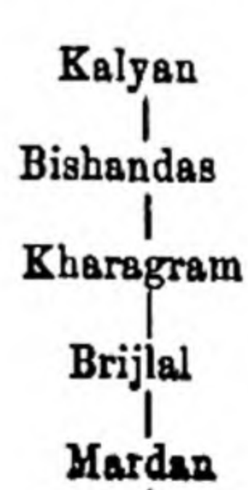
JUDGMENT.—The suit out of which this appeal arises was brought by one Fadali along with three other persons to obtain possession of a half share in property of which the last male owner was a distant relation named Janki. The principal defendant is Gulab, the appellant to this Court.

As to the descent of Fadali and Gulab from one common ancestor there is no doubt, and the following table shows how they are related to each other :



Janki's father was admittedly one Mardan who died on the 28th May 1849. Janki himself died in June 1897 at the age of 75 years and was succeeded by his daughter, Kashi Bai, who died in April 1916. The suit was filed on the 24th January 1917. The second defendant, Maharani, was the widow of Janki's son, Girdhari, who predeceased Janki.

Mardan was admittedly the natural son of Gangju who figures in the above tree as the defendant Gulab's great grandfather. The plaintiffs' case is that Mardan was adopted by Brijlal and, according to them Janki, was descended from Kalyan as shown in the following table :—



According to the defence, Mardan was not adopted by Brijlal and Brijlal was the son of Kharagram's brother, Manju.

From these particulars of the pleadings it will appear that if the plaintiffs genealogy is correct, Fadali and Gulab are related in the same degree to Janki, while if the defence is accepted Gulab is the sole heir being two degrees nearer than Fadali.

With the plaint were filed certified copies of two old documents. The first document (Exhibit P-1) is a statement made by Mardan on the 4th December 1828 supporting a claim made before the Revenue Authorities to hold 15 *bighas* of land in *Mauza* Pamakheri free of revenue. The other (Exhibit P 2) is a pedigree of the Zemindars of the same *Mauza* which was filed in the Court of the Extra Assistant Commissioner in charge of Settlement operations on the 7th May 1864. The defence contended that neither of these documents was admissible and that Mardan could not be validly adopted by Brijlal inasmuch as he was Brijlal's paternal uncle's son. There were other pleadings the nature of which will be sufficiently apparent from the principal issues, namely :—

"1. Whether Brijlal was the son of Kharagram ?

2. (*a*) Whether Mardan was adopted by Brijlal ?

(*b*) Whether all the members of the family acquiesced in this adoption ?

3. Whether Mardan inherited the property of Brijlal and did not get any share in the property of Gangju ?

4. Whether the adoption of Mardan by Brijlal is valid in law or by the principle of *factum valet* ?

7. Whether plaintiff No. 1 is the next heir to Janki's property and has got a half share in it?

9. (*a*) Whether the point about Mardan's adoption by Brijlal was in dispute when Mardan made his statement as given in Exhibit P 1 and when Janki produced the family tree as shown in Exhibit P. 2 ?

(*b*) Are these documents admissible in evidence ? "

The Trial Judge held that Exhibits P-1 and P-2 were both admissible in evidence as statements made before any dispute regarding Mardan's adoption arose by persons having special knowledge of the family. On the strength of Exhibit P-1 Kharagram, not Manju, was held to have been Brijlal's father. The adoption of Mardan by Brijlal was found to be proved and valid in law. The plaintiffs were accordingly given a decree for possession in respect of the property inherited by Kashi Bai from Janki, ordinary and occupancy holdings excepted. The defendants were ordered to bear the plaintiffs' costs in proportion to the relief granted.

The only respondents are the plaintiffs, and of them Bhawani Prasad alone put in an appearance.

In the first ground of appeal Exhibits P-1 and P-2 are said to be inadmissible in evidence and, if admissible, of no evidential value. I shall deal first with the question whether Exhibit P-1 is admissible. The appellant urges that Mardan's own allegation showed him to have been only 4 years old when adopted and Brijlal to have died a year later. It is urged that Mardan cannot, therefore, be regarded as having possessed special means of knowlegde regarding the adoption. It is also said that the adoption should be regarded as having been disputed in December 1828, inasmuch as failing the adoption Mardan could have no title to the land which he claimed to hold free of revenue. Section 32 (5) of the Indian Evidence Act renders admissible a statement by a person who is dead and runs as follows :—

"When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

I cannot think there is any force in the appellant's contention. Mardan may well have remembered at the age of 36 or 37 that he was adopted when 4 years old and lived for a year with his adoptive father. Moreover, even if Brijlal had died when Mardan was too young to remember him, the latter would surely be able to declare positively that he had been adopted from that acquaintance with the history of his family which he would necessarily possess. In

GULAB THAKUR v. FADALI.

Debi Pershad Chowdhry v. *Radha Chowdhrain* (1) their Lordships of the Privy Council referred to the well-known practice by which Hindu boys were taught the names of their ancestors, paternal and maternal, by their parents and other relatives while very young. These instructions are given not merely as a matter of curiosity, but as a matter of necessity. In accordance with this practice Mardan would necessarily have learnt the name of his adoptive father, if he was adopted, and I have no hesitation in holding that he possessed the special means of knowledge required by law.

With regard to the question whether the statement in Exhibit P-1 was made before any dispute arose as to Mardan's adoption I can find no indication that the adoption itself was questioned. It appears from Exhibit 1 D 7, the order rejecting Mardan's claim, that the rejection was based merely upon his inability to show that he had ever received a *sanad* of exemption. It was no part of his story that the land had ever been held revenue-free by Brijlal, nor was his story told in the course of any reply to an opponent as was the case in *Narain Kuar* v. *Chandi Din* (2), an authority relied upon for the appellant. I, therefore, hold that there was no dispute in 1828 regarding Mardan's adoption by Brijlal and Exhibit P-1 is admissible in evidence.

With regard to the evidential value of this document it is urged for the appellant that Mardan was interested in making out a close relationship between himself and Brijlal and, therefore, may have lied as to the real nature of the relationship. On the other hand, he must have realised that his allegation might be put to the test of inquiry and he did in fact mention two persons (Kammal and Umrao) as able to corroborate him with regard to the adoption. There is more force in the point that before the Settlement Officer in May 1863 Janki made a statement (Exhibit P-4) in which he showed Mardan as the son of Gangju and referred to Brijlal as his paternal uncle. Janki's statement should be read in the light of Karanju's (Exhibit P-3) made a year later in which the latter described half of *Mauza* Pamakheri as belonging to him with his brother Bisram and the other half to Janki. This statement is not intelligible except on the assumption that Janki had passed out of the family so that, to use his own expression, Gangju's share was not in his possession and Karanju had no share in his (Janki's) share. In the mutation proceedings which took place in June 1849 immediately after Mardan's death we find Janki referred to as owning an entire one third of the village: see Exhibit P 6. A further indication that Mardan was adopted by Brijlal appears from Exhibit P-7 which is a statement of graden lands in *Mauza* Pamakheri forming part of the settlement *Misl* of 1864. In this Karanju is shown as occupying two gardens, both planted by his father Gangju. The third graden figures in the name of Janki and is described as planted by Brijlal, Janki's grandfather. In these circumstances I am not prepared to treat Exhibit P-1 as without value.

In connection with Mardan's statement that he was adopted when only 4 or 5 years old it is urged for the appellant that Brijlal would not be likely to take in adoption so young a child. It appears, however, from passage 22, section IV, Dattaka-Mimansa, though the authenticity of the quotation therein given is doubtful, that 5 was once the maximum limit of age for the adoptee. According to the late learned Sastri Golapchandra it is desirable that a boy should be adopted at a tender age so that he may be thoroughly assimilated to the family into which he is adopted and being bred up from his infancy amidst its members may be looked upon as a natural relation: see "the Hindu Law of Adoption", page 359, (second edition).

Turning to Exhibit P-2 I find from the original settlement record of *Mauza* Pamakheri, which I obtained at the request of the parties, that this pedigree was prepared by the Extra Assistant Commissioner in charge of this Settlement in 1863-64 from the statements made by the claimants whom he examined. He mentioned in his order of the 7th June 1864 that all the signatories admitted the details in the table to be correct. The signatories whose signatures are legible in the original are Ramdayal,

(1) 32 C. 84 at p. 94; 9 C. W. N. 161, 31 I. A. 160; 8 Sar. P. C. J. 708 (P. C.).

(2) 9 A. 427, A. W. N. (1887) 118; 5 Ind. Dec. (N. S.) 718.

Daryao, Ramlalju and Nirpat. It appears that the three sets of claimants recognised as owners were treated as representing respectively the three sons of Kirparam, the first holder of the village. Those three sons were Bhimsen, Gopinath and Dalsa. Janki was the sole representative of Bhimsen's line, Karanju and Bisaram's widow admitting that they had no claim. The representative of Dalsa's line was Rai Singh, while Ramdayal took as descendant of Gopinath. The pedigree shows Mardan as adopted by Brijlal and it is clear from the orders of the Extra Assistant Commissioner, which I have perused in original, that no dispute as to the adoption was raised. There can be no doubt that Janki described his father Mardan as having been adopted by Brijlal and the reference in his statement of the 11th May 1863 (Exhibit P-4) to Gangju as his grandfather must, therefore, be read as in no way inconsistent with such a claim. The pedigree thus undoubtedly represents the views of the descendants of Kirparam at a time when the real position of Mardan in the family might well have been known to many. I have no doubt that it is admissible in evidence under section 32 (5), Indian Evidence Act, and deserves to have great weight attached to it. These considerations suffice for the disposal of all the first three grounds of appeal.

In the fourth ground of appeal it is said that Exhibit P 7, to which reference has already been made, is inadmissible and should not have been relied upon. In argument, however, the appellant's learned Counsel admitted the admissibility of this document and asked the Court to compare the copy filed with the original in the Settlement Record. I have made this comparison and find the copy to be perfectly correct. The word used for grandson is "Nathi," and Brijlal who was only one degree nearer their ancestor Kalyan could not possibly be described as Janki's grandfather.

The fifth ground of appeal complains that Janki is incorrectly referred to in the 12th paragraph of the lower Court's judgment as having inherited Brijlal's share. It is urged that in Exhibit P 4 Janki did not in fact describe himself as having inherited any share from Brijlal. What Janki actually said was that he was in possession of Brijlal's share. It appears from the Settlement Extra Assistant Commissioner's order of the 7th June 1864 that Janki was the sole descendant of Kirparam's son, Bhimsen, who put in a serious claim to the share which would ordinarily go to that line. Karanju appeared before the Settlement Officer as is shown by Exhibit P-3 and explained that as he had long been out of possession, having failed many years back to pay the land revenue, he could not set up any title to a share. There is nothing in all this one way or the other to assist us in deciding whether Mardan had been adopted by Brijlal or not. The history of the village as given in the Settlement Extra Assistant Commissioner's Order of the 12th May 1863 (Exhibit P 5) shows that Brijlal was one of the holders for some years from 1796 A. D. This order refers more than once to the genealogical table (Exhibit P-2) which the Extra Assistant Commissioner himself prepared, as already stated, and the history of the village becomes perfectly intelligible if it be held that Mardan took Brijlal's place as he would do, if adopted, and was in turn succeeded by his natural son Janki.

The sixth ground of appeal relates to Exhibit 1 D 5 which is a copy of the statement made by one Nandkishor before the Assistant Commissioner, Saugor, on the 16th September 1861, at an early stage of the inquiry made at the Settlement with the object of determining who should be recognised as proprietors of *Mauza* Pamakheri. This Nandkishor was acting in the matter as agent of the plaintiff Fadali's father, Loke, and described Janki as son of Loke's uncle. The lower Court, relying on *Sangram Singh* v. *Rajan Bahi* (3), held Nandkishor's statement to be inadmissible in evidence, inasmuch as he was merely an agent and not proved to have special means of knowledge of the relationship in question. It is urged that the plaintiff Fadali should be regarded as having derived his interest from his father Loke and that the statement made by Loke's agent amounts to an admission under section 18, Indian Evidence Act, and is, therefore, relevant. Such statements, however, must have been made during the continuance of

(3) 12 C. 219; 12 I. A. 183; 4 Sar. P. C. J. 676; 6 Ind. Dec. (N. s.) 149 (P. C.).

the interest of the person making the statements and it appears from the Settlement Extra Assistant Commissioner's order that Loke's father Udet who died in 1847 when Loke was a minor, had already lost all rights in the village. Further, section 18, Indian Evidence Act, does not by itself make the admissions therein mentioned relevant. One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested, even though that other was his own father : see *Bhagwanta* v. *Sukhi* (4) and *Govinda Pillai* v. *Thayammal*(5). Consequently, the primary rule in section 21 that an admission is relevant and may be proved as against the person who makes it or his representative-in-interest is not applicable here. Nandkishor's statement is certainly not relevant under section 32 (5), Indian Evidence Act, inasmuch as he is not shown to have had any special means of knowledge regarding the family of his client. This point is exactly covered by the Privy Council decision relied on by the lower Court. Even if it be conceded that the statement is relevant, I consider that it does not amount to a clear denial of Mardan's adoption by Brijlal. In the first place, it was made nearly three years before the Settlement Extra Assistant Commissioner who prepared the genealogical table (Exhibit P 2) after examining all the claimants to the village. Secondly, in the loose parlance common among Hindus, Brijlal, no less than Mardar, might have been referred to as the uncle of Loke's father Udet.

The seventh ground of appeal relates to Janki's description of Karanju's son Ganu as his "*chachazad bahi*" (paternal uncle's son) in Exhibit D 1, the deed of gift, executed by Janki in Ganu's favour on the 3rd July 1891. It is urged that if Mardan had really been adopted by Brijlal, no special affection such as must have prompted the gift effected by Exhibit D-1 could have existed between Janki and Ganu and that Ganu could only be described as son of Janki's paternal uncle if Janki regarded his father Mardan as the full brother of Karanju. These contentions seem to me to lose much of their force when regarded in the light of the history of the village as given by the Settlement Extra Assistant Commissioner in Exhibit 1 D-2. Brijlal and Karanju occupied corresponding places in the table of descent from Kalyan and both in accordance with usage might have been referred to as Janki's uncle. As for the motive for the gift it appears from the Settlement Extra Assistant Commissioner's proceeding and Karanju's own statement in 1864 (Exhibit P-3) that Karanju was for some time a recognised *Pattidar* but lost his share because he was unable to pay the Government revenue. Janki's share in 1864 was declared to be 6 annas $4\frac{1}{2}$ pies or more than an exact one-third of the village by just about the share conveyed by Exhibit D 1. It appears from the plaintiff Fadali's statement as P.W. No. 10 that Gari Babu by whose name Exhibit D-1 describes the share given to Ganu was the widow of Janki's son Mahadeo. To infer from this gift that the statements made to the Settlement Extra Assistant Commissioner in 1864 by the then co-sharers regarding the adoption were incorrect would, in my opinion, be wholly unreasonable. I agree then with the lower Court that Exhibit D 1 does not weaken the plaintiffs' case.

The 8th ground of appeal is concerned with the evidence of the first four witnesses examined by the appellant. Gaya Prasad (D. W. No. 1.) is the appellant's Purohit and tenant and there seems to be considerable force in the lower Court's remark that this man is not likely to remember the names of the ancestors recited by Janki who died 20 years before the witness was examined. Bhagole, the second witness, heard Janki recite the names of his ancestors at a wedding which took place in 1868 when the witness was only 15 years old : the appellant and he had given evidence for each other on a previous occasion. Pyarelal (D. W. No. 3) likewise speaks of a single recital at a wedding which took place about the year 1878 when he was 22 years old. His sister's daughter is married to the appellant and he had given evidence for him. Ante (D. W. No. 4) is 80 years old and still hardly old enough to remember Mardan who died in 1849. It is true that all these four men reside in Pamakheri and so had opportunity of knowledge which outsiders could not obtain. On the other hand, their evidence

(4) 22 A. 73; A. W. N, (1899) 159; 9 Ind. Dec (N. S.) 1054.
(5) 28 M. 57; 14 M. L. J. 209.

carries little weight when compared with the statements made more than 50 years earlier by claimants to the village at a time when none had any particular interest in alleging an adoption which had really taken place.

The 9th ground of appeal relates to evidence given not by the defendants' witnesses but by the plaintiff Fadali as his own 10th witness and Barelal (P. W. No. 11). If Mardan, who, like Brijlal, was by birth third in descent from the common ancestor, Kalyan, was adopted by Brijlal, then Janki stood in the same degree as the plaintiff, Fadali. On the other hand, if Mardan remained throughout his life the son of Gangju, then Janki would be one degree nearer than Fadali to the common ancestor and so his senior. Now, Fadali admittedly shaved his moustache when Janki died and it was elicited from him in cross-examination that this mark of respect is only shown to seniors. Similarly, Barelal (P. W. No. 11) said in cross-examination :—

"Ganu Thakur had shaved his moustaches at the death of Janki. Amongst us the younger relations only shave their moustaches. I mean those who are younger in degree and if of the same degree those who are younger in age shave their moustaches."

Fadali is only 40 years old and so must have been considerably younger than Janki when the latter died and according to Barelal would properly shave at Janki's death. We have no indication of Ganu's age, and if Mardan was not adopted Ganu and Janki would as cousins stand in the same degree of descent from the common ancestor : in these circumstances I am not prepared to attach any special significance to Ganu's shaving which, as the lower Court has remarked, may have been due to respect for Janki. It must be remembered in this connection that Janki was the most influential member of Bhimsen's branch and had given Ganu a part of his share in the village.

In connection with the 10th ground of appeal stress is laid on the supposed improbability that Brijlal would adopt a cousin standing in the same degree as himself from the common ancestor. Reference is made for the appellant to Placita 29 and 30 in Section II of the Dattaka Mimansa which are thus translated in "Stokes' Hindu Law Books" at page 552. (edition of 1865):—

Placitum No. 29:—

"By the position that a brother's son only must be affiliated, it is meant, that the son of a whole brother only must be affiliated. Manu declares this: 'if one, among brothers of the whole blood (*Ekajata*), be possessed of male issue (*Putravan*), Manu pronounces that they all are fathers of the same, by means of that son."

Placitum No. 30:—

"In this text, the state of brothers, as adoptive fathers, being propounded, their incapacity to be the objects of adoption follows."

In the placitum next following Nanda Pandita infers from the text of Manu that a man cannot adopt his paternal uncle of the whole blood, or his full brother, or his full sister's son. I am also referred to *Sriramulu* v. *Ramayya* (6) in which it was explained by that learned Hindu lawyer Muttusami Ayyar, J., that the prohibition of the adoption of a half brother has nothing to do with the possibility of a legal marriage between the son and his step mother in her virgin state. There is nothing in the present case to indicate that Brijlal could not have married the woman who married Gangju and became the mother of Mardan. That Mardan was much younger than Brijlal appears from Mardan's statement in 1828 (Exhibit P. 1). So far as his age then is concerned, there is nothing incongurous in the adoption. It is also clear that the express prohibitions laid down by Nanda Pandita in Placitum 107, Section II, Dattaka Mimansa, do not, include the paternal great grandfather's great-grandson. On the other hand, there is direct authority in *Yamnava Govind Appaji* v. *Laxuman Bhimrao Kulkarni* (7) in favour of adopting the son of the mother's brother and Nanada Pandita was there held to have intended that anybody could be adopted, so long as he was not within the cases specified as prohibited. In *Walbai* v. *Heerbai* (8) the adoption of a father's brother's son was treated as clearly valid. I may also refer to *Ramkrishna Gopal*

(6) 3 M. 15; 1 Ind. Dec. (N.S.) 566.
(7) 16 Ind. Cas. 180; 36 B. 533; 14 Bom. L. R. 543.
(8) 4 Ind Cas. 277; 34 B. 491; 11 Bom. L. R. 1172.

v. *Chimnaji Vyankatesh* (9)in which two Judges of the Bombay High Court, following *Yamnava Govind Appaji* v. *Laxaman Bhimrao Kulkarni* (7) (above cited), upheld the adoption of a father's sister's son. In *Virayya* v. *Hanumanta* (10), one of the cases relied upon by the lower Court, the adoption of a paternal uncle's son was upheld.

The law being in favour of Mardan's adoption and his age having been suitable, I am unable to see that there was any improbability in the case set up for the plaintiffs.

In the 11th ground of appeal objection is taken to the lower Court's conclusion from the behaviour of Gangju as described in Exhibit P.-1 that Mardan's adoption was acquiesced in by the members of the family. It is urged that acquiescence which can properly be treated as evidence of an adoption should be shown to have extended over a number of years. This argument is sufficiently met by the circumstances already set out in which the pedigree of the family was prepared at the Settlement of 1864. The alleged adoption had taken place between 60 and 70 years back and it was admitted by the members of the family who set up claims to be recognised as proprietors of the village. It is not to the point that Mardan's claim to hold 15 *bighas* of land free of revenue was rejected.

My conclusion then is that the adoption of Mardan by Brijlal is satisfactorily established.

It is unnecessary to consider the documents which the plaintiff respondent, Bhawani Prasad, moved this Court to admit and consider although they had been rejected by the lower Court as filed too late. I may, however, say that the respondent's affidavit shows that he knew of the existence of the originals before he brought to the notice of the lower Court the fact that they supported his case and that he wished to file copies.

It remains to deal with the allegation in the last ground of appeal that the schedule of costs as drawn up by the lower Court is not correct. The plaintiffs' claim included a half share in an ordinary holding and an occupancy holding and a half share in a large house. The claim to the share in the ordinary and occupancy holdings has been disallowed. The house is number 4 of the 5 in which a share was claimed and the appellant who was said to be in possession pleaded that the person actually in possession was Bala Prasad who was thereupon joined as the fourth defendant. On Bala Prasad's defence the fifth issue was framed on which the lower Court found that a portion only of that house belonged to Janki, the name of this portion being "Bhula." Accordidgly, the plaintiffs were given a decree against Bala Prasad for possession of one-half of "Bhula." The value of the entire house was found on a preliminary issue to be Rs 2,000, but the value of the portion called "Bhula" has not been separately ascertained.

The plaintiffs have been allowed all their costs except a sum of Rs. 20 for Court fees and Rs. 10-3 0 for Pleader's fee and it is impossible to understand how these figures have been reached.

It is clear that the decree does not correctly give effect to the order in the judgment that the defendants are to bear the plaintiffs' costs in proportion to the relief granted to the plaintiffs. The decree must be modified so as to disallow as much of the Court-fee and Pleader's fee scheduled for the plaintiffs as corresponds to the value of a half share in the ordinary and occupancy holdings and a half share in that part of the fourth house which is called "Bhula." What these values are will be ascertained by the lower Court which will then amend its decree accordingly.

The appeal is dismissed. The appellant having failed on the principal question and succeeded only on the trivial matter of costs he will pay the costs in this Court of the plaintiff-respondent, Bhawani Prasad.

N. H.

Appeal dismissed.

(9) 21 Ind. Cas. 34; 15 Bom. L. R. 824.
(10) 14 M. 459; 5 Ind. Dec. (N. s.) 321.

KASAM *v.* JORAWAR SINGH.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

April 6, 1922.

Present :—Viscount Cave, Lord Shaw and Sir John Edge.

Syed KASAM SINCE DECEASED (NOW REPRESENTED BY *Syed* KHANE JAMA AND OTHERS)—APPELLANTS

versus

JORAWAR SINGH AND OTHERS—RESPONDENTS.

Hindu Law—Mitakshara *as interpreted in Berar—Power of undivided co-sharer to sell—Severance of estate how effected—Agreement to divide, effect of.*

According to the law of *Mitakshara*, as interpreted in Berar, an undivided co-sharer can sell his share in joint family property without the consent of his co-owners [p. 574, col. 1.]

In the case of a joint Hindu family, subject to the law of *Mitakshara*, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place, and the commencement of a suit for partition is sufficient to effect a severance in interest even before decree. So also is a claim by one member of a co-parcenary for his share followed by an agreement under which all the members appoint an arbitrator to divide their property and agree to accept whatever partition he might make. [p. 574, col. 2.]

Appovier v. *Rama Subba Aiyan*, 11 M. I. A. 75; 1 Suth. P C. J. 57; 2 Sar. P. C. J. 218; 8 W. R. P. C. 1, 20 E. R. 30, *Joy Narain Giri* v. *Girish Chunder Myti*, 5 I. A. 228; 4 C 434; 3 Sar. P. C. J. 871, 3 Ind. Jur 81, 2 Ind Dec. (N. s.) 276 P. C.), *Girja Bai* v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321, 43 I. A. 151; 43 C. 1031, 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78, 12 N. L R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L J. 207; 31 M. L. J. 455 (P. C.); *Kewal Nain* v. *BudhSingh*, 40 Ind. Cas. 2·6; 44 I. A. 159; 39 A. 496; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 612; 26 C. L J. 101; (1917) M. W. N. 514, 6 L. W. 330 (P. C.), followed.

Privy Council Appeal against the judgment and decree of the Court of the Judicial Commissioner, Nagpur, reversing that of the Additional District Judge, East Berar, Amraoti.

Mr. *De Gruyther*, *K. C.* and Mr. *Parikh*, for the Appellants.

Mr. *Kenworthy Brown*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—This is an appeal by the defendant in the suit against the decree of the Court of the Judicial Commissioner of the Central Provinces, reversing a decree of the Additional District Judge, East Berar, Amraoti, and giving judgment for the plaintiffs.

Nain Singh and the plaintiffs, who were the issues of his brother Khannu Singh, formed at one time a joint Hindu family, resident in Berar and subject to the law of the Mitakshara as there interpreted. Before the date of the deed next mentioned, Nain Singh and the plaintiffs had become separate in mess and residence, but not in estate.

By registered sale-deed, dated the 29th September 1902, Nain Singh sold his half share of the ancestral property of the family (with some moveable property) to Syed Kasam for Rs. 20,000 of which Rs. 15,000 were admitted by the vendor to have been received in advance, and the remaining Rs. 5,000 were paid to him in the presence of the Registering Officer. No partition was then effected, but the purchaser was allowed to hold and cultivate certain parts of the property corresponding in value to a half share. On the 4th December, 1905, all the members of the family signed a *kararanama* appointing one Ghasi Ram as arbitrator to partition the property and agreeing to accept whatever partition he might make The arbitrator divided the property into two lists, one (representing the remaining moiety in value) containing the property to be allotted to the plaintiffs. The latter list was apparently divided into three sub-lists one for each of the plaintiffs. These lists were handed to Nain Singh. The formal division was not at once carried out, as Nain Singh died on the 26th March 1906, but after his death the lists appear to have been acted upon by all the persons interested, as the purchaser was put into possession of the property allotted by the arbitrator to Nain Singh, and the plaintiffs from time to time dealt with various parts of the lands contained in heir lists.

On the 23rd July 1914 the plaintiffs brought the present suit against Syed Kasam claiming possession of the lands of which he had been so put into possession on the ground that the family had continued joint in estate down to the death of Nain Singh, and that on the death of Nain Singh's widow (which occurred on the 10th July 1910) the property had passed to them. They also alleged that the half share had

been sold by Nain Singh to the defendant "for a bogus consideration of Rs. 20,000," an expression which has no legal signification, but which apparently meant that the consideration of Rs. 20,000 had not in fact been paid.

The suit was heard by the Additional District Judge, East Berar, who dismissed it, holding that there had been an effective agreement for partition, and that the Rs. 20,000 had been paid. On appeal, the Additional Judicial Commissioner held that there had been no partition, and that although Rs. 5,000, part of the purchase money, had been paid before the Registering Officer, the balance of Rs. 15,000 had not been paid, or, if paid, had been at once returned. He declined to admit the plea that the *kararnama* effected a severance of the joint tenancy on the ground that this had not been specifically pleaded. He, therefore, set aside the decree of the lower Court, and directed the defendant to put the plaintiffs in possession of the property in suit on payment by the plaintiffs of Rs. 5,000. Against this decree the present appeal was brought. The original appellant, Syed Kasam, has died pending the appeal, and is represented by the present appellants.

Two points are taken on behalf of the appellants: First, it is said that the law of the Mitakshara is to be interpreted in Berar in the same manner as in Bombay, and that, according to that law as so interpreted Nain Singh had power to sell his undivided share in the joint family property without the consent of his co-owners; and their Lordships do not doubt that this statement is correct. But to this point it was answered by the Judicial Commissioner that the sale by Nain Singh in 1902 only gave to the purchaser an equity to enforce a partition, and that such equity was displaced by the fact that the purchase money was not fully paid. In view of their Lordships' opinion on the second question, to be hereafter stated, and of the fact that the evidence on the question of the payment of Rs. 15,000 was not fully brought to their notice, they do not think it necessary to deal with this point; nor do they express any opinion on the question whether, even if it was proved that part only of the purchase-money was paid, the form of decree adopted by the Judicial Commissioner was appropriate to the case.

But, secondly, it is argued on behalf of the appellants that the transactions which took place in the year of 1905 effected a severance of the joint estate and accordingly the plaintiffs have no right to sue, and in their Lordships' opinion this argument should prevail.

It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place, and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree [see *Apcovier* v. *Rama Subba Aiyan* (1), *Joy Narain Giri* v. *Girish Chunder Myti* (2), *Gir.a Bai* v. *Sadashiv Dhundiraj* (3), *Kawal Nain* v. *Budh Singh* (4).]

In the present case it was proved by the evidence of one of the plaintiffs (Jorawar Singh) and of Ghasi Ram that Nain Singh claimed his half share of the ancestral property, and that after discussion all the joint holders signed the agreement of the 4th December 1905 appointing Ghasi Ram to partition the property and agreeing to accept whatever partition he might make; and this claim and agreement were quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship. It is true that the agreement was not specifically pleaded by the defendant Syed Kasam; but he pleaded that Nain Singh was separate in estate and relied in his written statement on the division of the property which resulted from the agreement, and their Lord-

(1) 11 M. I. A. 75; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 8 W. R. P. C. 1; 20 E. R. 30.
(2) 5 I. A. 228; 4 C. 434; 3 Sar. P. C. J. 371; 3 Ind. Jur. 81; 2 Ind. Dec. (N. s.) 276 (P. C.).
(3) 37 Ind. Cas. 321; 43 I. A. 151; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 79; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 62; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455 (P. C.).
(4) 40 Ind. Cas. 286; 44 I. A. 159; 39 A. 496; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330 (P. C.).

ships do not think that the agreement leading up to that division can be put out of account. The subsequent division of the property between the co-owners was accepted by all parties and is not said to have been unfair, and there appears to be no reason why it should be disturbed. In these circumstances the sale to Syed Kasam could not be set aside at the instance of the joint owners, but only (if at all) at that of the vendor or his representatives; and any proceedings for that purpose were Statute barred before the commencement of the suit. This is sufficient to dispose of the plaintiffs' claim.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Judicial Commissioner should be set aside and the decree of the District Judge restored, and that the respondents should pay the costs in both the Courts below and the costs of the present appeal.

N. K. *Appeal allowed.*

Solicitor for the Appellans.—Mr. *E. Dalgado.*

Solicitors for the Respondents.—Messrs. *Downer Johnson.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 347 OF 1920.

August 22, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

KUMUDINI RAY AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

KAMALA KANT SEN—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 14—Appeals, admission of, after limitation—Court, whether may follow provisions of s. 14.

In the exercise of its discretion under section 5 of the Limitation Act in regard to the admission of an appeal, the Court may very well be guided by the provisions of section 14 of the Act, although the same do not in terms apply to appeals. [p. 576, col. 2.]

Ardha Chandra Rai v. *Matangini Dassi*, 23 C. 325; 12 Ind. Dec. (N. S.) 217, *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra*, 23 C. 526; 12 Ind Dec. (N. S.) 350, *Dadabhai Jamsetji* v. *Maneksha Sorabji*, 21 B. 552; 11 Ind Dec. (N. S.) 370, *Gopisetti Narayanaswami Naidu Garu* v. *Tallavraju Vencatasubbarayudu*, 9 Ind. Cas. 642; 9 M. L. T. 315; (1911) 1 M. W. N. 233, *Madhuban Das* v. *Narain Dass* 4 A. L. J. 397 at p. 400; 29 A. 535; A. W. N. (1907) 155, *Narain Singh* v. *Bikram Singh*, 11 Ind. Cas. 814; 8 A. L. J. 793, referred to.

Appeal against the order of the District Judge, Chittagong, dated the 10th July 1920, affirming that of the Subordinate Judge, Chittagong, dated the 3rd March 1920.

Dr. *Dwarka Nath Mitter* and Babu *Manindra Nath Banerjee*, for the Appellants.

Babu *Narendra Kumar Das*, for the Respondent.

JUDGMENT.—This appeal is directed against an order of dismissal made on an application for execution of a decree against a surety. The decree was made by this Court on the 23rd January 1917 in a first appeal in a suit valued at more than Rs. 5,000. It is plain that an appeal against an order in execution of such a decree lies not to the District Judge but to this Court. The order of the Subordinate Judge was made on the 3rd March 1920, and an appeal was presented to the District Court on the 1st April 1920. The District Judge dismissed the appeal on the 10th July 1920. Thereupon the present appeal was lodged in this Court on the 11th September 1920 against the order of the District Judge whereby he had affirmed the order of the Subordinate Judge. No preliminary objection was taken to the appeal presented to the District Judge and nobody discovered that the appeal was incompetent. Indeed, in this Court also, the point was not mentioned till the respondent was called upon to answer the argument advanced on behalf of the appellant. It is plain that the order of the District Judge was made without jurisdiction and that this Court must now set aside that order and substitute therefor the order which should have been made by the District Judge, namely, an order that the memorandum of appeal presented to the District Judge be returned to the appellant for presentation to this Court. This is the course which was adopted in *Ranjit Missir* v. *Ramudar Singh* (1). There is this

(1) 16 Ind. Cas. 94; 16 C. L. J. 77; 17 C. W. N. 116.

difference, however, between that case and the present, namely, that there the lower Appellate Court had modified the order of the primary Court, while here the lower Appellate Court has affirmed the order of the Court of first instance. This circumstance, however, does not affect the position, and the learned Vakil for the appellant has suggested that, as the memorandum of appeal presented in the Court of the District Judge is now in this Court, it may be taken to have been presented here after its return by an order of this Court. This, we think, is reasonable. The memorandum of appeal will, therefore, be taken to have been presented to this Court on this day and an endorsement to that effect will be made on the memorandum by the Registrar.

No question of Court-fees arises; but we have to consider the question of limitation. It is, we think, sufficiently obvious that this is a fit case for the exercise of our discretion under section 5 of the Indian Limitation Act. It has been ruled that in the exercise of that discretion in regard to an appeal, the Court may well be guided by the provisions of section 14, which does not in terms apply to appeals, because appeals are governed by section 5 which has a manifestly wider scope. This view was adopted by this Court in the cases of *Ardha Chandra Roi* v. *Matangini Dassi*(2) and *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra* (3). A similar view was adopted by the Bombay High Court in *Dadabhai Jamsetji* v. *Maneksha Sorabji* (4), by the Madras High Court in *Gopisetti Narainswami Naidu Garu* v. *Tallanraju Venkatasubbarayudu* (5) and by the Allahabad High Court in *Madhuban Das* v. *Narain Das* (6) and *Narain Singh* v. *Bikram Singh* (7). If the period between the presentation of the appeal in the Court of the District Judge and the order for return made by this Court be deducted, the appeal now lodged in this Court is within time. The proper course to follow in these circumstances is that stated in *Ranjit Missir* v. *Ramudar Singh* (1), namely, to allow the appeal, to discharge the order of the District Judge, to record on the memorandum of appeal presented to that Court an order of return for presentation to the proper Court to be signed by the Registrar and finally to regard the memorandum as presented in this Court on this day. The memorandum will now be registered as an appeal from an original order against the order of the Subordinate Judge passed on the 3rd March 1920, and, in the exercise of the discretion vested in the Court under section 5 of the Indian Limitation Act, we hold that the appeal so registered is in time. The paper-book will be prepared and the appeal heard in due course as a first appeal. We order accordingly.

As the objection to jurisdiction was not raised in the Court of the District Judge and as the point was not taken in this Court till a late stage of the argument, we direct each party to pay his own costs both here and in the Court of Appeal below.

The appellant will file a *vakalatnama* in support of the appeal now lodged in this Court.

N. H. *Appeal allowed.*

(2) 23 C. 825; 12 Ind. Dec. (N. S.) 217.
(3) 23 C. 526; 12 Ind. Dec. (N. S.) 350.
(4) 21 B. 552; 11 Ind. Dec. (N. S.) 370.
(5) 9 Ind. Cas. 642; 9 M. L. T. 315; (1911) 1 M. W. N. 233.
(6) 4 A. L. J. 397 at p. 400; 29 A. 535; A. W. N. (1907) 155.
(7) 11 Ind. Cas. 814; 8 A. L. J. 793.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 457 OF 19 8.
May 12, 1921.

Present :—Mr. Justice Broadway and Mr. Justice Wilberforce.

Musammat SHANKAR - DEFENDANT—APPELLANT

versus

JODHA—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 42, proviso—Person in joint possession with another—Declaratory suit that other person has lost his interest in property, whether maintainable.

A person in joint possession with another cannot sue for a mere declaration that the other person has lost his interest in the property and is not entitled to remain in possession because in such a case the plaintiff can and should sue for exclusive possession [p. 577, col. 1.]

Abdul Ghafur v. *Mehr-un-nissa*, 4 Ind. Cas. 856; 101 P. R. 1909; 173 P. W. R. 1909, referred to.

SATIS CHANDRA GHOSH v KALIDASI DASI.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 2nd November 1917, affirming that of the Subordinate Judge, Second Class, Hoshiarpur, dated 15th February 1917.

Mr. *Dev Raj Sawhney*, for the Appellant.

Mr. *B. D. Qureshi*, for the Respondent.

JUDGMENT.—In the suit giving rise to this appeal Jodha, son of Wazira, sought to obtain a declaration to the effect that, owing to her unchastity the defendant, *Musammat* Shankri, widow of Nawab, had lost her life estate in 187 *kanals* 2 *marlas* of land, and, therefore, was not entitled to retain possession thereof. The Courts below have held that the plaintiff being in joint possession was entitled to bring a declaratory suit. They also held that the defendant had become unchaste and the plaintiff was awarded a decree for the declaration prayed for.

Musammat Shankri has now come up to this Court in second appeal through Mr. Dev Raj Sawhney, and it has been contended that the appellant is in sole possession of about 23 *kanals* of the land in suit and in joint possession of the rest. On the authority of *Abdul Ghafur* v *Mehr un nissa* (1), Mr. Dev Raj contended that the suit for a declaration did not lie In this view we agree. The plaintiff who is in joint possession of a greater portion of this land could and should sue for exclusive possession if his allegations as to *Musammat* Shankri's unchastity are correct It is clear that the object of his suit is to dispossess *Musammat* Shankri of the land of which she is in sole possession and that of which she is in joint possession with him. Mr. Qureshi, on behalf of the respondent, urged that he should be allowed to amend his plaint at this stage As, however, this point was raised by the defendant from the very outset, we do not think we would be justified in allowing the amendment prayed for at this late stage of the proceedings. We would note that the judgment of the learned District Judge is unsatisfactory inasmuch as neither of the points raised before him have been discussed. He appears to have accepted the conclusions arrived at by the Trial Court without any independent examination of the evidence or the law.

(1) 4 Ind Cas. 856; 101 P. R. 1909; 173 P. W. R. 1909.

The appeal is accepted and the suit dismissed with costs throughout.

N. H.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 195 OF 1919.

July 15, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

SATIS CHANDRA GHOSH—DEFENDANT—APPELLANT

versus

KALIDASI DASI—RESPONDENT.

Parda-nashin *lady, transactions with—Principles applicable—Persons standing in relation of personal confidence—Absolute strangers—Independent and competent advice, what is—Family settlement—Consideration—Pleading Fraud—Variance between pleading and proof—Plaintiff, position of.*

All transactions with *parda-nashin* ladies fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of the transaction is one who stood towards her in a fiduciary character or some relation of personal confidence; and, secondly, cases where such person was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted: in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The fairness of the bargain is the crucial test [p. 581, col. 1; p. 582, col. .]

The Court, when called upon to deal with a deed executed by a *parda-nashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do: secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered: and, thirdly, that she had independent and disinterested advice in the matter. [p. 580, col. 2; p. 581, col. 1.]

Mariam Bibee v. *Muhammad Ibrahim*, 48 Ind. Cas 561; 28 C. L. J. 303 at p. 367, referred to.

(Case-law considered.)

The circumstances under which a *parda-nashin* woman agrees to transfer property in which she is interested must be carefully examined in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the

relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepesentation. [p. 582, col. 2.]

It is not necessary to insist upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities; it is sufficient that the general result of the transaction should be understood and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady. [p. 588, col. 1.]

Independent and competent advice does not mean independent and competent approval; it simply means that the advice should be removed entirely from the suspected atmosphere, and that from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction. [p. 587, col. 2.]

The absence of advice would not by itself necessarily vitiate a transaction, if it is otherwise established to be righteous, that is, such as a right-minded person might be expected to do. [p. 588, col. 2.]

The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself. [p. 582, col. 2.]

The above are only general principles. There is a great fear of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case requiring adjudication. [p 583, col. 1.]

Whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence or unconscionable advantage. [p. 583, col. 2.]

If a confidence is reposed and that confidence is abused, Courts of Equity will grant relief .Equity demands in such circumstances the most abundant good faith *uberrima fides*) in the transaction between the parties. There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and, as far as possible, restore the parties to their original right. [p. 583, col. 2.]

Although in a deed of family settlement the Court should not scan with much nicety the quantum of consideration, yet to make the compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection. [p. 589, cols. 1 & 2.]

A family arrangement to be operative must be without fraud it would not be supported if founded on mistake of either party to which the opposite party was an accessory, or if either party has been misled by the concealment of material things, for the essence of the matter is mutual communication of all relevant circumstances. [p. 589, col. 2.]

(Case-law considered.)

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made [p 592, col 2.]

Every variance between pleadings and proof is not fatal: the Court must carefully consider whether the objection is one of form or of substance. [p. 590, col. 2; p 591, col. 1.]

When a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated; for, it is only fair play between man and man that the defendant should know what is charged against him. A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. [p 590, cols. 1 & 2.]

Per *Buckland, J.*—In a case of fraud, it will not suffice to find fraud otherwise than as alleged on behalf of the plaintiff, and even should the Court find that fraud was practised, if such fraud is other than the fraud alleged, the defendant is entitled to have the suit dismissed. This is a proposition which may be applicable in cases between man and man or where a *parda-nashin* lady is not concerned But where a *parda-nashin* lady is involved, other rules have to be applied and conformity with them has to be established. [p. 592, col. 2; p. 593, col. 1.]

Appeal against a decree of the Subordinate Judge, Howrah, dated the 15th July 1919.

Mr. *T. C. P. Gibbons* (Advocate-General), Babu *Jogendra Nath Mookerjee*, Dr. *Sarat Chandra Basak* and Babu *Tarak Nath Mookerjee*, for the Appellant.

Dr. *Dwarka Nath Mitter*, Babus *Manindra Nath Banerjee*, *Narendra Krishna Bosu* and *Rama Prosad Mookerjee*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in the present appeal is an estate of considerable value left by one Kedar Nath Ghose who died intestate on the 7th October 1905. The foundation of the fortune of the family was laid by his father, Govinda Chandra Ghosh, who executed a Will on the 21st August 1905 which was registered, but was not probated after his death on the 9th November 1913. The relationship of the members of the joint family composed of the descendants of

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Govinda Chandra Ghose will appear from the following genealogical table:

GOVINDA CHANDRA GHOSE
died 9th November 1913.

Ambika Charan Ghose, died 1886	Kedar Nath Ghose, died 7th October 1915,	Moti Lal Ghose, died 1885.	Satis Chandra Ghose, defendant.
Musammat Kusum Kumari.	*Musammat* Kalidasi, plaintiff		
Nagenbala			
Nalinibala.	Chinabala.		
	Radharani.	Umasasi.	

Govinda Chandra Ghosh had four sons, Ambika Charan and Moti Lal who died in his lifetime, and Kedar Nath and Satis Chandra who survived him. When Kedar Nath died, he left him surviving his brother, Satis Chandra, his widow Kalidasi, his widowed daughters Nalinibala and Chinabala, and two granddaughters, Radharani and Umasasi. The widow, Kalidasi, had two brothers Kamini and Rajkumar, and was the daughter of a family of Deotis whose genealogical table is set out below:

KEDAR NATH DEOTI.

Kamini.	Kalidasi, plaintiff.	Rajkumar.

Shortly after the death of Kedar Nath Ghose, a partition deed was executed on the 4th November 1915 between his brother Satis Chandra and his widow Kalidasi, and the document was registered on the 8th December 1915. On the 28th June 1916 the widow instituted the present suit for cancellation of the partition deed on the ground of fraud and unfairness, for declaration of exclusive title to a hardware business, its assets and the properties acquired from its income, for declaration of joint title to other properties, for partition and accounts, and for incidental reliefs. The defendant denied all the material allegations in the plaint, repelled the imputation that the partition deed had not been fairly obtained, asserted that the properties claimed as exclusively owned by the husband of the plaintiff really formed part of the joint family estate, and repudiated all liability to render accounts. On these pleadings, the following issues were framed and set down for trial:

1. Has the plaintiff any cause of action?
2. Can the suit proceed without *ad valorem* Court fees being paid on the value of the entire properties in suit?
3. Is the suit bad for non-joinder of parties?
4. Was the deed dated the 4th November 1915 read over and explained to the plaintiff and was it understood by her? Was it executed by her with free will and consent? Or was it obtained from her by fraud as alleged in the plaint?
5. Was Kedar Nath Ghose the sole owner of the Karbar at 78, Clive Street, Calcutta? Or, did it belong to his father Govinda Chandra Ghose, and was inherited, on his death by his two sons Kedar and Satis? Was it their joint property?
6. Was the house at Benares the joint property of Kedar and Satis? What is the plaintiff's share in it?
7. Did the plaintiff's husband purchase the garden at North Bantra from the widow of Bellilios in *benami* of the defendant?
8. Is the suit barred by the principles of estoppel, acquiescense and waiver?
9. Was the manufactory at Bantra an independent Karbar? Or, did it form one Karbar with the Karbar at 78, Clive Street?
10. Is the defendant liable to render accounts of the Karbar at Bantra and of the Karbar at 78, Clive Street? If so, for what period.

After a protracted trial, the Subordinate Judge decreed the suit in part. He held on the fourth and eighth issues that the deed had been executed by the plaintiff under circumstances which made it inoperative against her as an illiterate *parda nashin* lady, and that there was no question of estoppel, acquiescence or waiver. He also held, upon the fifth, sixth, seventh and ninth issues, that the hardware business at 78, Olive Street which stood in the name of Kedar Nath Ghose was an ancestral joint family concern, that the smithy and manufactory in the family dwelling house at South Bantra

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in the District of Howrah was not an independent business, that the lands and houses in Calcutta and Benares had been acquired with joint funds and formed part of the family estate, and that the garden at North Bantra purchased from Bellilios must be included in the same category. He further held, on the tenth issue, that the defendant, who was in charge of the business at 78, Clive Street and at South Bantra, was bound to render accounts from the date of the death of Kedar Nath Ghose. On these findings, the Subordinate Judge has set aside the partition deed, declared that all the properties in suit were jointly owned and possessed in equal shares by Kedar Nath Ghose and Satis Chandra Ghosh, and directed partition and accounts; he has also ordered the parties to bear their respective costs. Neither the plaintiff nor the defendant is satisfied with this decision, as the latter has appealed and the former has preferred a memorandum of cross-objections. The substantial question argued on the appeal relates to the validity of the partition deed; the principal point raised in the memorandum of cross-objections refers to the true character of the properties claimed by the plaintiff as the separate acquisitions of her husband. Neither the memorandum of appeal nor the memorandum of cross objections bore adequate Court-fees, and the Court was called upon to decide the point during the course of the arguments. Each memorandum bore a Court fee of Re. 10 only; this was plainly inadequate. The defendant-appellant had obviously anticipated the objection and had made a note on his memorandum at the time of presentation to the following effect: "The suit was valued at Rs. 1,21,360. The appeal is for a declaration." This note must have been recorded in view of clause 17 (iii) of Schedule II of the Court Fees Act, 1870, which provides that the plaint or memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed must bear a Court-fee of Rs. 10. But the plaint in the present case was unquestionably not a plaint in a suit of this description and bore a Court-fee of Rs 1,187-8-0. The memorandum of appeal also could not be treated as a memorandum in a suit of that nature; indeed, the appeal itself was not in essence for a pure declaration. The Trial Court had cancelled the partition deed, had determined the question of title to the properties, had directed partition of all the properties in suit, and had rendered the defendant liable for accounts. An appeal directed against a decree so comprehensive in scope, can, by no stretch of language or recourse to legal fiction, be described as an appeal for a declaration, even if we were to assume that an appeal, which really seeks nothing beyond a declaration, in a suit other than a suit for a pure declaratory decree without consequential relief, was ever intended to be included within clause 17 (iii) of Schedule II of the Court Fees Act, 1870. Similar remarks were applicable to the memorandum of cross-objections. The appellant and respondent were consequently called upon to value the reliefs sought in the appeal and by way of cross objections, respectively. It is not necessary to set out the details of the calculations made for the purpose of valuation; suffice to state that, as a result of this investigation, it was found that the appellant and respondent were liable to pay Rs. 1,105 and Rs. 25 respectively, as deficit Court fees on the memorandum of appeal and the memorandum of cross-objections. It was also found that the fee paid *ad valorem* on the plaint in the Court below was insufficient and that an additional sum of Rs. 145 was leviable on that account from the plaintiff respondent. The appellant duly paid the deficit Court-fee and thus regularised the memorandum of appeal. The plaintiff-respondent paid the additional sum leviable on the plaint but not the deficit Court-fees required to validate the memorandum of cross objections. There is consequently, no valid cross-objection which may be considered by the Court, and the memorandum must be rejected. The arguments on both sides have thus centered round what is the root question in this case, namely, the validity of the partition deed taken by the appellant from the respondent. Before, however, we investigate the circumstances which led up to the execution of the deed, we may usefully re-call the well-established cardinal principles now recognised as applicable to a case of this description, where the Court is called upon to throw a protective cloak upon a *parda nashin* woman who is unable to protect herself.

It is well-settled that the Court, when called upon to deal with a deed executed by a *parda-nashin* lady, must satisfy itself upon

the evidence, first, that the deed was actually executed by her or by some person duly authorized by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principales are collected in the judgment of this Court in *Mariam Bibee* v. *Muhammad Ibrahim* (1), and on examination they will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. This is a fundamental distinction which does not appear to have been always kept in view, with the result that observations made in the one class of cases have been applied without scrutiny to the other class of cases. Illustrations of the confusion which has resulted from this failure to discriminate between the two classes of cases, are furnished by the decisions in *Ranee Usmut Koowar* v. *Tayler* (2), *Tayler* v. *Ranee Asmedh Koonwar* (3), *Soondur Koomaree* v. *Kishoree Lal* (4), *Ram Pershad* v. *Ranee Phoolputtee*(5), *Kanai Lal* v. *Kanini Debi* (6), *Manohar Das* v. *Bhagbati Dasi* (7), *Asmutoonissa Bebee* v. *Alla Hafiz* (8), *Roop Narain Singh* v. *Gugadhur Pershad Narain*(9), *annalal seal* v. *Srimati Bamsundari Dasi*(10), *Dooles Chand* v. *Oomda Khanum*(11), *Bibee Rukhun* v. *Shaikh Ahmed Hossein* (12), *Khas Mehal* v. *Administrator-General of Bengal* (13); *Nistarini Dasi* v. *Nundo Lall*(14), *Keshab Lal* v. *Radha Raman* (15), *Badiatannessa Bibi* v. *Ambica Charan Ghose* (16), *Bhuban Mohini Dasi* v. *Gajalakshmi Debi* (17), *Behari Lal* v. *Habiba Bibi* (18), *Achhan Kuar* v. *Thakur Das* (19), *Hakim Muhammad* v. *Nanbin* (20), *Sumsuddin Goolam Husein* v. *Abdul Husein* (21), *Tamarasherri Sivithri* v. *Maranat Vasudevan* (22), *Mahadevi* v. *Neelamani* (23), *Latchemy* v *Lewcock* (24), *Ohellummal* v. *Garrow* 25), *Narsummall* v. *Lutchmana* (26). Reference may also be made in this connection to the two decisions of the Judicial Committee in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (27) and *Geresh Chunder Lahoree* v. *Musammat Bhuggobutty Debia* (28). In the former case, where the transaction was between a husband and a wife, their Lordships observed that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him. In the latter case, which was one of a death-bed gift in favour of the donor's brothers in their wives' names to the exclusion of her husband's adopted son, their Lordships pointed out that the Judicial Committee and the Courts in India had always been careful to see that deeds taken from *parda* women had been fairly

(1) 48 Ind. Cas. 561; 28 C.L.J. 303 at p. 367.
(2) 2 W. R 307.
(3) 4 W. R. 86.
(4) 5 W. R. 246.
(5) 7 W. R 98.
(6) 1 B. L. R. (O. C. J.) 81*n*; 1 Ind. Dec. (N. s.) 302.
(7) 1 B. L. R. (O. C. J.) 28; 3 Ind. Dec. (N. s.) 301.
(8) 8 W. R. 468.
(9) 9 W. R. 297.
(10) 6 B. L. R. 732.
(11) 18 W. R. 235.
(12) 22 W. R. 443.
(13) 5 C. W. N. 505.
(14) 26 C. 891 at p. 918; 3 C.L.J. W. N. 670; 13 Ind. Dec. (N. s.) 1171.
(15) 20 Ind. Cas. 717; 17 C. W. N. 991.
(16) 23 Ind. Cas. 401; 18 C. W. N. 1183.
(17) 32 Ind. Cas. 119; 19 C W. N. 1330.
(18) 8 A. 267; A. W. N. (1886) 91; 5 Ind. Dec. (N. s.) 58.
(19) 17 A. 125; A. W. N. (1895) 24; 8 Ind. Dec. (N. s.) 406.
(20) 20 A 447; 2 C. W. N. 545; 25 I. A. 137; 7 Sar. P. C. J. 353; 9 Ind. Dec (N. s.) 647 P. C.).
(21) 31 B. 165; 8 Bom L. R. 781.
(22) 3 M. 215; 1 Ind. Dec. (N. s.) 705.
(23) 20 M. 269; 7 Ind Dec. (N. s.) 191.
(24) (1800) 1 Strange (N. c.) 26 at p. 30; 5 Ind. Dec. (o. s.) 14.
(25) (1812) 2 Strange (N. c.) 1; 5 Ind. Dec. (o. s.) 233
(26) (1809) 1 Strange (N. c.) 312; 5 Ind. Dec. (o. s.) 165
(27) 11 M. I. A 551 at p. 586; 8 W. R. P. C. 3 at p. 5; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.
(28) 13 M. I. A. 419 at p. 431; 14 W. R. P C 78; 2 Suth. P. C. J. 339; 2 Sar. P. C. J. 579; 20 E. R. 80[illegible],

taken and that the party executing them had been a free agent and duly informed of what she was about. The substance of the matter then is that the fairness of the bargain is the crucial test. This principle runs through the later decisions of the Judicial Committee, though the rule is more specially enforced in cases where a fiduciary relation involving trust and confidence is shown to exist; *Syud Fuzzul Hossein* v. *Amjud Ali Khan* (29), *Ashgar Ali* v. *Delroos Banoo Begum* (30), on appeal from *Delroos Banoo Begum* v. *Nawab Syud Ashgar Ally Khan* (3), *Azeezunnissa* v. *Baqur Khan* (32), *Tacoordeen Tewarry* v. *Nowab Syed Ali Horsein Khan* (33), *Sudisht Lal* v. *Musammat Sheobarat Koer* (34), *Mohomed Buksh Khan* v. *Hosseni Bibi* (35), *Amarnath Sah* v. *Achan Kuar* (36), *Deo Kuar* v. *Man Kuar* (37), *Hakim Muhammad* v. *Najiban* (20), *Annoda Mohan Rai* v. *Bhuban Mohini Debi* (38), *Shambati Koeri* v. *Jago Bibi* (39), *Ismail Moosajee Mookerdam* v. *Hafiz Boo* (40), *Kishori Lal* v. *Ohuni Lal* (41), *Muhammad Kamil* v. *Imtiaz Fatima* (42), *Sajjad Husain* v. *Abid Husain Khan* (43), *Kali Bokhsh Singh* v. *Ram Gopal Singh* (44), *Mahabir Prasad* v. *Taj Begam* (45), *Azima Bibi* v. *Shamalanand* (46), *Mohammad Ali* v. *Ramzan Ali* (47), *Sunitabala Debi* v. *Dhara Sundari Debi* (48), *Mati Lal Das* v. *Eastern Mortgage & Agency Co. Limited* (49). The essence of the matter was tersely put by Lord Buckmaster in *Sunitabala Debi* v. *Dhara Sundari Debi* (48) when he stated that the circumstances under which a *parda-nashin* woman agrees to transfer property in which she is interested must be carefully examined, in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation. The principle thus enunciated was adopted as the basis of the judgment pronounced by Sir John Edge in *Mati Lal Das* v. *Eastern Mortgage & Agency Co. Limited* (49). It will be observed that the Court must thus have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself; *Sunitabala Debi* v. *Dhara Sundari Debi* (48), *Mati Lal Das* v. *Eastern Mortgage & Agency Co. Limited* (49), *Mohammad Ali* v. *Ramzan Ali*

(29) 17 W. R. 523.

(30) 3 C. 324; 3 Sar. P. C. J. 749; 3 Suth. P. C. J. 444; 2 Ind. Jur. 601; 1 Ind. Dec. (N. S.) 791 (P. C.).

(31) 15 B. L. R. 167; 23 W. R. 453.

(32) 10 B. L. R 205; 17 W. R. 393.

(33) 1 I. A. 192; 13 B. L. R. 427; 21 W. R. 340; 3 Sar. P. C. J. 368 (P. C.).

(34) 8 I. A. 39; 7 C. 245; 4 Sar. P. C. J. 222; 5 Ind. Jur. 270; 3 Ind. Dec. (N. S.) 707 (P. C.).

(35) 15 I. A. 81; 15 C 684; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S) 1040 (P. C.).

(36) 19 I. A. 196; 14 A. 420; 6 Sar. P. C. J. 197; 7 Ind. Dec. (N. S.) 637 (P. C.).

(37) 21 I. A. 148; 17 A. 1; 4 M. L. J. 272; 6 Sar. P. C. J. 489; 8 Ind. Dec. (N. S.) 325 (P. C.).

(38) 28 I. A. 7 ; 28 C. 546; 11 M. L. J 164; 5 C. W. N. 489; 3 Bom. L. R. 386; 8 Sar. P. C. J. 58 P. C.).

(39) 29 I. A. 127; 29 C. 749; 6 C. W. N. 682; 4 Bom. L. R. 444; 8 Sar P. C. J. 304 (P. C. .

(40) 33 I. A. 86; 33 C. 773; 3 C. L. J. 484; 8 Bom. L. R. 379; 10 C. W. N. 570; 16 M. L. J. 166; 3 A. L. J. 353; 1 M. L. T. 137 (P. C.).

(41) 1 Ind. Cas. 128; 76 I. A. 9; 31 A. 116; 9 C. L. J. 172; 5 M. L. T. 58; 13 C. W. N. 370; 11 Bom. L. R. 196; 19 M. L. J. 186 (P. C.).

(42) 4 Ind. Cas 467; 36 I. A. 210; 31 A. 557; 10 C. L. J. 287; 11 Bom. L R. 1210; 14 C. W. N. 59; 19 M. L. J. 697; 13 O. C. 183 (P. C).

(43) 16 Ind Cas. 197; 39 I. A. 156; 34 A. 455; 16 C. L. J. 613; 14 Bom. L. R. 1055; 16 C. W. N. 889; 23 M. L. J. 210; 10 A. L. J. 864; 12 M. L. T. 861; (1912) M. W. N. 976; 15 O. C. 271 (P. C.).

(44) 21 Ind. Cas. 985; 41 I. A. 23; 36 A. 81; 19 C. L. J. 172; 26 M. L. J. 121; 18 C. W. N. 262; 16 Bom. L. R. 147; 15 M. L T. 130; (1914) M. W. N 112; 12 A. L. J. 115; 16 O. C 378; 1 O. L. J. 67 (P. C.).

(45) 23 Ind. Cas. 642; 19 C. W. N. 162; 27 M. L. J. 18; 1 L. W. 959; 1915) M. W. N. 387 (P. C.).

(46) 17 Ind. Cas 758; 40 C 378; 17 C. L. J. 303; 17 C. W. N. 121; 13 M. L. T. 159; (1913) M. W. N. 125; 11 A L. J. 169; 15 Bom. L. R. 423; 25 M. L. J. 55 (P. C.).

(47) 58 Ind. Cas 891; 24 C. W. N. 977; 7 O. L. J. 350; 23 O. C 150 P C.).

(48) 53 Ind. Cas 131; 46 I. A. 272; 47 C. 175; 37 M. L. J 483; 7 A. L. J. 997; 1919) M. W. N. 821; 22 Bom. L. L. 1; 2 U P. L. R. (P. C.) 2; 24 C. W. N. 297; 11 L. W. 227 (P C.).

(49) 61 Ind. Cas. 486; 47 I. A. 265; 25 C. W. N. 265; (1920) M. W. N. 631; 28 M. L. T. 351; 2 U. P. L. R. (P. C.) 166 (P. C.).

(47), *Kali Bakhsh Singh* v. *Ram Gopal Singh* (44), *Sajjad Husain* v. *Abid Husain Khan* (43), *Mahomed Buksh Khan* v. *Hoseni Bibi* (35), *Mahabir Prasad* v. *Taj Begam* (45), *Azima Bibi* v. *Shamalanand* (46), *Ismail Moosaiee Mookerdam* v. *Hofiz Poo* (40), *Hodges* v. *Delhi and London Bank Limited* (50), *Bindubashini Dasi* v. *Giridhari Lal Roy* (51), *Alik an B bi* v. *Rambaran Shah* (52), *Bhuban Mohini Dasi* v. *Gajalakshmi Debi* (17). These, however, are only general principles, and it cannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules, and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case which requires adjudication.

The case before us belongs to the first class mentioned above, where the person who seeks to hold the lady to the terms of her deed is one who stands towards her in a relation of personal confidence. Here, he is the younger brother of her husband. The two brothers had lived jointly in amity, and Kalidasi who was some years older than Satis, was on the best of terms with her brother-in-law On the death of her husband, Satis, though younger in age, became *ipso facto* the head of the joint family, she would thenceforth have to live under his care, look upon him as his natural protector and continue to repose confidence in him properly to safeguard her rights This position is in absolute conformity with the normal structure of a joint Hindu family and is recognised by ancient texts of Hindu Law, such as the text of Narada XIII, 28, 29 cited by Jimutavahana in his Dayabhaga, Chapter XI, section 1, paragraph 64, which provides that when the husband is deceased, his kin is the guardian of his childless widow, and it is only when the husband's family becomes extinct or contains no male or is helpless that the kins of her own father are entitled to be her guardians. This is not archaic and obsolete law, but has been recognised in modern decisions: *Khudiram Mookerjee* v. *Bonwari Lal Roy* (53). In such circumstances, the principle formulated in section 111 of the Indian Evidence Act applies, *viz.*, that where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. It is an elementary principle that whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence, or unconscionable advantage (Story on Equity Jurisprudence, section 308-323, referred to in Taylor on Evidence, section. 151). As Story puts it, Courts of Equity do not arrest or set aside an act or contract merely because a man of more honour would not have entered into it; there must be some relation between the parties which compels the one to make a full discovery to the other or to abstain from all selfish projects. But when such a relation does exist, Courts of Equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence. The general principle which governs in all cases of this sort is that if a confidence is reposed and that confidence is abused, Courts of Equity will grant relief. Equity demands in such circumstances the most abundant good faith (*uberrima fides*) in the transaction between the parties. There need not necessarily be misrepresentation by one party to the other to invalidate the deed; if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and as far as possible restore the parties to their original right. *Baker* v. *Bradley* (54), *Bank of Montreal* v. *Stuart* (55),

(50) 23 A. 137; 27 I. A. 168; 2 Bom. L. R. 967; 5 C. W. N. 1; 10 M. L. J. 279; 7 Sar. P. C. J. 767 (P. C.).

(51) 3 Ind. Cas. 330; 12 C. L. J. 115.

(52) 7 Ind. Cas. 166; 12 C. L. J. 357.

(53) 16 C. 584; 8 Ind. Dec. (N. s.) 336.

(54) (1855) 25 L. J. Ch. 7; 7 De G. M. & G. 597; 2 Jur. (N. s.) 98; 4 W. R. 78; 109 R. R. 245; 44 E. R. 233.

(55) (1911) A. C. 120; 80 L. J. P. C. 75; 103 L. T. 641; 27 T. L. R. 117.

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Coomber, In re, Coomber v. *Coomber* (56). We must not lose sight, however, of the fact that the question is one of substance and not merely one of burden of proof, and where, as in the present case, evidence has been addduced by both the contestants in support of their respective cases and the relevant facts are before the Court, the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay; see the observations of Viscount Haldane in *Kundan Lal* v. *Begam-un nisa* (57) and of Sir Lawrence Jenkins in *Seturatnam Aiyar* v. *Venkatachala Gounden* (58). We must now determine, how the case before us stands when tested in the light of these principles.

Kedar Nath Ghose, as previously stated, died on the 7th October 1915. The partition deed now in controversy was executed on the 4th November 1915, that is, as the Subordinate Judge points out, twenty-seven days after the death of Kedar Nath Ghose and three days before his Sradh ceremony had been performed; but the deed was based on a draft which had been prepared ten days earlier, on the 25th October, when the parties were about the middle of the period of mourning. The provisions of the partition deed have been correctly summarised by the Subordinate Judge. The document recites that the hardware business at 78, Civil Street as well as the house at Benares belonged jointly to Kedar Nath and Satis Chandra in equal shares and that the widow gave up her claim to those properties as also to the remainder of the joint estate, in consideration of the benefits granted to her, which may be enumerated as follows: (*a*) Kalidasi would become absolute owner of the house at Benares as also the house at Howrah, No. 8, Kaliprasad Chakrabarti Lane; (*b*) that Satis would pay to Kalidasi Rs. 20,000 by annual instalments of Rs. 2,000 each, the entire sum to be charged on the ancestral dwelling house at 3 and 4 Kaliprasad Chakrabarti Lane; (*c*) that Satis would pay, within three months from the date of execution of the deed, Rs. 2,000, to Nalinibala and Rs. 4,000 to Chinabala; (*d*) that Satis would pay Rs. 2,500 on the occasion of the marriage of each of the two daughters of Chinabala, named Radharani and Umasasi; and (*e*) that Satis would maintain Kalidasi, her two daughters and the granddaughter, in the family dwelling house, and if Kalidasi should live apart Satis would pay her Rs. 10 per month for her maintenance and after her death Rs. 10 per month for the maintenance of her two daughters Nalinibala, and Chinabala. The deed recites on the face of it that this distribution of the family estate gave effect to the intentions of Kedar Nath Ghose as expressed immediately before his death. The case for the plaintiff is that this allegation, which goes to the root of the entire transaction, is unfounded. It is, consequently, necessary to investigate the incidents which actually happened before the death of Kedar Nath Ghose. The evidence makes it abundantly clear that Kedar Nath Ghose did intend to make a testamentary disposition of his properties during his last illness. He gave instructions for the preparation of a draft Will, which was drawn up by one Aghor Nath Maiti. A fair copy was then made by one Akshay Kumar Goosa. The intended Will was, however, never executed; for when the document was taken to Kedar Nath Ghose for signature, it was found that he had lost consciousness. He never regained consciousness and the end came immediately afterwards. While he was on his death-bed, thus lying unconscious, a discussion took place among the persons present as to what steps might be taken to carry out the projected disposition of the estate. One Badal Chandra Ghose, a Pleader, suggested that after the death of Kedar Nath Ghose, a deed of family arrangement might be executed between Satis Chandra Ghose and Kalidasi, and he forthwith prepared a draft for such a deed. No further steps appear to have been taken for some days after the death of Kedar Nath Ghose, but on the 25th October 1915, the draft of a partition deed was drawn up by one Nilmani Bose and was executed as well by

(56) (1911) 1 Ch. 723; 80 L. J. Ch. 399; 104 L. T. 517.

(57) 47 Ind. Cas. 337; 22 C. W. N. 937; 8 L. W. 233 (P. C.).

(58) 56 Ind. Cas. 117; 47 I. A. 76; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 398; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 43 M. 567; 25 C. W. N. 485 (P. C.).

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Kalidasi as by Satis Chandra Ghose. On the basis of this draft, a fair copy was subsequently prepared, and the partition deed in its final form, which is the subject matter of this litigation, was executed on the 4th November 1915. It may be stated here that as Kalidasi was illiterate, her name was at the request of Satis, signed on the draft as well as on the final deed by her daughter Chinabala who, as the evidence shows, is a half crazy girl and herself writes Bengali very imperfectly, as may be seen from an inspection of the original signatures on the record. The draft of the intended Will made by Aghor Nath Maiti, the draft of the partition deed made by Nilmoni Bose, and the partition deed as executed and registered, have been produced; but the fair copy of the intended Will and the draft of the deed of family arrangement prepared by Badal Chandra Ghosh have not been produced; there can be little doubt, as will presently be seen, that they have been designedly withheld by the defendant, because that would have materially weakened his case. The draft of the Will is full of alterations and interlineations; these were not indicated in the paper book placed before the Court, and the hearing had to be adjourned, so that the Court might be supplied with a fresh translation of the deed indicating the draft in its original form as also the various alterations and interlineations. An inspection of the draft in this form makes manifest the vital changes introduced into the deed. This inevitably raises the question, whether the draft in its original form, or the draft as altered, corresponded to the actual instructions given by Kedar Nath Ghose. The Subordinate Judge has held that the draft in its original form contained the instructions given by Kedar Nath Ghose before his death, and that the changes introduced into the draft did not form part of those instructions. I feel no doubt that the view taken by the Subordinate Judge is correct. It is needless to determine, how far the instructions given by Kedar Nath Ghose were voluntary, or how far, in the precarious state of his health, he acted under the influence of his brother. The fact remains that to some at any rate of the persons present the terms seemed ungenerous, and one of them, Asutosh Banerjee, pressed for liberal treatment of his wife and children. Let it be assumed, however, for our present purpose, that the instructions were voluntarily given; these were correctly represented by the contents of the draft as drawn up by Aghor Nath Maiti. The changes in the draft were, in my opinion, no part of the instructions; indeed, it has not been definitely disclosed by the defendant when and by whom the changes were made. It was rather doubtfully suggested that they were in the handwriting of Asutosh Banerjee, who was present in Court at one stage but was not examined. If, now, we compare the draft Will in its original form, as representing the last wishes of Kedar Nath Ghose, with the partition deed in its final form which purports to give effect to those intentions, what is the result? In the original draft Will, we find that Rs 20,000 was to be paid to Kalidasi, in one instalment; in the partition deed, we find that the payment was to be spread over ten years; this accords with the interlineation. Again, according to the original draft Will, Kalidasi was to take an absolute right in the two houses at Benares and Howrah; by the partition deed, a life estate is conferred on Kalidasi and her two daughters; this also accords with the interlineation. There is another significant alteration which cannot be overlooked; wherever in the draft Will, the singular word *amar* (my) occurred, it has been altered into the plural *amader* (our). In my opinion there is ample indication that the draft Will was so altered, after the death of Kedar Nath Ghose, that it might serve as a draft for a partition deed to be executed by two persons, namely, Kalidasi and Satis Chandra Ghose. This also explains why the fair copy of the Will made by Akshay Kumar Ghose and the draft deed of family arrangement made in accordance therewith by the Pleader, Badal Chandra Ghosh, have both been withheld; those two documents were in agreement with the draft Will in its original form and if they had been produced, they would have completely demolished the theory that the draft Will with alterations represented the last intentions of Kedar Nath Ghose. This fits in further with the significant circumstance, emphasised by the Subordinate Judge, that the intended Will of Kedar Nath Ghose was never shown to the plaintiff. We may also observe that the partition deed in its final

form departs, in at least one particular, from its draft which also contains alterations and interlineations, namely, that the maintenance for Kalidasi and her two daughters at Rs. 20 per month is reduced to Rs. 10 for herself and nothing for her daughters until her death. There is no explanation on whose authority, the alteration in the draft deed of partition was made by Nilmoni Bose who has not been examined on the plea of absence at Waltair. In my view, there is no escape from the conclusion that the partition deed, as executed, departs in very material particulars from the true intentions of Kedar Nath Ghose as expressed shortly before his death, and that as the assent of Kalidasi thereto was secured on the untrue representation that its provisions carried out the last wishes of her husband the deed was in essence obtained from her by false pretences and must on this ground alone be set aside. But there are other grounds equally weighty, which destroy the operative character of the deed.

The schedule to the partition deed sets out the values of the properties. The Subordinate Judge has held it conclusively proved, by local investigation and the other evidence adduced in the case, that the properties reserved for Satis were grossly undervalued, while the two houses given to the plaintiff were overruled. This conclusion of the Subordinate Judge is amply sustained by the evidence, and he is undoubtedly right in his view that the properties taken by Satis are the cream of the estate while those assigned to the plaintiff are the worst of all. It is farther important to note that inasmuch as Satis takes under the deed the entire joint estate, with the exception of what is expressly given to Kalidasi, it is an obviously damaging circumstance that some valuable properties are not mentioned at all in this deed of partition. Upon the question of undervaluation, the most flagrant instance is the value of the stock-in-trade of the hardware business and the workshop appurtenant thereto, which is stated in the schedule to the deed to be only Rs. 31,000, but is now shown to be at least Rs. 60,442. Another instance, equally striking, is that of premises 10 and 12, Reja Woodmunt Street and 77-2 Olive Street which are described as worth Rs. 1,001 only; this ignores what was well known to Satis, namely, that the price had been fixed at Rs. 20,000 and that Kedar had paid Rs. 15,000 in part payment to the vendor to satisfy a mortgage on the property. A third instance, in no way less impressive, is that of the ancestral dwelling house which was valued Rs. 21,000, but has now been found to be worth Rs. 35,746. It is significant that all these instances of undervaluation relate to properties taken by Satis; on the other hand, the value of what has been assigned to Kalidasi has been demonstrated to be in fact much less than the estimated amount. As an instance of total omission, mention may be made of an incident which is by no means creditable to Satis. It appears, that after the death of Kedar, he signed the name of Kedar and on the 18th October 1915 withdrew from the National Bank of India, a sum of Rs. 11,200 which stood in the name of Kedar, and deposited the sum in his own name in the Mercantile Bank of India. No mention was made of this amount in the partition deed. In the face of these circumstances, it is impossible to hold that the defendant observed that "utmost degree of good faith" which his sister in-law was entitled to expect from him in his dealings with her, on well-recognised equitable principles. This by itself would manifestly justify the cancellation of the deed.

But it has been strenuously argued by the defendant that the lady had the benefit of independent advice and cannot consequently impeach the transaction. In my opinion, there is no solid foundation for this contention. There is no satisfactory evidence to show that Rajkumar Dasti, the brother of Kalidasi, did in fact advise her in this matter, or was able and willing to give her the requisite assistance. To enable us to appreciate the situation of the parties at the time, the successive events may be conveniently set out in chronological order:

7th October 1915—Kedar Nath Ghose died.

25th October 1915—Draft partition deed signed.

4th November 1915—Partition deed executed.

6th November 1915—Sradh ceremony of Kedar Nath Ghose performed.

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22nd November 1915—Rajkumar borrowed Rs. 1,001 from Satis.

8th December 1915—Partition deed registered.

23rd January 1916—Rajkumar took certified copy of partition deed from Registration Office.

26th January 1916—Rajkumar borrowed Rs. 2,000, from Satis.

31st January 1916—Kalidasi applied for Succession Certificate in respect of Insurance Policy on life of her husband (not included in partition deed).

23rd February 1916—Kalidasi applied to include in Succession Certificate G. P. Notes for Rs. 7,500 (not mentioned in partition deed).

11th March 1916—Proposed supplementary deed of family settlement drawn up by Satis.

8th April 1916—Satis objected to grant of certificate to Kalidasi for G. P. Notes.

10th April 1916—Satis applied for certificate for G. P. Notes.

12th May 1916—Satis sued Rajkumar to recover the sums advanced to him (Suit No. 103 of 1916).

13th May 1916—Properties of Rajkumar attached before judgment at the instance of Satis.

16th May 1916—Rajkumar obtained power-of-attorney from Kalidasi.

20th May 1916—Applications for Succession Certificate made by Satis and Kalidasi heard. Satis produced partition deed. Satis granted certificate for G. P. Notes; Kalidasi granted certificate for Life Insurance Policy.

28th June 1916—Kalidasi instituted present suit.

12th July 1916—Satis appointed Receiver of hardware business.

11th July 1917—Order for grant of certificate to Satis in respect of G. P. Notes set aside on appeal.

It is by no means clear from the evidence on the record that Kalidasi acted under the advice of her brother. Rajkumar was one of the executors named in the Will intended to be executed by Kedar Nath Ghose. He was, no doubt, aware of the terms of the Will, and it is improbable that he should have been a party to variations therefrom to the prejudice of his sister. This is confirmed by the significant fact that as early as 23rd January 1916, Rajkumar took a certified copy of the partition deed from the Registration Office, evidently with a view to take steps to secure to his sister her full rights in the estate left by her husband. It is further remarkable, if Rajkumar was really present throughout and advised his sister, that he should not have read over the deed and explained it to her, become an attesting witness thereto, or even identified her before the Registering Officer. Nor can we overlook the fact that Kamini Kumar, the eldest brother of Kalidasi and Rajkumar, is conspicuous by his absence from the scene. It has, moreover, been suggested on behalf of the plaintiff that Rajkumar was perhaps more anxious to improve his own prospects than to safeguard the interest of his sister. There is no direct evidence to prove this phypothesis; though it must be conceded that the circumstance that Rajkumar was able to borrow Rs. 3,000 from Satis shortly afterwards, is calculated to excite suspicion. On the other hand, it has been suggested on behalf of the defendant that the present suit has been engineered by Rajkumar to wreak his vengeance on Satis who had enforced his claim for recovery of the loan. This theory is not improbable; but even if true, it does not justify the inference that Kalidasi has made an unfounded claim against Satis, who might perhaps have postponed the evil day for a while, if he had been diplomatic enough to keep Rajkumar under obligation for a longer period. I am not unmindful that, as observed by Fletcher Moulton, L. J. in *Coomber, In re, Coomber* v. *Coomber*(56), independent and competent advice does not mean independent and competent approval; it simply means that the advice shall be removed entirely from the suspected atmosphere and that from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction. I see no reason to doubt the correctness of the conclusion of the Subordinate Judge that Kalidasi had not the benefit of such independent advice from Rajkumar or any other person. It is, I think, also clear that even if Rajkumar be assumed to have been entirely beyond the sphere of influence of Satis,

he was really not able to give the requisite advise. To secure a fair transaction, a full appreciation by the lady of the value and nature of her rights was essential. No doubt, as pointed out by Lord Buckmaster in *Sunitabala Debi* v *Dhara Sundari Debi*(48), it is not necessary to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities; it is sufficient that the general result of the compromise should be understood and that people disinterested and competent to give advise should, with a fair understanding of the whole matter, advise the lady that the deed should be executed. Tested from this point of view, the evidence does not show that Rajkumar himself was fully acquainted with the facts, duly appreciated the effect of the transaction and was able to advise his sister. To mention one aspect only: the deed as executed might well raise the point whether the transaction was a device for division of the estate between a limited owner and a reversioner and whether Satis could validly transfer to Kalidasi, as he did, his reversionary interest in two of the properties, indeed, the question involved was precisely such as required consideration by a lawyer, in view of the recent pronouncements of the Judicial Committee in *Khunni Lal* v. *Gobind Krishna Narain* (59), *Amrit Narayan Singh* v. *Gaya Singh* (60), *Rangasami Gounden* v. *Nachiappa Gounden* (61), *Sureshwar Misser* v. *Maheshrani Misrain* (62), and other cases reviewed in *Annada Mohan Roy* v. *Gour Mohan Mullick* (63). Although it may be conceded that, as pointed out in *Buchi Ramayya* v. *Jagapathi* (64), the presence of a professional adviser cannot be deemed necessary in every case, the Subordinate Judge has properly commented on the fact that while a Pleader was called to witness the execution of the intended Will of Kedar Nath Ghose and two Pleaders were called to witness the registration of the partition deed, not a single Pleader, not even a competent disinterested person, was called to advise Kalidasi in a matter of such vital moment to her, either at the time when her assent was obtained to the draft partition deed or at the time when the deed was executed. No doubt, as pointed out by Jenkins, C. J. in *Keshab Lal* v. *Radha Raman* (15), the absence of advise would not have by itself necessarily vitiated the transaction, if it had been otherwise established to be righteous, that is, such as a right-minded person might be expected to do. All the indications in the present case, however, point to a contrary conclusion; and from this point of view, much weight cannot be attached to the evidence which shows that the draft partition deed was read over and explained to Kalidasi by one Fakir Chand Ghosh, who himself, as is clear from his testimony, did not fully appreciate the nature and effect of the transaction. On the other hand, there is abundant indication that full advantage was taken by Satis of the deeply distressed condition of his sister-in-law, who had shortly before lost both her sons-in law, and had hardly recovered from the shock, when she lost her husband. Before the period of mourning was over, her brother-in law expedited the execution of the deed with what cannot but be characterised as indecent haste. During this period of mourning, arrangements had to be made for the performance of the prescribed ceremonies on a suitable scale. The lady was anxious that the poor of the locality and the adjoining villages should be fed in a proper style. This request, somewhat insistently made, was utilised to put pressure upon her and to make her agree to terms which her brother-in law considered advantageous to himself. This furnishes an illustration of what is felicitously described by Lord Macnaghten in *Mahomed Buksh Khan* v. *Hosseni Bibi*

(59) 10 Ind. Cas. 477: 38 I. A. 87: 33 A. 356: 13 C. L. J. 575: 16 C. W. N. 545: 8 A. L. J. 554: 18 Bom. L. R. 427: 10 M. L. T. 25: (911) 1 M. W. N. 432: 21 M. L. J. 645 (P. C.).

(60) 44 Ind. Cas. 408; 47 I. A. 35: 23 M. L. T. 142; 22 C. W. N. 402; 27 C. L. J. 296; 34 M. L. J. 238; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 303; 7 L. W. 581; 20 Bom. L. R. 546; 45 C. 590 P. C.).

(61) 50 Ind. Cas. 498; 46 I. A. 72; 34 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 252; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105 (P. C.).

(62) 57 Ind. Cas. 325; 47 I. A. 233; 1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 54; 2 U. P. L. R. (P. C.) 128; 12 L. W. 431; 18 A. L. J. 1063; 25 C. W. N. 194; 48 C. 1001 P. C.).

(63) 65 Ind. Cas. 27; 33 C. L. J. 457; 25 C. W. N. 496; 48 C. 556.

(64) 8 M. 304; 8 Ind. Dec. (N. S.) 209.

(35), as "a subtle form of undue influence." There can be little doubt that Satis himself must have realised that the deed had been taken by him from his sister-in-law under circumstances which made it open to successful attack; this alone affords a plausible explanation of his conduct in the Succession Certificate cases, where he did not set up the partition deed till a very late stage of the proceedings. But weightier than all these circumstances put together, we have the outstanding fact that Satis, on his own initiative, took steps to prepare, at his expense, a supplemental deed of family settlement to rectify to some extent the unfairness of the partition deed he had taken from his sister in law; the attempt, however, came too late. It is difficult to conceive what more convincing proof could have been brought forward to establish the true character of the deed challenged by the plaintiff.

It has finally been urged on the merits that the partition deed was in essence a deed of family settlement and should consequently be supported, even though there were no rights actually in dispute at the time of making it; in such cases as was said in *Upendra Nath Bose* v. *Bindeshri Prosad* (65) and *Mariam Bibee* v *Muhammad Ibrahim* (1) the Court should not scan with much nicety the quantum of consideration. The principle invoked may be conceded and is, as pointed out in *Helan Dasi* v. *Durga Das Munsal* (66) and *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (67), supported not only by the authority of *Williams* v. *Williams* (68) and *Lucy's case* (69) but also by the decision of the Judicial Committee in *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu* (70), *Mantappa Madgowda* v. *Basawantrao Nadgowda* (71), *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (72), *Greender Chunder Ghose* v. *Troyluckho Nath Ghose* (73), *Muhammad Imam Ali Khan* v. *Husain Khan* (74), *Khunni Lal* v. *Gobind Krishna Narain* (59). But it is equally well-settled that, as James, L. J., puts it in *Moxon* v. *Payne* (75), to make a compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection; one side must not know more about the matter than the other, unless what he knows could not possibly have affected the other party's decision: *Gilbert* v. *Endean* (76), *Maynard* v *Eaton* (77). This accords with the rule enunciated in *Gordon* v. *Gordon* (78), which was repeatedly argued before Lord Eldon, namely, that a family arrangement to be operative must be without fraud; it would not be supported if founded on mistake of either party to which the opposite party was an accessory; or if either party has been misled by the concealment of material things, for the essence of the matter is mutual communication of all relevant circumstances. To the same effect are the decisions in *Hoghton* v. *Hoghton* (79), *Lawton* v. *Compton* (80), *Bentley* v. *Mackey* (81), which show that a Court of Equity will not permit a family arrangement to bind the parties when the transaction has been unfair and founded upon falsehood or misrepresentation. Tested in the light of these principles, the position of the defendant is full of

(65) 32 Ind. Cas. 168; 22 C. L. J. 452 at p. 476; 20 C. W. N. 210.

(66) 4 C. L. J. 823.

(67) 3 Ind. Cas. 247; 10 C. L. J. 503.

(68) (1867) 2 Ch. 294; 36 L. J. Ch. 419; 16 L. T. 42; 15 W. R. 657.

(69) (1853) 4 De G. M. & G. 356; 22 L. J. Ch. 732; 17 Jur. 1143; 43 E. R. 645; 102 R. R. 164.

(70) 13 M. I. A. 497; 14 W. R. P. C. 33; 6 B. L. R. 202; 2 Suth. P. C. J. 365; 2 Sar. P. C. J. 601; 20 E. R. 837 (P. C.).

(71) 14 M. I. A. 24 at p. 36; 15 W. R. P. C. 33; 2 Suth P. C. J. 407; 2 Sar P. C. J. 648; 20 E. R. 695.

(72) 1 I. A. 257; 13 B. L. R. 312; 3 Sar. P. C. J. 314; Rafique & Jackson's P. C. No. 27.

(73) 24 I. A. 35; 20 C. 373; 6 Sar. P. C. J. 267; 17 Ind. Jur. 49; 10 Ind. Dec. (N. S.) 253 (P. C.).

(74) 25 I. A. 161; 26 C. 81; 2 C. W. N. 737; 7 Sar. P. C. J. 432; 13 Ind. Dec. (N. S.) 656 (P. C.).

(75) (1873) 8 Ch. 881; 43 L. J. Ch. 240.

(76) (1878) 9 Ch. D. 259; 39 L. T. 404; 27 W. R. 252.

(77) (1874) 9 Ch. 114; 43 L. J. Ch. 641, 30 L. T. 241, 22 W. R. 467.

(78) (1821) 3 Swan. 400; 19 R. R. 230; 36 E. R. 910.

(79) (1852) 15 Beav. 278; 92 R. R. 421; 21 L. J. Ch. 482; 17 Jur. 95; 68 E. R. 545.

(80) (1854) 18 Beav. 87; 23 L. J. Ch. 505; 18 Jur. 8; 2 W. R. 209; 52 E. R. 35; 23 L. T. (o. s.) 201; 104 R. R. 378.

(81) (1862) 31 Beav. 143; 54 E. R. 1042; 135 R. R. 145 affirmed on appeal 4 De G. F. & J. 279; 10 W. R. 873; 6 L. T. 1101.

insoluble difficulties from which no ingenuity on the part of the most skilful legal adviser can extricate him.

As a last resort, it has been contended on behalf of the defendant that no relief should be granted to the plaintiff in the present suit as framed, inasmuch as the plaintiff who alleged fraud can succeed only on proof of the fraud specified in the plaint, and no variation between pleading and proof can be allowed. In support of this position, reference has been made to the following passage from the judgment in *Bansiram* v. *Secretary of State* (82): "Two principles, it is well settled, are applicable in these circumstances. In the first place, as pointed out by the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (83), where reliance was placed upon the observations of Selborne, L. C. in *Wallingford* v. *Mutual Society* (84) when a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated: *Gibert* v. *Lewis* (85) for, in the language of Fry, J., in *Ked grave* v. *Hurd* (86), it is only fair play between man and man that the defendant should know what is charged against him: *Clydesdale Bank* v. *Paton* (87), and *Laurance* v. *Norreys* (88). In the second place, a charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it: *Abdul Hossein* v. *Charles Agnew Turner* (89); the rule that the Court will grant only such relief as the plaintiff is entitled to upon the case made by his pleadings, is strictly enforced when the plaintiff relies upon fraud: *Wilde* v. *Gibson* (90) and *Hickson* v. *Lombard* (91). But there is plainly no real substance in the contention in the circumstances of the present ligitation. The essence of the case for the plaintiff is that the defendant, who was her trusted brother-in-law, took advantages of her helpless situation as an illiterate *parda-nashin* Hindu widow and obtained her assent to a deed, the true effect whereof was not appreciated by her as she had no competent independent advise. It cannot thus be seriously maintained that there has been an infringement of the rule formulated by Lord Westbury in *Eshenchunder Singh* v. *Shamachurn Bhutto* (92), by Sir Barnes Peacock in *Mylapore Iyasawny Vyapoory Mudaliar* v. *Yeo Ray* (93) and by Sir Lawrence Jenkins in *Malraju Lakshmi Venkayyamma Row* v. *Venkatadri Appa Row* (94), that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, nor can it be suggested that there has been any violation of the elementary rule of procedure laid down by Sir Barnes Peacock in *Abdul Hossein* v. *Charles Agnew Turner* (89), and by Lord Shaw in *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (95) that a charge of fraud must be substantially proved as laid, so that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. We must further bear in mind that every variance between pleading and proof is not fatal: the Court must carefully consider whether, in the words of the Judicial

(82) 35 Ind. Cas. 284; 20 C. W. N. 633.

(83) 15 I. A. 119; 15 C. 533; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168; 7 Ind. Dec. (N. S.) 939 (P. C.).

(84) (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

(85) (1862) 1 De G. J. & S. 38 at p. 49; 32 L. J. Ch. 347; 7 L. T. 541; 11 W. R. 223; 9 Jur. (N. S.) 187; 2 J. & H. 452; 46 E. R. 15; 137 R. R. 138.

(86) (1881) 20 Ch. D. 1 at p. 6; 51 L. J. Ch. 113; 45 L. T. 483; 30 W. R. 251.

(87) (1896) A. C. 381; 65 L. J. P. C. 73; 74 L. T. 738.

(88) (1890) 15 A. C. 210 at p. 221; 59 L. J. Ch. 681; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708.

(89) 14 I. A. 111; 11 B. 620; 5 Sar. P. C. J. 25; 11 Ind. Jur. 352; 6 Ind. Dec. (N. S.) 408 (P. C.).

(90) (1848) 1 H. L. C. 605; 12 Jur. 527; 9 E. R. 897; 73 R. R. 191.

(91) (1864) 1 H. L. 324.

(92) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3.

(93) 14 I. A. 168; 14 C. 801; 11 Ind. Jur. 397; 5 Sar. P. C. J. 50; 7 Ind. Dec. (N. S.) 531 (P. C.).

(94) 59 Ind. Cas. 767; 33 C. L. J. 171; 25 C. W. N. 654; 19 A. L. J. 97; 40 M. L. J. 144; 13 L. W. 256; (1921) M. W. N. 77; 29 M. L. T. 164; 23 Bom. L. R. 713 (P. C.).

(95) 29 Ind. Cas. 639; 42 I. A. 135 at p. 151; 39 B. 441; 22 C. L. J. 1 at p. 19; 13 A. L. J. 570; 19 C. W. N. 729; 17 Bom. L. R. 527; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611 (P. C.).

Committee in *Radha Mohun* v. *Jadoomonee Dossee* (96) the objection is one of form or of substance. The rule that the allegation and the proof must correspond is intended to serve a double purpose, namely, first, to apprise the defendant distinctly and specifically of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise, and, secondly, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations Tested from these points of view, the objection urged by the defendant proves to be groundless. There is no room for doubt that the contending parties fully appreciated the real points in issue and have adduced all the material evidence The fundamental point in controversy was really of a very simple character, namely, what were the circumstances under which the partition deed was executed? Each side had full opportunity to give in minute detail its own version of the incidents, and the Court was called upon to determine the true state of things from the conflicting narratives. There is plainly no question of surprise; but if it were necessary to adhere to matters of form with the strictest accuracy, the plaint could well have been amended to enable the Court to do that substantial justice between the parties for which alone Courts exist: *Muhammad Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (97), *Sunitabala Debi* v. *Dhara Sundari Debi* (48), *Charan Das* v. *Amir Khan* (98) and *Ma Shwe Mya* v. *Maung Ho Hnaung* (99). In this connection, a well-known passage from the judgment of James, L. J. in *Maxon* v. *Payne* (75) may be usefully re called: "A great part of the argument which was addressed to us on behalf of the defendant Payne was, that the case alleged against him by the bill was one of gross and premeditated fraud, and that unless the actual fraud as alleged was proved, the bill must fail. It was contended that the plaintiffs were bound to make out, and had failed to make out, the case alleged in the tenth paragraph of the bill. It is true that when a case is based on fraud, the fraud must be proved, and no relief could be given in this suit on any different ground. But the obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit. It is at most a rhetorical exaggeration, which a person who commits the fraud, has no right to complain of. If a man robs his fellow traveller, and is indicted for so doing, the allegation that he became the companion of his victim with a pre conceived design to rob him is wholly immaterial. Much the same line of defence was taken in the case of *Huguenin* v. *Baseley* (100), and it may be worth while to quote what Lord Eldon said in that case: 'I agree, further, that the relief must proceed upon what is alleged and proved by the persons complaining, that their complaints must be treated as effectual or ineffectual according to what they have, not what they could have, represented ...I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached if the situation of the parties had enabled them to go through all the difficulties as to amendment; also that many circumstances might have been brought forward on behalf of the defendants, which I am bound not to look at. But, taking the case as it stands, though there is in this bill much foul allegation, which, if not true, ought not to be there, and a great deal of which is denied and clearly disproved, there is enough upon the bill and in evidence to show that this deed cannot stand, if the whole transaction taken together cannot stand.'"

(96) 23 W. R. 369.

(97) 14 M. I. A. 468 at p. 485; 6 W. R. P. C. 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 20 E. R. 177.

(98) 57 Ind. Cas 606; 47 I. A. 255; 39 M. L. J. 195; 28 M. L. T. 149; 2 U. P. L. R. P. C.) 124; 18 A. L. J. 1095; 22 Bom. L. R 1370; 3 L. W. 49; 25 C. W. N. 289; 3 P. W. R. 1921; 48 C. 110 P. C.).

(99) 63 Ind. Cas 914; (1921) M. W. N. 396; 4 U. B. R. (1921) 20; 30 M. L. T. 28; 48 C. 832; 24 Bom. L. R. 682 (P. C.).

(100) (1807) 14 Ves. 273 at p. 290; 1 Wh. & T. L. C. (7th Ed.) 247; 33 E. R. 526; 9 R. R. 276.

SATIS CHANDRA GHOSH v. KALIDASI DASI.

In my judgment, the Subordinate Judge was unquestionably right in his conclusion that the defendant obtained the partition deed from the plaintiff by an untrue representation that its terms were in conformity with the last wishes of her husband, as well as by a concealment of the true extent of the assets of the family business and the value of the family properties; he also took advantage of her distressed condition during the period of mourning immediately after she had lost her husband; she had further no competent independent advice as to the nature, value and extent of her rights in the estate left by the deceased and the true effect of the deed upon her position as his heiress. In these circumstances, she was entitled substantially to the reliefs granted by the decree of the Subordinate Judge.

The result is that the decree of the Trial Court must be affirmed and this appeal dismissed with costs. The memorandum of cross-objections is rejected without costs.

BUCKLAND, J.—This appeal is against the judgment and decree in a suit brought by one Srimaty Kalidasi Dasi to have it declared that a deed described in the plaint as a partition deed, executed by her on the 4th November 1915 in favour of the appellant, Satis Chandra Ghose is fraudulent and void and to have it cancelled and for partition of the immoveable property mentioned in the schedule to the plaint and to recover a hardware business in Calcutta to which she alleges she is entitled as widow of her deceased husband. One Gobinda Chandra Ghose who died in November 1913 left two sons—Kedar Nath Ghose and Satis Chandra Ghose. The latter is the appellant. Kedar Nath was the husband of the plaintiff and by her he had two daughters—Chinabala and Nalinibala. The plaintiff has two brothers called Kamini Kumar and Raj Kumar and this completes the list of the relatives of the parties whose names have been introduced into the case. The learned Subordinate Judge has found that the hardware business was the property of Gobinda Ghose on whose death his two sons inherited it jointly. The respondent who claimed the whole of this business has abandoned his cross-objections on this point and it is not necessary further to consider the question.

The respondent's case is that shortly after the death of her husband Kedar Nath Ghose, which took place on the 7th October 1915, the appellant came to her and asked her to entrust him with the management of the hardware business. To this she says that she agreed. The deed of the 4th November 1915 was prepared; it was signed by the respondent by the pen of her daughter Chinabala; no explanation of its terms was given, nor was the deed read over to her. On the 8th December it was registered, again without explanation. After registration the respondent disclosed the existence of the deed to her brother Raj Kumar who took her to task and said that he would obtain a copy of it and see her about the matter. This Raj Kumar did and told her that Satis had defrauded her of everything. Subsequently, on the 28th June 1916 she filed this suit. This is the broad outline of the respondent's story as told by her and her witnesses. It is not necessary to analyse this case in detail because the Subordinate Judge himself has paid very little attention to it. It is not possible to say from his judgment what view he takes of it, for he deals exclusively with the case made by the appellant. He has refused to accept the appellant's case in all its details, but he has treated it as representing more or less what took place and he finds in language admitting of no ambiguity that taking the case made by the appellant substantially to represent what occurred, fraud was practised on the respondent in whose favour he has made a decree setting aside the deed of the 4th November 1915.

It has been argued by the learned Advocate-General on behalf of the appellant that in a case of fraud, it will not suffice to find fraud otherwise than as alleged on behalf of the plaintiff, and that even should the Court find that fraud was practised, if such fraud is other than the fraud alleged the defendant is entitled to have the suit dismissed. This is a proposition which may be applicable in cases between man and man, or, stated more appropriately to this case, where a *pardanashin* lady is not concerned. But where a *pardanashin* lady is involved, other

and equally well-known rules have to be applied and conformity with them has to be established. As I read the judgment of the learned Subordinate Judge, it is according to these rules that he has found that the appellant fails even assuming his case to be true. I propose, therefore, to state the history of the matter and examine it from this point of view.

For some years before his death Kedar Nath Ghose had been an invalid and at the time of his death he was bed-ridden. He had spoken to his wife some two or three days before his death about a Will, and on or about the 28th or 30th September a draft Will was prepared for him. The materiality of the Will which Kedar Nath intended to execute arises from the circumstance that the case put forward by the appellant in his written statement and in the evidence is that it was in order to give effect by deed to the wishes of her deceased husband, which the intervention of death prevented him from carrying out by Will, the respondent executed the instrument which is the occasion of these proceedings. The draftsman of the Will was Aghore Nath Maiti, a man who describes himself as a trader, dealing in building materials and also with deeds, who has been called as a witness for the appellant: Aghore Maiti's evidence is that he was summoned by one Ashutosh Banerjee to write out the Will: that Kedar Babu stated his intentions at some of which Ashutosh Banerjee protested and after discussion with Asutosh Banerjee he wrote out the terms. This draft has been produced. It contains a number of alterations but it has not been proved by whom these alterations were made. Aghore Maiti did not make them, though he says they were made on the same day as the draft was written, but he cannot say by whom. The suggestion is that the alterations were made by Asutosh Banerjee who, however, has not been called by either side though present at the trial of the suit. The importance of these alterations will appear later. The Will was fair copied on the 6th October. This appears from the evidence of the appellant, and of a witness named Boloram Ganguly, an attesting witness to the deed in suit. This man says that on the day preseding the death of Kedar he went to Kedar's house where he saw Akhoy Ghose, Jotin Ghose, Shyama Charan Bhaduri, Asutosh Banerjee and Raj Kumar Deoti. The document was being dictated by Akhoy Ghose to his son Jotin who was writing a fair copy. This fair copy has not been produced and no explanation of the omission to produce it is forthcoming. On the 7th October Kedar Nath Ghose died without having executed the Will, though on the morning of that day the several persons whom I have named, a Pleader called Badal Chandra Ghose, the Doctor Sarat Chandra Das, and a person of the name of Pulin Behary Mondal, had collected, most of them for the purpose of being present at the execution of the document. But nothing could be done as Kedar had become unconscious. Kedar died and died so intestate. The appellant and also Asutosh Banerjee and Jaharilal Bhaduri then asked what was to be done. Whereupon a suggestion was made by Badal Chandra Ghose that as the Will could not be executed, a deed which in his evidence he called a deed of family arrangement might be executed in its terms. This suggestion was made in the absence, it is to be observed, of the respondent. All of this is most significant: it suggests the thought that the death of Kedar Nath Ghose intestate was regarded by these persons as a catastrophe, so far as he could do aught to remedy it. Badal Chandra Ghose lost no time and he then and there, as he says, dictated a draft to Akhoy Ghose's son Jotindra. This draft too is not forthcoming nor is its absence explained. Some few days later the appellant suggested to the respondent that a deed should be executed. He made the suggestion at a time when expenses to be incurred for the Sradh of Kedar Nath Ghose were under discussion. The respondent was most anxious that a feeding of the poor should take plase. This appears to have afforded to the appellant the opportunity which he desired. For he demurred and said he would consent if the respondent would execute what he called a family arrangement. A number of persons whom it is unnecessary to specify, their names recur throughout the evidence at each stage of the incidents leading up to the final conclusion, also met and discussed the matter with the appellant and respondent. As regards this discussion, suffice it to

say that it related to arrangements regarding the immoveable property, and that according to the witness, Fakir Chandra Ghose the respondent intimated that if the Sradh would only cost Rs. 5,000 or Rs. 6,000, she would execute a deed in accordance with the terms of the Will which her husband had proposed to execute. There appears to have been more than one such interview with the respondent as the appellant says that terms were discussed in his presence while Fakir Chandra Ghose says: "We came back and told Satis that Kalidasi had agreed." It is not a simple matter to disentangle the evidence as to these several interviews, but on each occasion the appellant's adherents were present and the impression on my mind, whether or no she was alive to her own interests, or advised as to them, a point I shall deal with hereafter, is that the respondent was being importuned in the interests of the appellant to put her hand to the document which he was anxious to obtain. The appellant says that the respondent agreed to certain terms and, accordingly, in furtherance of the project, on the following day a draft of the Will of Kedar and the draft deed prepared by Badal Babu and "perhaps also the fair copy of the Will" were made over to an individual of the name of Nilmony Bose to prepare a "partition deed" in the terms arranged. Nilmony Bose has not been called as a witness and the explanation given for his absence from the witness-box, that he was travelling to Waltair, is wholly insufficient. His evidence might have thrown some light upon the failure to produce the draft prepared by Badal Chandra Ghose and the fair copy of the Will. The importance of the omission to produce these papers lies in the fact that, as already stated, it is the appellant's case that, subject to such alterations as were agreed upon between him and the respondent, the object of the deed was merely to give effect to the wishes of Kedar Nath Ghose which the deceased had not been able to carry out before his death. The learned Subordinate Judge has found that the alterations in the draft of the Will were interpolated subsequently in order to bring the Will into conformity with the partition deed. The alterations in the draft in various respects are not such as one would expect to find in a Will but are such as might well find a place there if the draft Will had been used as a rough draft for the purpose of engrafting upon it the deed of partition. This does not improve the position for the appellant and it is not necessary to come to any definite conclusion one way or the other. But the appellant's case being what it is, that the draft Will as altered and the deed in suit represent the testamentary wishes of the deceased, the omission to produce the fair copy of the Will and the draft prepared by Badal Chandra Ghose suggests the inference that were they produced they would show that neither the fair copy of the Will nor the draft partition deed were in accordance with the Will which Kedar Nath Ghose intended to execute. This omission and the failure fully to explain their non-production throw the gravest suspicion on the appellant's case.

About the time when Nilmoni Bose has been told to prepare a draft, in particular on the 19th October, the appellant, who had charge of the hardware business in Calcutta drew from the National Bank of India practically the whole of the cash balance of the business which stood in Kedar's name amounting to Rs. 11,000 and transferred it to an account in his own name at the Mercantile Bank of India. At that time, of course, the respondent knew nothing about this. It came to light in circumstances to which I shall presently refer. Four or five days after receiving instructions Nilmoni produced a draft which according to the appellant was read over and explained to the respondent on the 25th October 1915 in the presence of some ten persons by Fakir Chandra Ghose, who also explained it. The draft was approved and executed by the respondent through her daughter Chinabala. Fakir again lent his services in the same manner some days later when the fair copy was executed by the parties in similar fashion as regards the respondent. That took place on the 4th November 1915. On the 8th December the deed was registered. A Vakil of the name of Bhupendra Nath Bose has been called to support this part of the case and he produced a diary in which he had made a note as to his presence on the occasion and the reading over of the document to the respondent by one Shyama Charan Bhaduri. There is nothing in the

note to show that the document was explained to the respondent on that occasion in the manner in which that should have been done and this witness's evidence does not carry the case for the appellant very far.

Raj Kumar having been informed by his sister of what had occurred, obtained a copy of the deed, which he says he procured on the 22nd or 23rd January 1916. On the 26th January he borrowed a sum of Rs. 2,000 from the appellant the significance of which will have to be considered in dealing with his connection with this affair. On the 31st January, the respondent made an application to the Court of the Subordinate Judge for a Succession Certificate to enable her to realise a sum of Rs. 2,825 for which her late husband had been insured in the Phoenix Insurance Company Ltd. On the 23rd February she filed a further petition asking that Government Promissory Notes of the total approximate value of Rs. 7,500 should be included in the application. Raj Kumar Deoti signed this application on behalf of the respondent The need for the application, according to Raj Kumar, was that his sister was going to bring a suit to set the deed aside which would cost a good deal of money, and in order to raise funds he made enquiries and from those made at the Bank, it came to his knowledge that the appellant had withdrawn Rs. 11,000 and was about to withdraw the Government Promissory Notes. From the Insurance Co, he learnt that a Succession Certificate would be necessary before the money could be paid. While this application was pending events took a singular turn, for Raj Kumar, who professes to have been interested in securing for his sister her just rights, entered into negotiations with the appellant for the preparation and execution by the respondent of a deed to supplement the partition deed by making provision as regards items of property not comprised in it; in particular the items which were the subject of the application for the Succession Certificate. Raj Kumar says he asked Satis to make a draft but at no time did he consult his sister in the matter. The appellant's evidence as to this is that Raj Kumar asked him whether a supplemental deed should be executed with regard to the Government Promissory Notes and the life policy which had been omitted from the partition deed. A draft was accordingly prepared and made over to Raj Kumar. Then, according to the appellant, Raj Kumar told him that if he would discharge him from a debt of Rs. 3,500 which Raj Kumar owed him he would allow the respondent to execute it, otherwise he would prevent her from so doing. The statement, considered in the light of all the evidence, has the ring of truth about it. But, as will be seen when I discuss Raj Kumar's position in relation to his sister and the deed in suit, so far from helping the appellant it militates against his success. Our attention has been drawn at some length to the details of the supplemental deed and errors in and omissions from the original deed which an examination of the supplemental deed discloses. For instance the valuation of the hardware business in Calcutta is given in the deed of the 4th November as Rs. 31,000, while from the supplemental deed the net value appears to be 56,851 rupees. It is admitted by the supplemental deed that mistakes have been made in incorporating certain matters in the deed of the 4th November; and in his evidence the appellant admitted the incorrectness of the valuation of the properties mentioned in the first deed. The supplemental deed was never executed. On the 8th April 1916 the appellant objected to the respondent obtaining a Succession Certificate and himself filed a petition to the Subordinate Judge for a Succession Certificate in respect of the Government Promissory Notes. In that petition he stated that he was the reversionary heir and claimed the sums in question as such, making no mention either of the partition deed or of the agreement only recently entered into for a supplemental deed. On the 16th May, the appellant filed a suit against Raj Kumar Deoti to recover Rs. 3,668-4-0 borrowed by him which sum included the Rs. 2,000 borrowed on the 26th January 1916. On the 18th of May, according to the appellant's deposition in the proceedings for a Succession Certificate, the respondent executed the *am-mukhtearnama* in favour of Raj Kumar. On the 20th May the applications for Succession Certificates were disposed of and the Court ordered that a Succession Certificate should issue to the appellant as regards the Govern-

ment Promissory Notes and as regards the insurance money to the widow. On the 28th June of the same year the suit which has resulted in this appeal was filed. This is the case which the Subordinate Judge has considered and which he says is a fraud on the respondent.

The rules laid down by a long series of decisions for the protection of *pardanashin* ladies are well-established and it is unnecessary that I should repeat them. It is with their application that we are concerned, and we have to consider whether or not those rules were observed in the circumstances in which the deed in question was executed. In my opinion, they were not. I have already indicated what the course of events suggests to my mind with reference to the Will. That the appellant was aware of the contents of the proposed Will I have no doubt, nor that his disappointment that it had not been executed was intense. But there was no need for the execution of a deed such as this immediately after the death of the husband of the respondent. There was no dispute and no "family arrangement" was necessary. But immediately her husband had died the respondent was importuned by the appellant and his adherents to execute this deed. That he saw his opportunity when she wanted a considerable sum to be spent in feeding the poor I feel convinced. The business which was the source of her income was in his hands. The Sradh ceremony had to be performed. Whatever her rights may have been money had to be forthcoming at once for the purpose. Accordingly, she agreed to the proposal, thinking that she was but giving effect to her husband's wishes. That she was doing so is extremely doubtful, either on the view taken by the Subordinate Judge as to the draft Will, or in the view to which I incline. But in any event she was entitled to be held by the appellant at arm's length and to receive independent advice and this is the point upon our view as to which the decision of the appeal must depend. There is nothing to show that the respondent ever had independent advice. That a *pardanashin* lady must have independent legal advice is not necessary as an inflexible rule. But what I conceive to be the effect of the decisions is that, excluding those rare cases where the experience and attainments of the lady or the circumstances of the case render advice superfluous, a *parda-nashin* lady must have advice, that the advisor should have no adverse interest, and should be such a person as is capable of explaining to her fully her rights in general and in particular under the document which she intends to sign, if necessary, contrasting them with her rights should the intended document not be executed by her: if the circumstances are such that unless he has a knowledge of law he is not competent to advise her, then and in that case independent legal advice is essential. Considerable argument has been addressed to us on behalf of both parties as to the need for independent legal advice in this case. I am not prepared to say that it was not necessary. But inasmuch as I am of opinion that the lady had no independent advice at all, it is unnecessary to consider that aspect of the matter. All that has been proved, assuming the evidence to be true, is that the document was read to her, for I cannot give any weight to bald assertions that the document was explained without details of what such explanation consisted of. It has not been proved that she was aware what her rights were apart from the document, or that she was giving up any rights for what she obtained. It has been argued by the learned Advocate-General that she knew her rights, and that the discussions with her prior to the execution of the draft establish this. But this I do not think is the case. She was undoubtedly aware that the source of her income was the hardware business in Calcutta, but it has not been established that she knew what her rights were as a Hindu widow either with reference to the business or with reference to the immoveables; or that she knew what she was giving up or what she was to obtain in return or the legal consequences of what she was doing. Yet these were matters of which she was entitled to be and ought to have been made fully cognisant. Who would naturally have been the people to explain matters to the respondent? The document which she was executing was for the benefit of her husband's brother. Ordinarily he would be the person whose duty it would be to protect her interests. In the circumstances she would turn to her own nearest male relatives. These are Kamini and Raj Kumar. But

Kamini hardly comes into the case. It has not been suggested that he took the slightest interest in his sister's affairs and he may be ignored. What was Raj Kumar's position in the matter? He says that he heard about the deed from his sister. He obtained a copy of it from the Registration Office. He says that he brought it and told her that she had been defrauded. Taking those statements as an index to his state of mind in January, how is it to be explained that in March he was entering into negotiations with the appellant for the execution by the respondent of a supplemental deed with reference to which he never consulted his sister at any time? He was a man who, it must be borne in mind, was in debt to the appellant. It would have been a matter for surprise had he advised his sister to execute the supplemental deed. At the same time as he was thus negotiating he was lending his sister his support in her application for a Succession Certificate. His attitude with regard to the supplemental deed and the Succession Certificate cannot be reconciled with his conduct with reference to the deed as soon as he had obtained a copy of it. In May the appellant filed a suit against Raj Kumar respondent who by obtaining an *am-muktearnama* from his sister for the purpose of filing this suit. From that time onwards Raj Kumar sided with the respondent. It is quite impossible to regard Raj Kumar as a disinterested person. So far from being disinterested, I think that it is abundantly clear that throughout the whole period till the 18th May he was actuated solely by self-interest. Raj Kumar is stated by the appellant and his witness to have been present on the various occasions when the matter was discussed with the respondent. In the view that I take of Raj Kumar's connection with and attitude towards this matter, it is quite possible that he was there. But that he was advising his sister and acting in her interests, I do not think is in the least degree probable. So far from that being the case I think that the inference which may very fairly be drawn from the facts and circumstances is that he was furthering the interests of the appellant for his own advantage in the first instance and that he eventually sided with his sister when the institution of the suit for Rs 3,668-4-0 showed him that the appellant was not prepared to treat him favourably. It is impossile, on a view of the evidence most favourable to the appellant, to take the view that Raj Kumar Deoti is a person who can be regarded as an independent adviser of the respondent.

I concur in the order to be made.

B. N. & N. H.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 75 OF 1922.

June 22, 1921.

Present:—Mr. Prideaux, A. J. C.

MAHADEO—DEFENDANT—APPELLANT

versus

KISANLAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 16—Undue influence—Indebtedness, effect of.

The mere fact that a person at the time of entering into a contract is indebted to the other party would not by itself be sufficient to establish undue influence. [p. 530, col. 1.]

Appeal from a decree of the Subordinate Judge, No. 1, Wardha, dated the 29th June 1921, in Civil Suit No. 2 of 1921.

Mr. *M. B. Niyogi*, for the Appellant.

Mr. *D. N. Khare*, R. B., for the Respondents.

JUDGMENT.—The plaintiffs who are Marwari money-lenders sued the minor defendant to recover Rs. 5,680 on account of money due by his father on a money-bond dated 7th June 1917 and subsequent advances. For the defence it was pleaded that though Daulat had dealings with the plaintiffs it is not known to what extent and the plaintiffs were put to proof that the money claimed by them was due. It was further contended that Daulat, the father, was an idiot and could not understand things. Plaintiffs were his creditors and were in a position to dominate his will and had made him execute certain bogus documents. Paragarph 3 of the written statement runs:—

MAHADEO v. KISANLAL.

"The defendant's father Daulat delivered towards the debt 10 Khandis 9 maunds 3 Pansaris of cotton at Rs. 115 per Khandi on 5th April 1917, amount comes to Rs. 1,195-15-3. After the death of Daulat Rao, his servant Tukaram delivered 21 Khandis of cotton at Rs. 212 per Khandi in the month of February 1920. The amount comes to Rs. 4,452."

Thus re-payments of Rs. 5,647-15-3 were claimed.

In reply it was stated that Daulat Rao was intelligent enough to manage his own affairs; it was admitted that 10 Khandis 9 maunds and 3 Pansaris of cotton at Rs. 115 per Khandi was given to plaintiffs on 5th April 1917 but that payment was made before the execution of the bond and was given credit for when the bond was executed. The amount of Rs. 825, the consideration of the bond, was as follows: Rs. 73-7-0 paid in cash; and Rs. 751-9-0 the balance due after deducting the price of cotton on account of Hawala of Rs. 2,031-14-0 of Makta money due from one Balwantrao, Hawala taken by Daulat. As regards the 21 Khandis said to have been given by Tukaram, plaintiffs admit receipt of 21 Khandis on three different dates on account of one Yadavrao, the sister's son of Daulatrao. Yadavrao deposited this cotton as a security for the payment of Rs. 2,550, the lease money for which Daulatrao stood security. The price of the cotton was not settled. It was denied that the bond sued on and the Kabulihisabs were vitiated by undue influence.

The case went to trial on the following issues:

"(1) Did Daulat execute the bond dated 7th June 1917 for Rs. 825?

"(2) If the execution of the said bond be proved, whether it was without consideration and vitiated by undue influence? Is it not binding on defendant for reasons stated by him?

"(3) Did plaintiffs advance the items of cash and cotton seed alleged in schedule 1 attached to the plaint, to Daulat?

"(4) Did Daulat take Hawala in respect of the following items mentioned in schedule 1 of the plaint.

Rs.	A.	P.
1,031	15	0
493	5	0
and 2,440	5	0

"(5) Did Daulat agree to pay interest at one rupee per cent. per mensem on the items of cash, cotton seed and Hawala?

"(6) Did Daulat execute the Kabulihisabs dated 14th March 1918 and 6th June 1919? Are they vitiated by undue influence? Is the claim in respect of the items of 1917 within time?

"(7) Did Daulat's servant Tukaram deliver 21 Khandis cotton at Rs. 212 per Khandi to plaintiffs in February 1920, towards the debt sued for?

"(8) Is the defendant entitled to claim credit for the payment of 10 Khandis 9 maunds 3 Passeris cotton at Rs. 115 per Khandi as a re-payment towards the debt sued for?

"(9) What amount are the plaintiffs entitled to?"

The findings of the Trial Court may be summarised thus. It was proved that the bond of 7th June 1917 was executed by the deceased Daulat. It was not without consideration and was not vitiated by undue influence and was binding on the defendant. The third, fourth and fifth issues were found in the affirmative. Daulat was found to have executed the two Kabulihisabs in suit which are not vitiated by undue influence and the claim in respect of the items of 1917 is within time. Dealing with the subject matter of the 8th issue the Judge finds that it was taken into account in making up accounts prior to the execution of the bond sued on. With regard to the alleged payment of 21 Khandis of cotton the Judge holds that Yadavrao had executed a Kabuliyat in plaintiffs' favour for Rs. 2,550 for which Daulat stood surety. The Judge writes:—

"I am satisfied that Daulat was virtually plaintiffs' tenant when the land was ostensibly leased to Yadavrao, that Daulat himself cultivated the land, and not Yadorao that Daulat was responsible for payment of rent and that the lease was a *benami* (not nominal in the sense of sham) transaction, Yadorao being a mere *benamidar*, and Daulat being the real lessee."

It was Daulat's servant who gave the 21 Khandis cotton to the plaintiffs' servant. The cotton was found to have been delivered not as a re-payment towards the debt now sued for but as a payment towards rent for which Daulat stood surety and

the price of cotton would, therefore, first go towards such rent and any balance for debts due by Daulat. The cotton was found to be of the value of Rs. 139 per Khandi coming to Rs. 2,919, thus exceeding the amount of rent by Rs 369. This amount, it was held, plaintiffs were bound to give credit for in the present suit, as it was in the nature of a deposit with them in Daulat's favour. They received this at the end of February 1920 and plaintiffs are liable to credit interest thereon at 1 per cent. per mensem up to 25th January 1921, the date of the institution of the suit, this amounts to Rs. 40-1-0. The suit resulted in a decree for Rs 5,270-15 0 being passed with proportionate costs. The present appeal is filed by the defendant.

The first ground in the memorandum of appeal to the effect that the contracts between Daulat and the plaintiffs were vitiated by fraud has not been seriously pressed, though it is argued that looking to the connection of the parties the onus of showing that the plaintiffs did not exercise undue influence over Daulat rests on them. Section 16 of the Contract Act Illustration (*c*) is appealed to. The terms of the contract in suit do not seem to be specially onerous. Daulat was unquestionably the plaintiffs' debtor but that fact alone would not establish undue influence. It is admitted that the case is more of suspicion than of undue influence. Though there is some evidence to show that Daulat used opium, I am not prepared to place reliance in the defence evidence that he was always drugged. Yadavrao (D. W. No. 2) who states this admits that Daulat was able to give orders to his servants and to see that they were carried out. Ramkrishna (D. W. No. 3) who was in Daulat's service states that his late master was eccentric but he explains this by saying that he meant that Daulat lived as he liked and was not influenced by others. Deosa (D. W. No. 4) who was a servant of Daulat for six years speaks to his late master being addicted to opium and being eccentric. I no not think that it has been shown that Daulat was not able to manage his own affairs and there is no force in this contention of undue influence.

The second point raised in appeal is as regards the 10 Khandis of cotton given before the execution of the bond. Hawala for Rs 2,050 is admitted and there is no evidence to rebut the plaintiffs' story that the value of this cotton was taken into account at the time of the execution of the bond. The evidence of Gopal (P. W. No. 2) shows that Daulat admitted the Hawala account, and Ramkisan (P. W. No. 4) who manages the plaintiffs' shop at Urvi speaks to this account also. There seems no reasonable doubt that this Hawala account was acknowledged by Daulat and gone into before the execution of the bond. This would naturally be done before the bond was executed. In my opinion, the finding of the first Court on this point is correct.

The third and last point raised in appeal is with regard to 21 Khandis of cotton. It is contended that the value of this cotton should have been credited to Daulat's personal account and not to the Hawala or surety debt. The evidence shows that this cotton was given to plaintiffs not by Daulat himself but by Yadavrao, his relative and the ostensible lessee of certain fields from the plaintiffs. There is no force in the argument that because Daulat did not specify to which debt this money was to be appropriated and because the plaintiffs also did not expressly appropriate the money to any certain debt it should go towards the older debts, namely, Daulat's own debts. There is no reasonable doubt that the cotton was deposited, as the evidence shows, with the plaintiffs by Yadavrao on account of the lease money due by him, lease money for which Daulat also had made himself responsible. The lower Court has criticised at some length the evidence which led it to believe that Daulat was in truth the real lessee of the land for the rental of which these 21 Khandis of cotton were deposited with the plaintiffs. I have considered that evidence and find myself unable to differ from the Judge of the Court below on this point. The rate of that cotton had not been settled; but that it was expressly put with the plaintiffs to satisfy their claim for lease money due really by Daulat the circumstances of the case fully show. The balance after satisfying the lease money has been given by the Court below to defendant's account. Interest has been allowed by the Court on the value of the

21 Khandis of cotton and thus there is no force in the 5th ground of the memorandum of appeal.

Taking the case as a whole I see no reason to differ from the results arrived at by the Sub Judge. The result is that this appeal fails and is dismissed with costs. The appellant will pay the respondent's' costs.

G. R. D.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 112 OF 1920.

March 2, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Cuming.

RAMESH CHANDRA SIRKAR

—JUDGMENT DEBTOR—APPELLANT

versus

MOHIM CHANDRA GUHA DEB BARUA

—RESPONDENT.

Costs—Question of principle—Second appeal.

When the question is one of principle a second appeal lies to the High Court on the question of costs only. [p. 601, col. 1.]

Bunwari Lall v. *Chowdhry Drup Nath Singh*, 12 C. 179; 6 Ind. Dec. (N. S.) 122.

Appeal against the order of the Subordinate Judge, Second Court, Chitagong, dated the 29th January 1920, reversing that of the Munsif, Second Court at Patiya, dated the 7th September 1918.

Babu *Probodh Kumar Das*, for the Appellant.

Babu *Chandra Sekhar Sen*, for the Respondent.

JUDGMENT.—The facts necessary for the disposal of this appeal are as follows: The appeal arises out of orders passed in execution proceedings. On the 23rd of February 1918 the Munsif before whom the application was pending passed an order directing a Commissioner to be appointed and further directing that the costs of the application would be borne by the decree-holder. Then, on the 4th of May 1918, after the Commissioner had delivered possession, an order was passed on the following terms: "case disposed of with costs to the decree-holder." Against this order an application for review was made which was disposed of by Order No. 25, dated the 7th of September 1918. By that order, another Munsif who succeeded the one who had passed the former orders held that Order No. 16, dated the 4th of May 1918, above referred to, had been passed through oversight. He granted the review and directed that the portion of the said Order No. 16 dated the 4th May 1918, relating to costs should stand cancelled. Against this order, an appeal was preferred to the Subordinate Judge. The Subordinate Judge treated it as an appeal against an order disallowing costs to the decree-holder and held on the merits that the decree-holder was entitled to his costs. He accordingly decreed the appeal and directed that the order disallowing costs should be reversed and the decree holder should get the costs amounting to Rs. 60.

The first question that has to be considered is whether a second appeal lies to this Court. The first contention is that the appeal to the lower Appellate Court was an appeal against an order granting an application for review and that, consequently, under O. XLIII, r. 1, clause (*w*), Civil Procedure Code, an appeal lay to Subordinate Judge, but under section 104 of the Code, no appeal lay from that appellate order. But the Subordinate Judge who heard the appeal did not deal with it as an appeal from an order passed on review but as an appeal from an order made after the review was granted. The order of the Munsif of the 7th of September 1918 really consists of two separate orders. He first grants a review of Order No. 16 dated the 4th May 1918 and then in reviewing that order he restores the Order No. 6 dated the 23rd of February, 1918. The second of these orders must be held to have been passed under section 47 of the Code and was, therefore, appealable as a decree. It is contended that the order must be held to have been passed under section 35 and not under section 47. Section 35 gives directions as to the ordering of costs, but we think that the award of costs depends finally on section 47 and that the provisions of section 35 are supplementary. It has been held by this Court that when the question is one of principle, as in the present case, a second appeal lies to the High Court on the question of costs only: *Bunwari Lall* v. *Chowdhry*

Drup Nath Singh (1) and we accordingly hold that this appeal is competent.

On the merits, we think that the appeal must succeed. The learned Subordinate Judge in dealing with the matter has gone into the question not as to the correctness of the order appealed against but as to the correctness of the Original Order No. 6 which was passed on the 23rd of February 1918. As we read the order appealed form, the Munsif held that that order, No. 16 dated the 4th of May 1918, was passed by indavertence, and there, we think, he was right. Had the Munsif at the time of passing this order intended to override his previous order, he would have certainly referred to it and given his reasons for so doing. He would not have passed this order in this form unless his previous order had been overlooked. Once the Order No. 16 dated the 4th of May 1918 was set aside, the question as to costs was a matter of *res judicata* which had been decided by Order No. 6 and as long as that order stood, the Munsif was bound to give effect to it and refuse the decree-holder his costs in accordance with that order. When the case came up to the Subordinate Judge on appeal, that Order No. 6 dated the 23rd of February 1918 was still in force and until that was set aside, the decree-holder could not recover his costs. We accordingly hold that the order of the lower Appellate Court was wrong. We decree this appeal, set aside the order the of lower Appellate Court and restore that of the Court of first instance. The appellant will get his costs in this Court and in the lower Appellate Court. In this Court we assess the hearing-fee at one gold *mohur*.

R. N.

Appeal allowed.

(1) 12 C. 179; 6 Ind. Dec. (N. s) 122.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 2 OF 1922.

July 13, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

ABDUR RAHMAN—APPELLANT

versus

WALI MOHAMMAD—RESPONDENT.

Muhammadan Law—Widow in possession of husband's property in lieu of dower-debt—Right to transfer lien apart from dower-debt—Construction of sale-deed—Transfer of dower-debt.

A Muhammadan widow in possession of her husband's estate in lieu of her unsatisfied dower cannot transfer the lien on the property without also transferring her dower-debt as the lien is not an interest in property which can be severed from the right to dower and transferred as a separate interest. [p. 603, col. 1.]

The widow may, however, as long as she does not transfer the dower-debt or that debt remains undischarged, transfer for her lifetime, the possession of the property the proceeds of which belong to her until the debt is paid off. The possession of the transferee in such a case might constructively be regarded as the possession of the widow. [p. 603, col. 1.]

Beeju Bee v. *Syed Moorthiya Sahib*, 53 Ind Cas. 905; 43 M. 214; 37 M. L. J. 627; 26 M. L. T 419; 11 L. W. 150 (F B), referred to.

A sale-deed executed by a Muhammadan widow after reciting that the widow was in possession of the property of her deceased husband, "by virtue of inheritance and in lieu of dower" purported to transfer to the vendee, "the whole and entire property owned and possessed by me together with all rights and appurtenances;" It further added, "In short, the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale-deed been transferred from me and become extinguished in so far as I am concerned and have devolved on and vested in the said purchaser and his heirs and representatives":

Held, that the deed transferred simply the share to which the widow was entitled in the property of her deceased husband as an heir and not the dower-debt [p. 602, cols. 1 & 2.]

Maina Bibi v *Wasi Ahmad*, 51 Ind. Cas. 242; 17 A. L. J. 529; 1 U. P. L. R. (A.) 166; 41 A. 538, referred to.

Letters Patent Appeal from a decision of Mr. Justice Bucknill, dated the 14th December 1921, reported as 65 Ind. Cas. 224.

Mr. *M. Ishfaq*, for the Appellant.

Mr. *S. M. Tahir*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal under the Letters Patent on behalf of Sheikh Abdur Rahman, the second defendant in the suit, against a decision of Mr. Justice Bucknill, dated the 14th December last.* The plaintiff, Sheikh Wali Mahommed, and the first defendant, Sheikh Ezid Baksh, are brothers and the appellant, the second defendant, is the son of Sheikh Ezid Baksh. The suit was instituted before the Munsif of Sassaram in January 1918 claiming possession of a 6 annas share in the estate of his deceased brother, Sajjad Hussain, to which

* *See* 65 Ind. Cas. 224.—[*Ed.*]

he was entitled as one of his deceased brother's heirs subject to the widow's right to retain possession as security for her unpaid dower. Sajjad Hussain, the elder brother of the plaintiff and the first defendant, died in 1899 leaving surviving him his widow, *Musammat* Kabiran, and his two brothers. His widow whose unpaid dower debt is said to amount to Rs. 4,000 was left in possession of the estate of her deceased husband holding it in lieu of dower, as she was admittedly entitled to do, until, out of the profits of the estate, her dower-debt had been discharged. The estate was a small one and we are not told what the net annual profits arising therefrom amounted to. It is not suggested, however, that the debt, at the date of that lady's death in 1911, had been discharged. On the 15th October 1900 *Musammat* Kabiran transferred to the appellant the whole of her interest in her deceased husband's estate. As one of his heirs she was entitled by inheritance to a quarter share in that estate and this she could undoubtedly transfer. The document, however, purports to transfer, in one place at all events, the whole of the interest which had come into her possession from her deceased husband and sets out in detail the properties, which, it is agreed, included the whole of her husband's estate. It recites that the donor has been in possession of the estate by virtue of inheritance and in lieu of dower-debt, and that she wishes to give away all her properties in her lifetime to the donee, subject to her right of maintenance during her lifetime, which she reserves at the rate of Rs. 60 per annum which is to be a charge on the property. It then purports to sell without reserving the right of cancellation "the whole and entire property owned and possessed by me together with all rights and appurtenances, for a consideration of a monthly allowance of Rs. 5, amounting to Rs. 60 per annum, with effect from to-day up to my death. I have, by making over this deed of sale to the vendee, put him in possession of the vended property as absolute proprietor in my place." It subsequently adds: "In short, the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale-deed been transferred from me and become extinguished in so far as I am concerned and have devolved on and vested in the said purchaser and his heirs and representatives." It is not absolutely clear from this document whether the vendor intended merely to transfer her own interest in the property, that is, the quarter share which she acquired by inheritance, or whether she intended to transfer the whole of the interest of her husband of which she was then in possession. But, whatever her intentions may have been, it is clear, and cannot be disputed, that she had no power of disposition over the property beyond the quarter share to which she was entitled by inheritance and to this extent alone could the transfer of the property be valid.

Both the learned Munsif and the learned Subordinate Judge, before whom the case came on appeal, took the view that the widow had no right to transfer the property beyond the extent of her own vested interest, *viz.*, a quarter share and that, although she was in possession of the remainder in lieu of dower, she could not transfer the remainder or even the possession thereof so as to be binding after her lifetime without also transferring her right to dower. The learned Munsif, however, considered that the plaintiff's right to sue accrued in 1900 when the deed was executed and the donee was put in possession, and that, therefore, the suit which was instituted more than 12 years after that date was barred by limitation. The learned Subordinate Judge, on the other hand, came to the conclusion that the plaintiff's right to sue for possession did not arise until the widow's death in 1911, and that the suit having been brought within 12 years of that date was not barred.

On appeal to this Court, Mr. Justice Bucknill took the same view as the learned Subordinate Judge and dismissed the appeal.

It does not appear to have been argued, either in the Trial Court or before the Subordinate Judge on appeal, that the conveyance by the widow transferred to the appellant her dower debt. It was, however, argued before Mr. Justice Bucknill and the argument has been repeated before us in this appeal, that, on a proper construction of the document, the dower-debt must be taken to have been transferred. It was also contended that, even if the dower-debt was not

P. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

in fact transferred, the widow had a lien or charge upon the property as security for the enforcement of the debt which she could transfer not only during her lifetime but even so as to enure for the benefit of the transferee after her death. The learned Judge, whose judgment is now under appeal, carefully considered these questions and decided them against the appellant. In my opinion, his decision was right. Although the instrument of transfer recites that the widow is in possession both by virtue of inheritance and in lieu of dower-debt, it purports only to transfer the proprietary interest and all rights, title and interest which the vendor had in the vended properties. There is not a word, from first to last, relating to any transfer of her dower-debt and I am unable to construe the document as purporting to transfer the dower-debt. Nor, in my opinion, was it possible for her to transfer the lien on the property so as to be binding after her lifetime without transferring also the dower debt. The lien on the property which gives the widow the right to possession until the debt has been discharged is not, in my opinion, an interest in property which can be severed from the right to dower and transferred as a separate interest. It is a right to the possession of the property by the person entitled to be paid the dower as long as the debt is not discharged either by the income from the property or by payment by the heirs or others interested in discharging the debt. It certainly gives the widow the right to possession and it may be assumed, I think, that, as long as she does not transfer her dower debt and that debt remains undischarged, she may transfer, for her lifetime possession of the property the proceeds of which belong to her until the debt is paid off. The position of the transferee in such a case might be regarded as constructively her possession, and, in this sense, it would not be severed from the dower debt. Just as she could dispose of the proceeds in any way she chose during her lifetime and until the debt was discharged, so also I apprehend she could transfer possession of the property in the same circumstances, the transferee being entitled to the usufruct. But if she should transfer the dower-debt or if she should die and her estate devolve upon her heirs or assignees, the transferee's right to possession would be extinguished, as the debt and the security cannot be severed, thereby converting the security into a separate interest in the property. It would appear, therefore, that even if the instrument in question purported to transfer to the appellant possession of the property forming the security for the debt this would not enure to the benefit of the transferee after the widow's death when the dower-debt passed to her heirs. The possession of the donee, in such a case, must, I think, be regarded as constructive possession of the widow. It is not an interest in property which is capable of absolute transfer. In any view of the case, therefore, in my opinion, the decision under appeal, upon this point, cannot be assailed.

It remains to consider the question of limitation. It is found as a fact, and cannot now be disputed, that the appellant was in actual possession of the whole of the property. He contends that from the moment he obtained possession, in the year 1900, his possession was adverse to that of the plaintiff who cannot, after more than 12 years had elapsed, be held to assert his right to the property. The plaintiff, no doubt, knew that the defendant was in possession but he was not entitled to possession himself as long as the widow was alive and the debt remained undischarged. It is not suggested that the debt was discharged during the widow's lifetime. Had the plaintiff sued for possession before 1911, when the widow died, the appellant would have had a complete answer to such a suit. He was in possession of the property with the consent of *Musammat* Kabiran, the only person at the time entitled to possession and the cause of action, which the plaintiff now seeks to enforce, had not at that time arisen and did not arise until after her death in 1911.

A further point, however, was taken by the appellant which must be considered. On the assumption that the widow retained her dower debt and did not transfer it to the appellant, he argued that the right to the dower debt does not belong to the plaintiff but to *Musammat* Kabiran's heirs. It is not shown, however, that *Musammat* Kabiran left any heirs and, in the absence of such, the plaintiff, as the heir of her deceased husband, has a

better title to his 6-annas share in the property than the appellant who has no title at all.

A further point which does not appear to have been suggested before was that in any case the Crown would be the ultimate heir to *Musammat* Kabiran. It is not shown, however, in this case that the Crown, even if the point is one which is sustainable, had any better title than the present plaintiff and in these circumstances it seems to me that there is no force in this argument. In my opinion this appeal should be dismissed with costs.

MULLICK, J.—In my opinion there are only two points of any substance in this appeal. The first is the construction of the deed of transfer by *Musammat* Kabiran in favour of Abdul Rahman. Both Courts below have found that the document was a deed of sale for consideration, and that what the widow transferred was neither her dower debt nor the right to retain possession of the estate of her deceased husband as security for that debt but her interest in the property as proprietor of that estate which admittedly includes the three-eighths share claimed by the plaintiff.

Now, it is admitted that it is the plaintiff who is the sole proprietor of that three eighths share by right of inheritance and that *Musammat* Kabiran had no proprietary interest in it, and that if she did not sell her dower debt together with the right to possession of the property as security, then the plaintiff has a good title against her transferee.

The Munsif, however, found that the transferee came into possession in 1900 immediately upon the sale and was in adverse possession as against the plaintiff from that date. The Munsif has accordingly dismissed the suit on the ground that the suit has not been brought within 12 years of the date from which possession became adverse.

The Subordinate Judge agrees with the Munsif as to the construction of the document but not as to the question of the limitation. He is of opinion that as the plaintiff was not entitled to eject the transferee during the lifetime of the widow, the possession of the latter could not have been adverse to him and that, therefore, limitation began to run only from the date of the widow's death which took place in 1911. He finds that the suit having been instituted in 1918, it was within time and he has given a decree to the plaintiff in respect of the disputed share.

That judgment was affirmed by Mr. Justice Bucknill and there can be no doubt that his construction of the deed of sale is correct. Except in the preamble, which states that *Musammat* Kabiran is in possession of her husband's estate by right of inheritance and in lieu of dower debt, there is no mention in the document of the dower debt. Throughout the transferor purports to transfer her proprietary interest in the whole and entire estate of her husband together with all rights and appurtenances. She sums up the effect of her dispositions in the following words :—"In short the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale deed been transferred."

It is contended on behalf of the appellant that the words of transfer are perfectly general and must be construed as meaning that it was intended to include not only a proprietary interest in the land in suit, which she thought she possessed but which it is now admitted she did not, but also the dower-debt and the right to retain possession till it was paid. In my opinion, this contention cannot be accepted. In *Maina Bibi* v. *Wasi Ahmad* (1) their Lordships of the Allahabad High Court had to construe a deed of gift of which the terms were very similar, and it was argued in that case that the greater right includes the lesser and that if the transferor had no right of ownership in the property, she at least had the right to retain possession of it and she should be taken to have transferred that right. The recital in that deed stated that the widow was in possession by virtue of two separate titles: the first was in lieu of dower and the second by virtue of a former decree under which, the heirs of her deceased husband having failed to pay her dower debt within the time appointed by the Court, she claimed to have become absolute owner. Their Lordships declined to accede to the contention that because she transferred the whole property believing herself to be the owner of

(1) 51 Ind. Cas. 242; 37 A. L. J. 623; 1 U. P. L. R. (A.) 106; 41 A. 538.

it, she should, in the absence of clear and definite words, be taken to have transferred also her dower debt and her right to retain possession.

In the present case the conditions are similar and I, think, it will be wrong without express words indicating an intention to transfer the dower debt to assume that the debt was also transferred.

The right of a Muhammadan widow to retain the possession of her husband's estate in lieu of dower has been sometimes described as a lien and sometimes as a charge. Strictly speaking, it is neither, but it is agreed that she has a right to transfer the debt coupled with the security and that the transfer will be binding upon her co-heirs till they discharge the debt. She may also during her lifetime transfer the right of possession apart from the debt, but that is a matter between herself and her transferee and the transfer will not be binding upon the co-heirs after her death. That is the meaning of the proposition that a Muhammadan widow in possession of her husband's estate in lieu of unsatisfied dower cannot alienate the estate. This view of the law is in accord with the decision of the Full Bench in *Beeju Bee* v. *Syed Moorthiya Sahib* (2) and in my opinion the defendants in the present suit have no answer to the plaintiff's claim.

The second point in the case relates to the question of limitation. Now, the onus of proving adverse possession for more than 12 years is clearly upon the defendants; the plaintiff was obviously not entitled to take possession during the widow's lifetime and there is no evidence that when the transferee took possession in 1900 the plaintiff had any notice that he was claiming to hold adversely to him.

The Munsif finds that possession became adverse from the moment of the transfer but that finding has been set aside by the Subordinate Judge and in second appeal upon the facts found no case of adverse possession arises.

It was finally contended that the widow's heirs, and, perhaps remotely, the Crown may have a right to resist the plaintiff's possession, but such a case was not made in the Courts below and cannot be inquired into at this stage. On the findings there is nothing to show that any one has at present a better right than the plaintiff.

The appeal should, therefore, be dismissed.

N. H.

Appeal dismissed.

(2) 53 Ind. Cas. 905; 43 M. 214; 37 M. L J. 627; 26 M. L. T. 419; 11 L. W. 150 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 50 OF 1922.

August 29, 1922.

Present:—Mr. Hallifax, A. J. C.

BALAJI—PLAINTIFF—APPLICANT

versus

SUKAMIYA—DEFENDANT—NON-APPLICANT.

Contract Act (IX of 1872), s. 74—Penalty, nature of—Damages for breach of contract stated in agreement—Damages, award of.

A penalty clause in a contract providing for the payment of a fixed sum of money by the person committing a breach of the same should not be looked upon as a mere *brutum fulmen*, an agreement that neither party had any intention of enforcing at all to any extent. The object of such a clause is to fix a maximum for damages which would be difficult to estimate in money. Therefore, even if a Court is not disposed to enforce such a clause this would not deprive the aggrieved party of his right to damages that he has actually suffered. [p. 606, cols. 1 & 2.]

Ballabhdas v. *Paikaji*, 38 Ind. Cas. 915; 12 N. L. R. 177, referred to.

Application for revision of the order of the Judge, Small Cause Court, Nagpur, dated 8th December 1921, in Small Cause Court Suit No. 1724 of 1921.

Messrs. *P. B. Lobo* and *S. C. Dutt Chowdhary*, for the Applicant.

Mr. *S. R. Mangrulkar*, for the Non-Applicant.

JUDGMENT.—The defendant promised to sell his absolute occupancy land to the plaintiff for Rs. 1,900 by 15th March 1921 and paid Rs. 400 by way of earnest money. He agreed that if he made default he would

re-pay the Rs. 400 and also would pay Rs. 500 by way of damages. He failed to complete the sale, though the plaintiff was both ready and willing to carry out his part of it, and eventually did buy the land on 12th August 1921 for Rs. 2,000 at a Court sale in execution of his own decree. In this suit he claimed Rs. 900 by way of damages for the breach of contract. He has been given a decree for Rs. 400 with interest for the time that amount has been with the defendant, but refused anything more, on the ground that the sum of Rs. 500 which the defendant agreed to pay was a penalty. The idea is very common that what is called a "penalty clause" in a contract is a mere *brutum fulmen*, an agreement that neither party has any intention of enforcing at all to any extent. Such an agreement would certainly not be mentioned in the Contract Act, and in fact would not be agreement at all. A penalty clause merely fixes a maximum for damages which would be difficult to estimate in terms of money, and anyhow does not deprive the aggrieved party of his right to damages that can be so estimated.

(2) In this case, the plaintiff has clearly proved that he has suffered a loss of Rs. 100 in having to pay Rs. 2,000 for the property instead of Rs. 1,900 and a loss of the value of the *kotha* which was included in the property to be sold for Rs. 1,900 but not in that sold for Rs. 2,000. In this Court the defendant himself admitted the value of that *kotha* to be twenty-five or thirty rupees and, in the circumstances, that can be taken as a very clear indication that its value is at least Rs. 100 even if it is not worth Rs. 250 as the plaintiff says it is. There is also the twenty annas that the plaintiff had to pay in order to get a refund of the value of the twenty-rupee stamp he bought for the sale-deed. The actual value of the land may well be over Rs. 2,000 as the full price is seldom obtained at a forced sale, and the Collector seems to have fixed the fair price at Rs. 2,000 mainly if not entirely on the statement made by the plaintiff that he had agreed to buy it for Rs. 1,900. Anyhow special and actual damage to the extent of over Rs. 130 has been proved, and it is obviously impossible to deprive the plaintiff of that merely because he agreed that the liquidated damages should not exceed Rs. 500.

(3) But it seems to me to have been too lightly assumed that the payment of Rs. 500 as damages to which the defendant agreed was by way of a penalty, that is to say, that the parties agreed that that sum should be the maximum payable as damages, and did not agree that it was to be paid in full without further question if the defendant broke the contract. There is a very strong indication of the intention of the parties in regard to the damages recoverable by the plaintiff in case of breach of the contract by the defendant, in what is agreed on all sides to have been their intention in regard to the damages to be recoverable by the defendant in case of breach by the plaintiff. It has throughout been accepted by everybody that if the plaintiff broke the contract the defendant would be entitled to retain the Rs. 400 paid to him as earnest money, and section 74 of the Contract Act applies to the agreement in regard to the earnest money as much as to the agreement in regard to the Rs. 500 as was held in *Ballabhdas* v. *Paikaji* (1). If it really was the intention of the parties that the damages payable to the defendant in cases of breach by the plaintiff were to be Rs. 400 without further question as to the amount, then the inference would be inevitable that the parties also agreed that the damages payable to the plaintiff in case of breach by the defendant were to be Rs. 500 and no more and no less.

(4) But I do not accept the defendant's contention that on breach of the contract by the plaintiff he would have been entitled to retain the whole of the Rs. 400 without further question as to the amount of damages he had suffered. He would clearly have been entitled to retain only so much of it as would give him reasonable compensation. So also the plaintiff can claim reasonable compensation up to a limit of Rs. 500 for any loss he has suffered, and in the circumstances it appears that the whole of the Rs. 500 would be more than reasonable, as he did get nearly all the property he wanted not many months later. But, as has already been shown, he suffered an actual demonstrable loss of not less than Rs. 131-4-0 by the default of the defendant, and in view of the practical certainty that the defendant's admission of the value of the *kotha* in this Court is a hopeless understatement it can fairly be

(1) 38 Ind. Cas. 915; 12 N. L. R. 177.

said that he has proved actual damage to the extent of Rs. 200.

(5) But he has undoubtedly suffered further loss of which the exact extent cannot possibly be proved, and it is just this kind of damage that the agreement to pay Rs. 500, or some reasonable sum not greater than Rs. 500, is meant to cover. This from its nature can only be assessed in a round sum, and I consider, having regard to all the circumstances of the case, that the payment of a sum of Rs. 300, which includes the extra price he had to pay for the land and also the value of the *kotha*, would be reasonable compensation to the plaintiff for the loss caused to him by the default of the defendant.

(6) There seems no particular reason for allowing any interest on this sum for the short period between the breash and the filing of the suit, but interest at the rate allowed on the Rs. 400 should certainly be paid on the whole amount decreed from the date of suit till actual payment is made. The decree of the lower Court is, therefore, modified by the substitution of Rs. 713-5-4 for Rs. 413-5-4 as the amount the defendant is to pay to the plaintiff and the addition of an order that the defendant shall pay interest at the rate of 1 per cent. per mensem on Rs. 713-5-4 from 25th June 1921, the date on which the suit was instituted, till payment is actually made. The defendant will also pay the whole of the costs of the suit and also those of these proceedings, in which Rs. 15 will be allowed as Pleader's fee.

N. H.

Decree modified.

CALCUTTA HIGH COURT.

CIVIL RULE No. 640 OF 1921.

February 27, 1922.

Present :—Mr. Justice Greaves and Mr. Justice Ghose.

Sm. AMULYA SUNDARI DASSYA—PLAINTIFF—PETITIONER

versus

SYAMA SUNDAR SAHA AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O XXV, r. 3—Suit for dissolution of partnership, for accounts and for recovery of plaintiff's stridhan *property, if suit for payment of money.*

A suit for dissolution of partnership, for accounts and for recovery of the plaintiff's *stridhan* property is not a suit for payment of money within the provisions of O. XXV, r. 3 of the Code of Civil Procedure

Rule against an order of the Sub-Judge, Fifth Court, Dacca.

FACTS appear from the judgment.

Babu *Gopal Chandra Das*, for the Petitioner.

—The plaintiff is the petitioner. The plaintiff brought a suit for dissolution of partnership and for accounts and also for the recovery of the *stridhan* properties as heiress to her deceased husband. The partnership firm deals in the purchase and sale of rice on wholesale scale and its assests consist in both moveable and immoveable properties. The suit was filed in the Court of the Fourth Subordinate Judge in September 1920. In October 1920 the defendants filed an application praying for an order calling upon the plaintiff to furnish security for costs but did not press it. In the meantime the parties cited witnesses, filed their documents, issues were settled and when the suit became ripe for hearing it was transferred to the file of the Fifth Subordinate Judge. Thereafter by a fresh affidavit in July 1921 they pressed their application for security. And on the 30th July 1921 the learned Subordinate Judge directed the plaintiff to furnish security for costs of the defendant. It is against that order that the present Rule is directed. My submission is that the application for security of costs is *mala fide* as it is quite obvious from their attitude. They had made a previous application soon after the institution of the suit. But they did not press it which they should have done if they really had any *bona fide* grounds

or that application. My next and the principal contention is that the suit not being a suit for money the Court below had no jurisdiction to order for security for costs under O. XXV, r. 1 (3) of the Code of Civil Procedure. My suit is not one for money. It is a *bona fide* one for my own benefit and not for the benefit of anybody else. I submit the section is clear. The properties consist of both moveable and immoveable properties. I submit O. XXV, r. 1 (3), Civil Procedure Code, does not apply. The order of the learned Subordinate Judge is bad in law and he had no jurisdiction to make it.

Dr. *Sarat Chandra Basak* (with him Babu *Nabadwip Chandra Saha*), for the Opposite Parties—I submit the present suit clearly falls within the scope of O. XXV, r. 1 (3), Civil Procedure Code. In the prayer clause of the plaint, the plaintiff *inter alia* asked for (*a*) ascertaining the amount due to the respective parties after adjustment of accounts and passing a decree in favour of the plaintiff for the sum thus due to her, (*b*) passing a decree for the *stridhan* and moveable properties described in schedules 3 and 4 on value thereof by way of damages amounting to Rs. 2,694, and (*c*) a decree for the money due after taking account of the loan business. From the reliefs she thus prays for it is quite clear that the suit is for the payment of money. Hence it comes under the purview of O. XXV, r. 1 (3), Civil Procedure Code. Refers to *Sonabai* v. *Tribhowandas Narotamdas* (1). That case is on all fours with the present case. There all the authorities on the point have been discussed. Then as regards the other point that our application is *mala fide* and ought to have been pressed earlier, I submit under O. XXV, r. 1 the application may be made at any stage of the suit. Merely because we fail to press it earlier would not make our application a *mala fide* one. Refers to *Debendra Narain Singh* (*Sinha*) v. *Narendra Narain Singh* (*Sinha*) (2).

Babu *Gopal Chandra Das* replied in brief.

JUDGMENT.—This Rule was granted at the instance of the plaintiff, who is a widow, to vacate the order of the Subordinate Judge directing her to give security for costs in a sum of Rs. 500. The suit is for dissolution of partnership, for accounts and for recovery of the plaintiff's *stridhan* property. The only question that arises for our consideration in this Rule is whether this is a suit for payment of money within the provisions of O. XXV, r. 3, Civil Procedure Code. Apart from the partnership, properties consist of immoveable properties. On behalf of the opposite party it is stated that any decree that results in the plaintiff's favour must be a decree for money and that, consequently, the suit must be deemed to be one for payment of money within O. XXV, r. 3, Civil Procedure Code. There is no doubt that in this Court a suit for ornaments has been held to be a suit for money within the meaning of O. XXV, r. 3. We have also been referred to the case of *Sonabai* v. *Tribhowandas Narotamdas* (1) where it was held that a suit by a widow claiming to be a reversionary heir was a suit for money within the sub-section even though some portion, a smaller portion of the claim, was in respect of moveables. Now, we have looked into the other decision which was referred to in the judgment of the First Court in that case and Sir Lawrence Jenkins, in delivering the judgment of the suit, stated that the suits before him were not exclusively for money but would, each, result in a decree for money on the relief sought. But even so, we do not think that the present suit falls within the sub-section, which involves the taking of partnership accounts, dissolution of partnership and so on. I can quite understand where the main claim is one for money and other relief is only incidentally sought that a Court may come to the conclusion that the suit is one for money within the meaning of the sub-section. But speaking for myself, I am not inclined to extend the sub-section so as to cover a suit of the nature of the present suit. In the result, we think that the suit does not fall within O. XXV, r. 3 and that it is not a suit for payment of money. The order of the Subordinate Judge is, accordingly, discharged with costs—hearing fee two gold *mohurs*.

B. N.

Rule discharged.

(1) 32 B. 602; 10 Bom. L. R. 337.

(2) 54 Ind. Cas. 636 at p. 641; 24 C. W. N. 110 at p. 116; 30 C. L. J. 417.

KALLU v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION APPLICATION No. 745 OF 1921.

December 5, 1921.

Present:—Mr. Justice Harrison

KALLU—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 435—District Magistrate as Court of Appeal, whether inferior to Sessions Judge.

A District Magistrate sitting as a Court of Appeal is an inferior Criminal Court to the Sessions Court for the purposes of section 435 of the Criminal Procedure Code. [p. 611, col. 1.]

Khamir Sheikh v. *Emperor*, 14 C. W. N. ccvi, *Shib Das* v. *Emperor*, 21 Ind. Cas. 899; 335 P. L. R. 1913; 40 P. W. R. 1913 Cr.; 14 Cr. L. J. 659, *Queen-Empress* v. *Laskari*, 7 A. 853 (F. B.); A. W. N. (1885) 257; 4 Ind. Dec. (N. S.) 925, *Jalloo* v. *Emperor*, 15 P. R. 1904 Cr.; 131 P. L. R. 1904; 1 Cr. L. J. 1063, *Opendro Nath Ghose* v. *Dukhini Bewa*, 12 C. 473 (F.B.); 6 Ind. Dec. (N. S.) 321, *Queen-Empress* v. *Jahandi*, 23 C. 249; 12 Ind. Dec. (N. S.) 166, discussed.

Case reported by the Sessions Judge, Karnal, with his No. 796 of 9th May 1921.

GROUNDS.—This is a petition for revision of an order of the District Magistrate, Karnal, sitting as a Court of Appeal.

I entertain some doubt whether a Sessions Judge is competent to entertain such a petition. The question is whether the District Magistrate *sitting as a Court of Appeal* is an inferior Criminal Court to the Sessions Court.

Page 906 of Sohni's Criminal Procedure Code, 9th Edition, contains a note in the following terms:—

"A Sessions Judge has no power to refer to the High Court the judgment of a District Magistrate given in the exercise of his appellate jurisdiction, as he is not then an inferior Criminal Court to the Sessions Judge within the meaning of section 435—*Khamir Sheikh* v. *Emperor* (1)." The ruling relied upon is not accessible to me. On the other hand, the petitioner's Vakil cited *Shib Das* v. *Emperor* (2) where a revision of a District Magistrate's appellate order was accepted on the recommendation of the Sessions Judge without this point of law being raised. He also referred to *Jalloo* v. *Emperor* (3), *Queen-Empress* v. *Karamdi* (4) and some other ruling not relevant. I have also referred to *Opendro Nath Ghose* v. *Dukhini Bewa* (5) and *Queen-Empress* v. *Laskari* (6). *Opendro Nath Ghose* v. *Dukhini Bewa* (5) says that a Sessions Court is superior to all other local Criminal Courts; while in *Queen-Empress* v. *Laskari* (6), Straight, J., held that the District Magistrate was undoubtedly inferior to the Court of Session and suggested that inferior was substituted for subordinate in the corresponding section of the earlier Code, as it has been held that the District Magistrate was not subordinate to the Sessions Court. None of these rulings, however, specifically deals with the case of a District Magistrate sitting as a Court of Appeal and I would welcome a pronouncement by the Lahore High Court on this point.

Coming to the facts, the present petitioner was convicted by Lala Lachhu Mal, Magistrate, Second Class, under section 403, Indian Penal Code, and sentenced to two months' rigorous imprisonment and Rs. 50 fine. This sentence was upheld on appeal by the District Magistrate. It was found by Lala Lachhu Mal that the complainant Banarsi Das owned a mare which disappeared while grazing. The following day he was told by Munshi that he had seen Sardar Ali riding the mare, and Kallu, the petitioner, walking alongside. After some time he took a *panchayat* to Kallu's village and Kallu promised to return the mare. At a second *panchayat* Kallu demanded and received Rs. 50 as *bhunga*. Ultimately he defaulted, and about a month and-a-half after the mare disappeared the complainant reported the matter to the Police and the same day lodged a petition.

The trying Magistrate discharged Sardar Ali, who is the son of Zaildar, and in his order of discharge he said that the

(1) 14 C. W. N. ccvi.
(2) 21 Ind. Cas. 899; 335 P. L. R. 1913; 40 P. W. R. 1913 Cr; 14 Cr. L. J. 659.
(3) 15 P. R. 1904 Cr.; 131 P. L. R. 1904; 1 Cr. L. J. 1063.
(4) 23 C. 250 at p. 251; 12 Ind. Dec. (N. S.) 167.
(5) 12 C. 473 (F. B.); 6 Ind. Dec. (N. S.) 321.
(6) 7 A. 853 (F. B.); A. W. N. (1885) 257; 4 Ind. Dec. (N. S.) 925.

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evidence of Munshi was unreliable. Yet both he and the District Magistrate have relied upon Munshi against Kallu.

This witness Munshi was not mentioned in the report the complainant made to the Police or in his complaint or in his statement under section 203, Criminal Procedure Code. In my opinion Munshi's evidence must be entirely rejected.

Hence the only remaining evidence against Kallu is that of four witnesses who narrate what took place at the *panchayat* in Kallu's village. Two of them also testify against Sardar Ali, but the trying Magistrate rejected their testimony against him. One of the witnesses, Nizam Khan, deposed that Kallu under pressure said *ath roz bad akar jaisa kaisa hoga waisa kar dunga*. The other three witnesses (of whom Suraj is a remote relative of the complainant) say that Kallu at first denied his guilt, then *man liya*. This is all.

In my opinion the evidence on the record is quite insufficient to justify conviction and I recommend that the conviction be set aside and Kallu who is on bail be discharged from security.

Mr. *Raj Kishen*, for the Petitioner.

Diwan *Khilinda Ram*, R. S., Public Prosecutor, for the Respondent.

ORDER.—Under section 433, Criminal Procedure Code, the Sessions Judge of Karnal has referred to this Court two orders of the District Magistrate passed in the exercise of his appellate jurisdiction, and in the order of reference he has asked for a decision as to whether he has jurisdiction to do so and whether under the circumstances the words "any inferior Criminal Court" in section 435 include the Court of a District Magistrate. In *Khamir Sheikh* v. *Emperor* (1) a decision of a Division Bench is reported to the effect that the District Magistrate when exercising appellate jurisdiction is not an inferior Criminal Court to the Sessions Judge. The only published Punjab case on the subject appears to be *Shib Das* v. *Emperor* (2). In this the Sessions Judge reported an order passed by the District Magistrate, acting as a Court of Appeal, and the question of his right to do so was not raised nor discussed, but the Judge dealt with the report and passed orders on it. The word used in section 435, Criminal Procedure Code, was formerly "subordinate" and for this the word "inferior" was substituted, the reason being, as explained in *Queen-Empress* v. *Laskari* (6), that in some matters the District Magistrate is not subordinate to the Sessions Judge, and in consequence of this amendment there has never been any question of the power of the Sessions Judge under section 435 to deal with an order passed by the District Magistrate in the exercise of his ordinary original jurisdiction. The meaning of the word "inferior" has been discussed and explained in *Jalloo* v. *Emperor* (3) and in a Full Bench decision of the Calcutta High Court, *Opendro Nath Ghose* v. *Dukhini Bewa* (5). To quote from the Punjab ruling:

"Inferiority is different from subordination as laid down in section 17 of the Code, though, under section 195, the District Magistrate is in certain cases subordinate also to the Sessions Judge. It is true that under section 435 the District Magistrate has concurrent jurisdiction with the Sessions Judge in matters of revision, but the District Magistrate's powers are limited to Courts in subordination to him, whereas the Sessions Judge's jurisdiction may extend over more than one district and over Assistant Sessions Judges, if there are any. The language of section 437 also shows that the District Magistrate may be ordered by Sessions Judge to make the further inquiry directed under that section. Thus there can be no question of the District Magistrate's Court being one inferior to that of the Sessions Judge except with reference to those special cases where their powers are declared equal by the Code."

The powers of the District Magistrate and the Sessions Judge as Courts of Appeal are not, and have not been, declared to be equal.

In *Opendro Nath Ghose* v. *Dukhini Bewa* (5) the following passage occurs:

"If we take the ordinary meaning of the word, there can be no question but that all subordinates are inferior to the authority to which they are subordinate; although inferiors are not necessarily subordinates. So within the territorial

jurisdiction of a High Court, all other Courts are inferior to it, in a Sessions Division: the Sessions Court is superior to all other local Criminal Courts, and all such other Courts are inferior to it; and in a district all other Magistrates are by section 17 of the Code subordinate to the Magistrate of the District, and, consequently, inferior to him: and inferior as much for the purpose of section 435 as in any other respect.

"The High Court can under that section call for the record of any proceeding before any Criminal Court within the local limits of its jurisdiction; a Court of Sessions, may do so as regards every other Criminal Court in the Sessions Division; and the Magistrate of the District can do the same as regards every other Magistrate's Court within his District."

This view hardly coincides with that taken in *Khamir Sheikh* v. *Emperor* (1) and it appears to me to give the natural and obvious interpretation to be placed on the word "inferior." The District Magistrate is in no possible sense of the word superior to the Sessions Judge and if authority be needed this has been very clearly explained in *Queen-Empress* v. *Jahandi* (7) and *Queen-Empress* v. *Karamdi* (4). He is certainly not a Court of co-ordinate jurisdiction except with reference to those special cases where his powers are declared by the Code to be similar to, though more limited than, those of the Sessions Judge. The only possible conclusions, therefore, is that he is inferior. The opposite view is based on more or less the same reasoning as that which led the Division Bench of the Calcutta High Court in *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (8), to hold that a First Class Magistrate is not inferior to a District Magistrate, a finding which was considered and dissented from in the Full Bench ruling *Opendro Nath Ghose* v. *Dukhini Bewa* (5). The words "inferior" and "subordinate" have different meanings and the only possible reason for holding that the District Magistrate *qua* an Appellate Court is not inferior to the Sessions Judge is that he is not subordinate in that particular capacity. This reason is, I think, unsound and is based on a confusion of ideas leading to the treatment of both words as identical and interchangeable. Following, therefore, the procedure observed in *Shib Das* v. *Emperor* (2), I deal with the cases reported by the Sessions Judge.

The facts are clearly stated in the order of reference . . . . . The District Magistrate has upheld the conviction of one Kallu who was sent up for trial together with Sardar Ali in spite of the fact that the principal witness against Kallu was rejected by the Trial Magistrate when dealing with the case of the co-accused. Without the evidence of this witness the remaining evidence on the record is quite insufficient to justify a conviction. I, therefore, accept the application for revision and acquit Kallu accused.

Z. K.

Application accepted.

(7) 23 C. 249; 12 Ind. Dec. (N. S.) 166.
(8) 10 C. 269; 8 Ind. Jur. 376; 5 Ind. Dec. (N. S.) 180.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 2 OF 1922.

January 26, 1922.

Present:—Mr. Daniels, A. J. C.

EMPEROR—COMPLAINANT

versus

LALJI AND OTHERS—ACCUSED.

Public Gambling Act (III of 1867), s. 13—Foot-path running through private grove—Public place.

A foot-path running through a private grove is a public place if it is used by the public as of right.

Criminal reference made by the Sessions Judge, Sitapur.

Mr. *M. Arabi*, for the Accused.

The Government Pleader, for the Crown.

JUDGMENT.—This is a reference by the learned Sessions Judge of Sitapur. The question for decision is whether a foot-path passing through a grove is a public place. The answer to this question depends on the nature of the foot-path and the nature of

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the right or permission by which it is used. In this case there is no question of permissive right as suggested by the Sessions Judge. The Magistrate has found that the path in question is a public path used by the public as of right. Under these circumstances the foot-path must, in my opinion, be considered to be a place. The rulings referred to by the learned Judge regarding gambling in a grove are not applicable. I am, therefore, unable to accept the reference except to this extent that the alternative sentence of two weeks' rigorous imprisonment imposed on Gaya Bakhsh Singh which the Magistrate admits to have been in excess of his powers is reduced to one week's rigorous imprisonment. To this extent only the reference is accepted. Let the record be returned.

N. K.

Record returned.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 187 OF 1921

March 13, 1922,

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Harrison.

EMPEROR—APPELLANT

versus

C. J. ROBINSON—RESPONDENT.

Opium Act (I of 1878), ss. 3, 9—"Opium," whether includes morphia.

Though morphia is not a preparation or admixture of opium, yet it is an intoxicating drug prepared from the poppy and, as such, fulfills the requirements of the definition of "opium" contained in section 3 of the Opium Act. [p 618, col. 1.]

Sita Ram v. *Emperor*, 59 Ind. Cas. 40; 1 L. 443; 22 Cr. L. J. 8; 2 L. L. J. 711, dissented from.

Appeal from an order of the District Magistrate, Multan, dated the 27th January 1921.

FACTS appear from the following order of remand, dated the 27th May 1921, by Justice Sir Shadi Lal, C. J. and Mr. Justice Moti Sagar—

This is an appeal against an order of acquittal, and the sole question for determination is whether morphia comes within the definition of opium as contained in the Opium Act, I of 1878. Now, the third section of the aforesaid Act enacts that opium includes also poppy-heads, preparation or admixtures of opium and intoxicating drugs prepared from the poppy. In *Sita Ram* v. *Emperor* (1) Mr. Justice Martineau held that morphia is not included in that definition, because it is neither a preparation or admixture of opium nor a drug, prepared from the poppy. The appellant, however, impeaches the correctness of the rule laid down in that judgment, and invites us to consider the question *de novo* and pronounce an authoritative opinion thereon.

It is clear that the rules framed by Government regulating the possession, sale and transport of morphia proceed upon the assumption that morphia is included in the definition of opium as contained in the Act, and there can be no doubt that the question raised in this appeal is one of public importance.

It appears from Watt's Dictionary of Chemistry, Volume III, page 639, that morphia or morphine is one of the constituents of opium, and that its quantity varies from 3 to 15 per cent. The learned Vakil for the appellant contends that morphia is a preparation or admixture of opium, and that the drug can be prepared also from the poppy. This contention is controverted by the learned Counsel for the respondent who argues that, though morphia may be prepared *from* opium, it cannot be described as a preparation or admixture of opium, nor is it prepared from the poppy. Upon the record there is no evidence to show how morphia is manufactured, nor is there any material to enable us to decide between the rival contentions.

In view of the importance of the issue we consider that it is necessary to order an enquiry into the question whether morphia is a preparation or admixture of opium or whether it is an intoxicating drug prepared from the poppy. We accordingly direct the District Magistrate to record evidence regarding the various methods in which morphia is or can be prepared, and to certify it to this Court. The inquiry

(1) 59 Ind. Cas. 40; 1 L. 443; 22 Cr. L. J. 8; 2 L. L. J. 711.

should be an exhaustive one, and both the parties should be afforded a reasonable opportunity to produce expert evidence and such other evidence as may be relevant to the decision of the question formulated above.

Dewan *Khilinda Ram*, R. S., for the Appellant.

Mr. *Manohar Lal*, for the Respondent.

JUDGMENT.—The order of remand made on the 27th of May, 1921, which sets out the relevant facts of the case, must be read as a part of this judgment. The evidence now recorded by the District Magistrate shows that opium is the inspissated juice obtained from the incised unripe capsules of the poppy, and that morphia is one of the alkaloids found in opium along with other constituents such as meconic acid, fatty matter, resin, gum, caoutchouc and mineral salts. There can be no doubt that morphia is one of the components of opium and cannot, therefore, be called a "preparation or admixture *of* opium." It is, however, clear that it is a drug prepared by a chemical process from opium which is merely the thickened juice of the poppy, and it can, therefore, be properly described as a drug prepared from the poppy. It is true that in the process of manufacturing morphia from the poppy an intermediate substance, namely, opium or inspissated juice of poppy, is prepared, but that circumstance does not furnish any ground for holding that morphia is not prepared from the poppy.

We must, therefore, hold that morphia is an alkaloid prepared from the poppy, and it is beyond doubt that it is an intoxicating drug. While accepting the view expressed in *Sita Ram* v. *Emperor* (1) that morphia is not a preparation or admixture of opium, we are unable to concur in the conclusion that it is not a drug prepared from the poppy.

Upon the evidence we are of opinion that morphia is an intoxicating drug prepared from the poppy, and that it fulfills the requirements of the definition of 'opium' contained in section 3 of the Opium Act, I of 1878.

We may point out that the Notification No. 954, dated the 16th October 1916, referred to in the aforesaid judgment, has since been cancelled and we do not think that it can affect the conclusion reached by us on the strength of the expert evidence.

The result is that we accept the appeal, and, setting aside the order of the lower Court, convict the respondent Robinson of an offence under section 9 (*c*) of the Opium Act. Having regard to the delay in the disposal of the case and to other circumstances, we do not consider it necessary to impose a sentence of imprisonment. We accordingly sentence him to a fine of Rs. 100. In default of payment of the fine he shall undergo rigorous imprisonment for a period of three months.

R. R.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 12 OF 1922.

May 2, 1922.

Present:—Pandit Kanhaiya Lal, J. C.

EMPEROR—COMPLAINANT

versus

BASHIR AND OTHERS—ACCUSED.

Public Gambling Act (III of 1867), s. 13—"Public place," meaning of—Publicity of situation.

A public place must be a place which is either open to the public or is used by the public and the mere publicity of a situation does not make it a public place within the meaning of section 13 of the Public Gambling Act. [p. 614, col. 2.]

Reg v. *Wellard*, (1885 14 Q. B. D. 63 at p. 66; 54 L. J.M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox C.C. 559; 49 J. P. 296, *Hari Singh* v. *Jadu Nandan Singh*, 31 C, 542; 8 C. W. N. 458; 1 Cr. L. J, 349, *Sukhnandan Singh* v. *Emperor*, 65 Ind. Cas. 419; 23 Cr. L. J. 67; 44 A. 265; 20 A. L. J. 80; *Queen-Empress* v. *Sri Lal*, 17 A. 166; A. W. N. (1895) 42; 8 Ind. Dec. (N. S.) 432, *Emperor* v. *Ajudhia Prasad*, A. W. N. (1904) 92, *Ahmad Ali* v. *Emperor*, 1 A. L. J. 129; 1 Cr. L. J. 272, *Moula* v. *Emperor*, 56 Ind. Cas. 672; 104 P. L. R 1920; 21 Cr. L. J. 512, *Badr-ud-din* v. *Emperor*, 57 Ind. Cas. 931; 21 Cr. L. J. 691, considered.

Case reported by the Sessions Judge, Sitapur, under section 438 of the Criminal Procedure Code.

Mr. *J. P. C. Bhattacharji* holding brief of the Government Pleader, for the Crown.

Mr. *Hargobind Dayal*, for the Accused.

JUDGMENT.—The question for consideration in this case is whether the accused persons were gambling in a public place within the meaning of section 13 of the Public Gambling Act (III of 1867). The map prepared by the investigating officer shows that they were gambling under a tamarind tree in an open space of ground on two sides of which there are public roads. On a portion of that land stood a hut occupied by a prostitute. There are other houses too standing near that locality. The land is not fenced in any way from the adjoining roads. It is not apparently used by the public, for when the learned Sessions Judge inspected the locality he found a quantity of newly felled timber lying there. The land is situated on the outskirts of Sitapur and forms an angle between two roads, but it is in no sense a public place, though it is exposed to the public view.

In *Reg.* v. *Wellard* (1) Lord Coleridge laid down that a place was a public place where the public were in the habit of resorting to it and no one prevented them from so doing. In the same case Grove, J., dealing with a case of an indecent exposure, said that the public place was a place where the public go, no matter whether they have a right to go or not. It is, however, obvious that what is a public place may vary from time to time, for a private place may be frequented by the public and may become a public place for the time it is so used. Where a place is in any way dedicated to the use of the public, it is of course a public place, but where it is owned privately and no such dedication has taken place the question whether it is a public place would seem to depend on the character of the place itself and the use actually made of it. In *Hari Singh* v. *Jadu Nandan Singh* (2) where a person was found playing a game of sham horse-racing in the compound of a press consisting of an open space of land, without any fence, situated one cubit from the Bazar it was held that the place was a public place because there was nothing to show that the owner ever gave or refused permission to any one to come to his compound or that any one asked his permission to do so and that any one was prevented from doing so. In *Sukhnandan Singh* v. *Emperor* (3) where gambling was going on in the area occupied by a large grove where a fair was in progress at the time and visitors to the fair had penetrated to all parts of the grove, it was held that though the grove was private property it was for the time being a public place and gambling at such a place at that time was punishable. In *Emperor* v. *Lali* (4) (Criminal Reference No. 2 of 1922, decided on the 26th January 1922) gambling in a grove where a foot-path was running was similarly held to be punishable.

On the other hand, in *Queen-Empress* v. *Sri Lal* (5) a *chabutra*, which was neither a place where the public had a right of access, nor a place to which the public were ever permitted to have access, was held not a public place within the meaning of section 159 of the Indian Penal Code, though it adjoined a public road. In *Emperor* v. *Audhia Prasad* (6) gambling in a Zomindar's grove was held to be not gambling in a public place though there was a foot-path running through it, which was commonly used by the tacit permission of the Zamindar. In *Ahmad Ali* v. *Emperor* (7) it was similarly held that a private grove was not necessarily a public place, though it might be open to the public view. In *Moula* v. *Emperor* (8) and *Badr-un-din* v. *Emperor* (9) the proximity of a place to a public road or Railway station was treated as insufficient to make a place a public place, if it was not in the use of the public or the public had a right of access to it.

A public place must be a place which is either open to the public or is used by the public and the publicity of its situation is not a necessary element of the offence any more than public ownership. The learned Sessions Judge inspected the locality and came to the conclusion that the place was not a public place and was not in the use

(1) (1885) 14 Q. B. D. 63 at p. 66; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox C. C. 559; 49 J. P. 296.

(2) 31 C. 542; 3 C. W. N. 458; 1 Cr. L. J. 349.

(3) 65 Ind. Cas. 419; 23 Cr. L. J. 67; 44 A. 261; 20 A. L. J. 80.

(4) 69 Ind. Cas. 611; 25 O. C. 114.

(5) 17 A. 166; A. W. N. (1895) 42; 8 Ind. Dec. (N. S.) 432.

(6) A. W. N. (1904) 92.

(7) 1 A. L. J. 129; 1 Cr. L. J. 272.

(8) 56 Ind. Cas. 672; 104 P. L. R. 1920; 21 Cr. L. J. 512.

(9) 57 Ind. Cas. 981; 21 Cr. L. J. 691.

of the public as such, though it was situated close to two public roads.

The conviction cannot, therefore, be upheld and is set aside. The fines, if realized, will be refunded.

N. K.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 26 OF 1922.

(CRIMINAL REVISION PETITION No. 26 OF 1922).

April 25, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

A. T. SANKARALINGA MUDALIAR—PETITIONER

versus

NARAYANA MUDALIAR AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 366, 367, 435, 439, 537—Judgment—Order directing release of accused—Full judgment, delivery of, later—Irregularity—Revision against acquittal, when lies—Costs award of, in revision cases—Revision creature of Statute.

Where a Sessions Judge agreeing with the assessors simply makes an endorsement that the accused is acquitted and directs that he be set at liberty and writes the full text of his judgment assigning reasons for his order a few days later, he commits an irregularity under section 537 of the Code of Criminal Procedure, but such irregularity does not vitiate the proceedings. [p. 617, col. 1.]

Queen-Empress v. *Hargobind Singh*, 14 A. 242; A. W. N. (1892) 83; 7 Ind. Dec. (N. S.) 525 and *Tilak Chandra Sarkar* v. *Baisagomoff*, 23 C. 502; 12 Ind. Dec. (N. S.) 334, referred to

Where there is an appeal by a Public Prosecutor or the Crown from an acquittal, the High Court sets its face against revision. But when an aggrieved complainant moves the Government to appeal under section 417 of the Code of Criminal Procedure and the Government refuses, he can move the High Court in revision, but the latter will exercise its jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. [p. 616, col. 2.]

Faujdar Thakur v. *Kasi Choudhuri*, 27 Ind. Cas. 186; 42 C. 612 at p. 616; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122, followed.

A High Court has no power to grant costs to the successful party on a revision petition brought by a private prosecutor against an acquittal. [p. 617, col. 1.]

Where a Statute gives a Court power to grant costs in specific instances and the same Statute gives the Court its whole criminal jurisdiction, it excludes any other right of granting costs. The Code of Criminal Procedure excludes any such right except where it confers it specifically, *viz.*, among others, under sections 148, 433, 488, 526 and 545. [p. 615, col. 1.]

Nallapparaju Venkataramaraju v. *Madisetti Achayya*, 33 Ind. Cas. 824; 17 Cr. L. J. 184, *Mahomed Dustagir Sahib* v. *Mahomed Karimuddeen*, 2 Weir 196 and *Queen-Empress* v. *Yemana Rao*, 24 M. 305; 2 Weir 722; 1 Weir 728, referred to.

Per *Coutts-Trotter, J.*—Revision is not an inherent power of any Court, the whole machinery of revision is a creature of Statute and has to be found within the four walls of the Code of Criminal Procedure, and a Court cannot posit an inherent power to supplement that purely statutory machinery by assuming the power of supplementing it by the awarding of costs. [p. 618, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the Tinnevelly Division, in Sessions Case No. 70 of 1921.

FACTS appear from the judgment.

Mr. *K. P. M. Menon*, for Messrs. *Richmond, Chidambaram* and *Marthandam*, for the Petitioner.—The lower Court has not written a proper judgment when it acquitted the accused. On the day of acquittal his judgment only set forth the findings of assessors and the Judge's finding agreeing with assessors. That is not a sufficient compliance with sections 366 and 367, Criminal Procedure Code. The points for determination and the reasons for the decisions should have been set forth. No doubt a fuller judgment was written later but that does not cure the defect.

The High Court has power to entertain revision petitions against acquittals and in practice has interfered.

Messrs. *Nugent Grant, T. Rangachariar, S. Srirangachari*, for the Accused.—The petitioner has no *locus standi* to move High Court in revision against an order of acquittal. The Government declined to appeal. After a protracted trial both the Judge and the assessors found the accused not guilty. No public interest is at stake.

As to the judgment the Judge has complied with the terms of section 367 (4) Criminal Procedure Code. The offence has

been set forth and there is a direction that accused be set at liberty. The Judge has written a full judgment later. Any way it is only an irregularity that does not render the proceedings void.

The respondents are entitled to their costs. The petition was frivolous. The High Court has inherent power to award costs. *West Ham Union (Guardians of)* v. *Churchwardens & Co.* (1), *Bombay Civil Fund Act*, 1882, *In re, Pringle* v. *Secretary of State for India* (2).

Mr. *Menon*, in reply.—The Code expressly limits the power of awarding costs to specified cases. That means that all other cases are excluded. There is no power conferred under sections 435 and 439.

ORDER.

SCHWABE, C. J.—This is a criminal revision petition against the acquittal of the accused on a charge of murder, in a case tried by the Sessions Judge of Tinnevelly. The ground and the only ground on which we are asked to order a re-trial is that the learned Judge did not deliver in Court his full reasons for acquitting the accused. At the end of a three weeks' trial he left certain specific questions to the assessors. The assessors agreed that the accused were not guilty and, in answer to a specific question, they agreed that certain witnesses for the prosecution who were the principal witnesses were not worthy of belief. The Acting Sessions Judge then wrote a document headed "judgment" setting forth the findings of the assessors and adding his own finding agreeing with the assessors that accused were not guilty and they were acquitted. At a later date he wrote and prefixed to that judgment a full reasoned judgment dealing with the various points raised, the classes of witnesses and the reasons he had for believing or disbelieving those witnesses. It is argued that that is not complying with the terms of sections 366 and 367 of the Code of Criminal Procedure. Under section 367 a judgment is to be written by the Judge containing the point or points for determination, the decision thereon and the reasons for the decision, and the same section, sub section (4) dealing with acquittals says, "If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty." Now, the judgment that was delivered in Court complied with section 367 (4), because it stated, by a reference back to the question to the assessors, the offence and directed that the accused be set at liberty. Whether that is a sufficient compliance with section 366 or 367 is a different question. There is a *dictum* in *Queen-Empress* v. *Hargobind Singh* (3) that it is not. The correctness of that *dictum* has certainly been questioned in *Tilak Chandra Sarkar* v. *Baisagomoff* (4). I do not think it is necessary in this case to express any view on that matter; because, under section 537 of the Code of Criminal Procedure, no finding of a Court is to be reversed on appeal or revision on account of any error, omission or irregularity in various matters including a judgment. In my view, assuming that the method adopted by the learned Judge in this case is not a full compliance with sections 366 and 367, it is a mere irregularity, and, in my judgment, it is not open to us to set aside the acquittal on that ground alone. But this case gives rise to another interesting question, namely, the powers in revision of this Court of setting aside this acquittal. Where there is an appeal by the Public Prosecutor or the Crown from an acquittal, the Court sets its face against revision; but where a private prosecutor, having no powers of appeal, comes to the Court in revision, it is certainly open to the Court to hear him. But it has now been laid down in a long series of cases what on that sort of application should be the guiding principle to be acted upon by the Court and, I think, it is very clearly stated in *Fazudar Thakur* v. *Kasi Choudhuri* (5) by Jenkins, C. J. There he reviewed the practice of all the High Courts in India on this point and summarised his conclusions in these words: "I am not prepared to say the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly, and only where it is

(1) (1896) A. C. 477; 65 L. J. M. C. 201; 75 L. T. 286; 60 J. P. 740.

(2) (1889) 40 Ch. D. 288; 58 L. J. Ch. 815; 60 L. T. 796.

(3) 14 A. 242; A. W. N. (1892) 83; 7 Ind. Dec. (N. S.) 525.

(4) 28 C. 502; 12 Ind. Dec. (N. S.) 334.

(5) 27 Ind. Cas. 166; 42 C. 612 at p. 616; 19 C. W. N. 184; 21 C. L. J. 58; 16 Cr. L. J. 122.

urgently demanded in the interests of public justice. This view does not leave an aggrieved complainant without remedy: it would always be open to him to move the Government to appeal under section 417, and this appears to me the course that should be followed," that is to say, that the private prosecutor can, if he likes, move the Government to appeal. In this case the representative of the Government has told us that, having considered the matter, the Government would not appeal. But, if he cannot get redress that way, he can come before this Court on revision; but then the principle is that it is only to be granted "where it is urgently demanded in the interests of public justice." Applying that to this case, how can it be said that it is urgently necessary in the interests of public justice that this acquittal should be set aside? The case lasted three weeks; it was tried out fully; the assessors were unanimous; the Judge was satisfied with their finding and acquitted the accused with, no doubt, a desire to prevent either this charge being kept longer over the heads of persons who were in his view not guilty and he was going to acquit, or, perhaps in order to avoid the necessity of letting them out on bail, to come back again thereafter to hear their fate. He took the course which, on the face of it, seems an eminently reasonable one of telling the men that they were acquitted, and, in fact, he gave his full reasons for the acquittal at another time and it ended there. Now, how it can be suggested that his having done that can amount to an urgent demand in the interests of public justice that the acquittal should be set aside, I cannot see. On these grounds, I think this petition should be dismissed. As regards the question of costs the case will be adjourned to to-morrow.

OLDFIELD, J.—I agree and have nothing to add.

COUTTS-TROTTER, J.—I agree and only wish to add this that I am satisfied that this is a case in which we have a discretion and we need not interfere unless we choose; and, speaking for myself, I cannot agree to the course suggested, namely, that people who have been tried for their lives for a month and acquitted should be made to undergo a re-trial at the instance of a private prosecutor when the Government would not come forward and urge such a case in the Court of Appeal.

SCHWABE, C. J.—We reserved this case for further consideration on the question whether there is power in this Court to grant costs on a revision petition brought not by the Crown but by a private prosecutor against an acquittal, which petition has failed. If there were power, it is a case in which I, speaking for myself, would gladly grant costs, because, as I have expressed in my judgment on the main point in this case, I think this is a petition which ought never to have been brought and it is undoubtedly hard that persons, who have been tried for their lives and acquitted, should be put to much further expense on frivolous grounds. However, we have to consider whether this Court has power or not, and we have listened to very interesting arguments on both sides on the question. A Court may have inherent power to grant costs. That is clear from a judgment in the House of Lords in *West Ham Union (Guardians of)* v. *Churchwardens & Co.* (1), where the House of Lords held that they had inherent power to grant costs, and in *Bombay Civil Fund Act*, 1882, *In re, Pringle* v. *Secretary of State for India* (2), where Cotton and Bowen, L. JJ., state clearly their view that they had an inherent power to grant costs in the matter which came before them, although there was no statutory provision enabling them to grant the costs. But, in my view, the exercise of that inherent power must be always restricted and limited to this that, if the power of granting costs by the Court in that kind of proceeding is provided for in some way by Statute, the Court cannot, by invoking its inherent powers, extend the powers which have been granted to it by the Statute. Now, in this matter we sit in revision in criminal cases, first, under the Letters Patent and being constituted under the Letters Patent have powers given to us as a Court to hear criminal appeals and revision petitions by the Criminal Procedure Code of 1898. That Code does provide in several instances for the payment of costs. Unlike the Code of Civil Procedure, it has no general clause providing for costs in every case. The sections providing for costs are, among others, 148, 433, 488, 526 and 545. The one, and I think the only

one, that it is necessary to look into carefully in section 433, because there in a particular form of proceeding before the High Court in criminal cases there is an express provision that the High Court may direct by whom the costs of a reference shall be paid. The other sections are specific instances where power to grant costs is given, such as, in maintenance proceedings by a wife and in proceedings to recover stolen property. Having got those instances in which specific power is given to grant costs, in my judgment, the maxim *expressio unius est exclusio alterius* applies. Where in specific instances a Statute gives a Court power to grant costs and the same Statute gives the Court its whole criminal jurisdiction, I think, the proper rule of interpretation is that expressed in the maxim I have just quoted, with the result that, as the Code gives a specific right of granting costs, it excludes any other right of granting costs. There is some authority to the same effect in the three cases which have been quoted to us *Nallappa raju Venkataramaraju* v. *Madisetti Achayya* (6), *Mahomed Dustagir Sahib* v. *Mahomed Karimuddeen* (7) and *Queen-Empress* v. *Yamana Rao* (8), all of these cases in which this Court has refused to grant costs on the ground that it had no power to do so in criminal cases and with those judgments I agree. It is true that the Privy Council has frequently exercised the power of granting costs in criminal cases, but the Privy Council was given that power by a Statute and so the fact that the Privy Council exercised that power under the Statute does not in any way help in the solution of the question whether this Court has inherent power or not. On these grounds, I think, this petition must be dismissed, but there will be no order as to costs.

OLDFIELD, J.—I agree.

COUTTS-TROTTER, J.—I am of the same opinion. It seems to me perfectly clear that we have no express statutory authority to grant costs generally in criminal matters and, moreover, as my Lord has pointed out, where the Code intends to confer the power of granting costs, it does so in terms. But then it is said that, apart from any question of the Code, the Court has an inherent jurisdiction to put matters right as between those who seek its aid by the granting of costs. The Courts of Equity in England always asserted their possession of such jurisdiction and constantly used it as is pointed out in the judgment of Lord Chancellor Hardwicke in *Burford (Corporation of)* v. *Lenthall* (9). The Common Law Courts did not attempt to assert their possession of such an inherent jurisdiction and it was often emphatically denied, at any rate, by equity lawyers, but the House of Lords in *West Ham Union (Guardians of)* v. *Churchwardens & Co.* (1) undoubtedly laid down that, as by virtue of its position as the highest Court in the land, and not by any devolution of powers from the Courts of Equity, they had jurisdiction to deal with costs in cases whether arising on the Equity or the Common Law side of the Court. But, I think, that the main reason why it is not possible for this Court to adopt that line of reasoning and take upon itself the awarding of costs in criminal cases is this: Revision is not an inherent power of this or any other Court; the whole machinery of revision is a creature of Statute and has to be found within the four walls of the Code of Criminal Procedure; and, as far as criminal cases are concerned, I do not see how we can posit an inherent power in ourselves to supplement that purely statutory machinery by assuming to ourselves the power of supplementing it by the awarding of costs. I, therefore, am of the opinion that we have no power to do what is asked. It is for the Legislature to consider whether the power of revision in cases of the kind that we have seen in these proceedings has not outlived its usefulness, or, at any rate, whether it should not be safeguarded by the arming of Courts with the power, at least in cases where revisional proceedings are taken by private prosecutors and not by the Crown, of muleting them in proper cases by the award of costs.

M. C. P. *Petition dismissed.*

N. K.

(6) 33 Ind. Cas. 824; 17 Cr. L. J. 164.
(7) 2 Weir 196.
(8) 24 M. 305; 2 Weir 722; 1 Weir 723.
(9) (1743) 2 Atk. 550; 26 E. R. 730.

In re KARIYAPPA NINGAPPA.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 65 OF 1922.

June 15, 1922.

Present:—Sir Lalubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

In re KARIYAPPA NINGAPPA.

Criminal Procedure Code (Act V of 1898), ss. 133, 137, 537—Conditional order under s 133—Enquiry referred to another Magistrate—Final order passed by First Magistrate—Illegality—Consent of parties, effect of.

It is open to a Magistrate making an order under section 133, Criminal Procedure Code, to direct the party to appear before himself or before some other Magistrate of the First or Second Class at a certain time and place to be fixed by the Court. If, however, he orders the party to appear before himself, he cannot refer the matter for enquiry to some other Magistrate and then pass the final order on the report submitted by that Magistrate. It is incumbent upon him, under section 137 of the Code, to himself take evidence as in a summons case. [p. 619, col. 2.]

The failure to act according to the manner abovementioned vitiates the final order and even the consent of the parties cannot cure the illegality. [p. 619, col. 2.]

Per *Shah, J.*—The record of evidence by one Magistrate and decision thereon by another is opposed to the scheme and provisions of the Criminal Procedure Code bearing on the point. [p. 619, col. 2.]

Criminal application against an order passed by the Sub Divisional Magistrate Dharwar.

Mr. *H. B. Gumaste* for the Applicant.

Mr. *G. S. Mulgaonkar*, for the Opponent.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, ACTG. C.J.—In this case a conditional order was made under section 133, Criminal Procedure Code, by the Sub-Divisional Magistrate, Third Division, Dharwar, on the 5th December 1921, whereby the present petitioner, Kariappa *bin* Ningappa Savadi, was required either to remove the wall by the 21st December 1921 or to appear before the said Magistrate to show cause against the order. After that the parties appeared before him and it appears from the proceedings that the papers were forwarded to the Second Class Magistrate, Navalgund, for inquiry and report, because the parties expressed their inability to attend the Court of the said Magistrate. Afterwards the Second Class Magistrate recorded evidence and made a report. On that the Sub-Divisional Magistrate made his final order. We think that the procedure followed in this case is irregular and the order should be set aside on that ground.

It was open to the Magistrate to direct the party by the conditional order to appear before himself or before some other Magistrate of the First or Second Class at a certain time and place to be fixed by the Court. But he ordered that the party should appear before himself, and having done that, it seems to me that, under section 137, Criminal Procedure Code, it was his duty to take the evidence in the matter as in a summons-case. The Code does not provide that evidence can be recorded in the manner in which it has been recorded in this case even with the consent of the parties. The result in the present case has been that the evidence has been recorded by one Magistrate and the decision thereon has been given by another Magistrate. That seems to me to be opposed to the scheme and provisions of the Criminal Procedure Code bearing on the point. After the conditional order was made in the terms already stated, it was incumbent upon the Magistrate under section 137 to take evidence as in a summons-case, if the final order was to be made by him.

It has been urged by the Government Pleader that this may be treated as an irregularity and as the parties consented to the procedure it may be condoned. I am, however, unable to accept that contention. I think that it is a matter of substance that the evidence should be recorded by the Magistrate who has to decide the case; and generally speaking it is difficult to say that the omission to do so does not occasion a failure of justice. I am of opinion that on this ground the order made by the Sub-Divisional Magistrate on the 17th February 1922 should be set aside. This will be of course without prejudice to any fresh proceedings that may be taken with reference to the alleged obstruction in a proper way under this Chapter against the present petitioner.

CRUMP J.—I agree. I do not think that it is possible to uphold this order by invoking section 537 of the Criminal Procedure Code. For, as I apprehend the matter, there has been a complete disregard of the imperative provisions of section 137. The conditional order under section 133 was made by the

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Sub-Divisional Magistrate on the 5th December 1921, and, on the 17th February 1922, he made that order absolute. Now, if we refer to section 137, it is manifest that the materials on which the conditional order can be made absolute by the Magistrate who makes that order are described in the language of the section as evidence taken as in a summons-case. That imports the necessity of the Magistrate taking the evidence before himself and he cannot, even with the consent of the parties, refer the matter for inquiry and report to another Magistrate. I am not speaking now of those cases where parties are directed to appear before another Magistrate of the First or Second Class, as provided for in the last paragraph of section 133 (1), for that is not the case in the present matter. The order having thus been made absolute on materials which are not provided for by the section and in a manner contrary to the express provision of the section, no consent of the parties can possibly cure the illegality. I, therefore, agree that the proceedings must be set aside.

N. H. *Order set aside.*

LAHORE HIGH COURT.
CRIMINAL REVISION No. 91 OF 1922.
March 18, 1922.
Present:—Mr. Justice Scott Smith.
BAZ AND ANOTHER—PETITIONERS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 361, Exp., 366—Guardianship, lawful, kidnapping from—Kidnapping minor while under temporary custody of servant or friend—Consent of custodian, whether material—"Include," meaning of.

The fact, that a mother allows her minor girl to be in the custody of a servant or friend for a limited purpose and for a limited time, does not determine the mother's rights as guardian or her legal possession for the purposes of the criminal law, and if an accused kidnaps her from the possession of such servant or friend and marries her without the consent of her mother, he is guilty of an offence under section 366 of the Penal Code. The consent of the servant or friend is immaterial. [p. 620, col. 2.]

The word "include" in the Explanation to section 361 of the Penal Code is not intended to limit the protection which the section gives to parents and minors but rather to extend that protection by including in the term "lawful guardian" any person lawfully entrusted with the care and custody of the minor. [p. 621, col. 1.]

Jagannadha Rao v. *Kamaraju*, 24 M. 284; 1 Weir 349; 2 Weir 458; 10 M. L. J. 405, followed.

Criminal revision from an order of the Sessions Judge, Jhelum, dated the 22nd December 1921, affirming that of the Magistrate, First Class, Pind Dadan Khan, District Jhelum, dated the 16th November 1921.

Mr. *Kanwar Narain* for Mr. *Muhammad Iqbal*, for the Petitioners.

Mr. *Niaz Ali*, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an application for revision of the order of the Sessions Judge of Jhelum, dismissing the appeal of Baz and Mawaz, who were convicted of kidnapping *Mussammat* Sardar Bi, a minor girl, under section 366, Indian Penal Code. *Musammat* Sardar Bi has been held to be less than 16 years of age, and was living under the guardianship of her mother, *Musammat* Nekan. The latter sent her with *Musammat* Hussain Bi and Ahmad on a visit to her sister at Dalelpur, and while on the way there Baz and Mawaz are said to have kidnapped her. Baz and Mawaz, after taking her from the possession of *Musammat* Hussain Bi, took her to Chandna, their own village, and there she was married to Baz, without the consent of her mother.

The Judge in Chambers ordered that notice should issue, because the judgment of the learned Sessions Judge was not clear as to whether the girl was taken away without the consent of *Musammat* Hussain Bi. In my opinion, it is immaterial whether *Musammat* Hussain Bi gave her consent or not. The girl was only in her temporary charge and the guardianship of *Musammat* Nekan, her mother, still subsisted. As pointed out by the learned Sessions Judge, *Musammat* Hussain Bi could not legally make her over to Baz and Mawaz. She had no authority to do so. The girl had been made over to her merely in order that she might take her to her sister at Dalelpur

JAFFAR AYUB KATCHI v. EMPEROR.

As pointed out in *Jagannadha Rao* v. *Kamaraju* (1), the word "include" in the Explanation to section 361 of the Indian Penal Code is not intended to limit the protection which the section gives to parents and minors, but rather to extend that protection by including in the term "lawful guardian" any person lawfully entrusted with the care or custody of the minor. The fact that a father allows his child to be in the custody of a servant or friend for a limited purpose and for a limited time, does not determine the father's rights as guardian or his legal possession for the purposes of the criminal law. Applying these remarks to the present case, I am quite clear that the mere fact that *Musammat* Nekan allowed *Musammat* Sardar Bi to be in the custody of *Musammat* Hussain Bi for a limited purpose and for a limited time only did not determine *Musammat* Nekan's rights as guardian or her legal possession of the minor for the purposes of the criminal law. I, therefore, see no reason to interfere on revision and reject the petition. The petitioners should surrender to their bail to the District Magistrate of Jhelum in order that they may be recommitted to jail.

N. K.

Revision rejected.

(1) 24 M. 284; 1 Weir 349; 2 Weir 458; 10 M. L. J. 405.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 86 B OF 1922.

July 15, 1922.

Present :—Mr. Prideaux, A. J. C.

JAFFER AYUB KATCHI—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Penal Code (*Act XLV of* 1860), *s.* 420—*Cheating*—*Dishonest intention.*

In cases under section 420 of the Penal Code the evidence must establish the existence of a fraudulent or dishonest intention at the time of the commission of the act in respect of which the cheating is alleged. [p. 623, col. 1.]

Revision of the judgment of the Sessions Judge, Akola, dated the 23rd May 1922, in Criminal Appeal No. 77 of 1920.

Messrs. *W. A. Jinah*, *M. R. Dixit* and *A. V. Khare*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—This Rule is directed against an order convicting the petitioner of an offence punishable under section 420, Indian Penal Code, and sentencing him to six months' rigorous imprisonment with fine. The imprisonment was reduced on appeal to one month simple imprisonment. The facts found are these.

By a Will dated 1st December 1902 one Mohomed Hasham Seth left his estate in charge of certain trustees. Moula Dina Ayub and Abdulla Ayub were two of the trustees. They are brothers of the accused Jaffer Ayub. The managing trustee is one Ayub Karim. Matters seem to be strained between accused and his brothers and the managing trustee. A house belonging to the trust estate had been rented to D. G. Deshmukh Pleader at the rental of Rs. 20 per mensem. His brother K. G. Deshmukh, Pleader, is now living in the house. The two brothers are joint. The house rent was not regularly paid but various payments were made at intervals. It is said that arrears of rent were due from the 1st October 1917. This was demanded and accounts were settled with K. G. Deshmukh, as sum of Rs. 704-4-0 being found due for the period 1st October 1917 to 31st December 1920. In this accounting a deduction of Rs. 50 was made as already paid to a former clerk of the trust and Rs. 25-12-0 were also deducted as the costs of repairs paid for by the tenant. A receipt was drawn up and signed by the managing trustee. It was shown to Mr. K. G. Deshmukh about the 25th of August. He approved of it and gave the complainant Abdul Karim, who is the present clerk of the trust, a letter adressed to the accused, who was the managing partner of the family firm going by the name of Moula, Dina, Abdula, directing the firm, who were his bankers, to pay. This letter was shown to the managing trustee and the clerk then took it with the receipt to accused's shop on the morning of the 29th of August 1921. The accused returned the receipt and the letter stating as his reason for doing so that there was a mistake in the

receipt as regard K. G. Deshmukh's father's name. He wrote out the correct name of the father on a separate bit of paper and gave it to the clerk together with the receipt and Deshmukh's letter. The clerk was asked to come again in the evening to receive payment, it being stated that Jaffer's brother Moula Dina would by then have the money ready. In the evening Abdul Karim, the clerk, returned to Jaffer with the duly corrected receipt and the letter. Jaffer is said to have read both letter and receipt, then put them into his pocket and told the clerk that no payment would be made until the managing trustee passed a receipt for certain rents said to have been paid to the estate by Moula Dina and until three beams belonging to the accused's firm which were in one of the *kothas* of the estate were returned to them. The clerk tried to get the receipt back and argued that if the receipt was kept payment should be made. But Jaffer refused to do either. The clerk then returned to the managing trustee, Ayub Karim, and reported to him what had occurred. The managing trustee sent his son Abdus Satar with the complainant but Jaffer still refused to listen. Then one Wali Nur was sent with the complainant but he also failed to get Jaffer accused to either return the receipt or to pay the money. The same evening a report was made to the Police who referred the complainant to a Magistrate, and on 7th August 1921 on his complaint the present case was started.

The Magistrate and the lower Appellate Court find that Jaffer Ayub's action in obtaining and retaining the receipt amounted to an offence within the four corners of section 420, Indian Penal Code. Stress has been laid by the Courts below on the fact that Jaffer's returning the receipt and the letter and telling the complainant to bring again in the evening indicates that the accused intended to get the receipt back and retain it. But I am not disposed to attach much importance to this incident of the morning as indicating any criminal intention on the part of Jaffer. But I think that when Jaffer took the receeipt he had no intention of paying the money but intended to retain the receipt to bring pressure upon the managing trustee with regard to a receipt for rent said to have been paid and the return of three beams claimed. The question is whether Jaffer's inducing complainant to give him the letter and receipt and meaning to retain the latter amounts to an offense under section 420, Indian Penal Code.

It has been argued here that Jaffer had no intention of retaining the receipt when he obtained it that evening but that the intention was formulated later on when his brother Moula Dina Ayub stated that the receipt should be retained pending the obtaining of the receipt for rent from the managing trustee. In these cases the evidence must establish the existence of a fraudulent or dishonest intention at the time of the commission of the Act in respect of which the cheating is alleged. Though Jaffer that morning may not have intended to eventually retain the receipt without making any payment, yet the fact of his telling the clerk that on the receipt being returned corrected his brother would arrange for the money would make the clerk believe that on presentation of the corrected receipt the money would be paid, and if Jaffer, knowing that his representations would engender this belief in the clerk's mind and make him give over the receipt when he took the receipt, did not intend to pay, it seems to me that the offence is complete. It is clear that if the clerk realised that he was not to get the money he would not have given up the receipt. That receipt was a valuable document; for its possession would enable Jaffer or his client who owed the rent, if dishonestly inclined, to produce the receipt as evidencing payment. It is further clear that until payment had been made the firm which Jaffer represents had no business to possess the receipt. Jaffer's intentions must be judged from his actions. There is evidence to show that immediately on possessing himself of the receipt and letter he at once stated that he would not pay until his other demands had been satisfied. The defence story that no letter had been given by K. G. Deshmukh to the clerk of the estate, Abdul Karim, is unquestionably false I think the applicant has been rightly convicted. He induced the clerk to deliver the receipt to him on the implied agreement to pay the money and such action was likely to cause harm to the clerk and the managing trustee. The conviction, as I have already said, is correct.

On the other hand, the offence is little more than technical. Jaffer's real object in obtaining the receipt was to bring pressure to bear on the managing trustee with regard to other matters and, looking at the case from this aspect, it does not seem to me that any severe term of imprisonment is called for. I think the ends of justice will be sufficiently met if his sentence is reduced to the period already undergone and the order of fine is confirmed. I direct accordingly.

G. R. D.

Petition rejected.

PATNA HIGH COURT.
CRIMINAL REVISION No. 376 OF 1922.
July 12, 1922.
Present—Mr. Justice Coutts and Mr. Justice Das.
LACHMI SINGH AND OTHERS—ACCUSED—PETITONERS
versus
EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 159—Police diary—Investigating Police Officer permitted to refer to, to refresh memory—Defence, right of, to inspect diary.

When an Investigating Police Officer appears as a witness for the prosecution, and is permitted by the Magistrate to refresh his memory in respect of a particular question by referring to the Police diary, the accused is entitled to an inspection of that portion of the diary only from which the witness refreshed his memory, and not to the whole diary.

Revision against an order passed by the Magistrate, Arrah.

Messrs. *G. C. Pal* and *Hareshwar Prasad Sinha*, for the Petitioners.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.

JUDGMENT.

COUTTS, J.—The ground on which this application for revision was admitted was an allegation that the Investigating Police Officer read over the whole of the Police diary for the purpose of refreshing his memory and that when an application for

inspection of the diary was made it was refused.

On reading the explanation of the Magistrate and the orders which were passed by the Magistrate on the application made at the time, it appears that what occurred was that the investigation officer, when in the witness-box, was asked about a certain date and the names of certain persons and the Court directed him to give the date and the names from the Police diary. This the witness did. The defence thereupon asked for an inspection of the whole diary. This was not allowed; but the Magistrate offered an inspection of the date and the names in respect of which the witness had refreshed his memory from the diary. This, however, was refused. I can find nothing in the law which entitles the defence to an inspection of anything more than that portion of the diary from which the witness refreshed his memory, and, in my opinion, there was no illegality or irregularity in the procedure of the Magistrate.

I see no reason to interfere and I would dismiss this application.

DAS, J.—I agree.

W. C. A.

Rule discharged.

NAGPUR JUDICIAL COMMISSIONER'S COURT.
CRIMINAL APPEAL No. 229 OF 1921
June 27, 1922.
Present:—Mr. Hallifax, A. J. C.
THE LOCAL GOVERNMENT—APPELLANT
versus
ISMAIL BHAI—ACCUSED.

Income Tax Act (VII of 1918), s. 46—Notice, service of—Method of service.

Section 46 of the Income Tax Act, VII of 1918, does not require that service of a notice under it must be effected by the officer of the Court himself placing the notice in the hands of the person named therein: the section in no way excludes any of the other forms of service permitted by O. V of the Civil Procedure Code of 1908, and allows a notice to be sent by post.

Appeal from an order of the Sessions Judge, Bhandara, in Criminal Appeal No. 143 of 1921, decided on the 20th July 1921.

ARUMUGA MUDALIAR.

Mr. *G. P. Dick*, Standing Counsel, for the Appellant.

Mr. *G. R. Bapat*, for the Accused.

JUDGMENT.—As the provisions of section 46 of Act VII of 1918 which have been so completely misinterpreted by the learned Sessions Judge have now been put in a slightly different form in section 63 of Act XI of 1922, there seems little chance of the same mistake being made again. I do not, therefore, consider it necessary to go at any length into the reasons for holding that section 46 of the earlier Act does not require that service of a notice must be by its being placed in the hands of the person named therein by the officer of the Court himself and does not exclude any of the other forms of service permitted by O. V of the Civil Procedure Code. It suffices to point out that so far from requiring greater certainty that the paper reaches the hands of the person himself than the Civil Procedure Code does, the Income Tax Act allows it to be sent to him by post. I may perhaps add that if tender or delivery to the person himself were the only form of service allowed by section 46, the reference to the Civil Procedure Code in the concluding words of the section would be entirely redundant and meaningless, as O. V nowhere prescribes the manner in which personal delivery or tender is to be made. I set aside the acquittal recorded on appeal in the Sessions Court and restore the finding and sentence of the Magistrate, that is to say, I find Ismail Bhai guilty of an offence punishable under section 39 (*b*) of the Income Tax Act, 1918, and sentence him to pay a fine of one hundred and ninety seven rupees.

W. C. A. *Appeal allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 144 OF 1922.
(CRIMINAL REVISION PETITION No. 133 OF 1922).

August 11, 1922.

Present:—Mr. Justice Krishnan,

ARUMUGA MUDALIAR AND ANOTHER—ACCUSED NOS. 1 AND 2—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 199,—Penal Code (Act XLV of 1860), s. 498—Enticing married woman, charge of—Complaint to Police, if sufficient.

A "complaint" within the meaning of s. 4 (*h*) of the Criminal Procedure Code can only be made to a Magistrate. Therefore a complaint to the Police of an offence under section 498, Indian Penal Code, is not sufficient for the purposes of section 199 of the Criminal Procedure Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the District Magistrate, Chingleput, in Criminal Revision Case No. 17 of 1921, preferred against the judgment of the Court of the Second Class Magistrate, Poonamallee, in Calendar Case No. 325 of 1921.

Mr. *F. S. Vaj*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—The order of the District Magistrate cannot be supported. His view that a "complaint" to the Police is sufficient under section 199 of the Code of Criminal Procedure is erroneous. He has evidently overlooked the definition of the word "complaint" in section 4, clause (*h*). It must be made to a Magistrate. There being no such complaint in this case the First Magistrate was right in rejecting the case sought to be made under section 498 of the Indian Penal Code.

The District Magistrate also suggests that on further enquiry an offence under section 366 of the Indian Penal Code may be made out. But no such charge was brought forward and there is no evidence on record to show that an offence under that section was committed. Further enquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available, which has not been taken, and which would support a charge for that offence. In this case, neither position is made out.

The order of the District Magistrate is set aside.

M. C. P. *Order set aside.*

N. H.

MASUD AHMED v. JAGAN SINGH.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 943, 1041 TO 1043 OF 1920.

May 27, 1922.

Present :—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.

Maulavi MASUD AHMED—PLAINTIFF—APPELLANT

versus

JAGAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 148A—Essential principles underlying—Suit by co-sharer for entire rent, form of.

The essential principles underlying section 148A of the Bengal Tenancy Act are, that the suit should in form be for the whole rent and in substance for the separate share of rent in arrears; that the whole body of landlords should be impleaded with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the plaintiff is entitled to assert that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves. [p. 626, col. 1.]

Ram Dhyan Singh v. *Pardip Singh*, 53 Ind. Cas. 91; 4 P. L. J. 500, followed.

Baikantha Nath Sen v. *Ramapati Chatterjee*, 45 Ind. Cas. 767; 27 C. L. J. 101, *Brohmanand Nath Deb Sarkar* v. *Hem Chandra Mitra*, 23 Ind. Cas. 981; 18 C. W. N. 1016 and *Ram Dhyan Singh* v. *Pardip Singh*, 53 Ind. Cas. 91; 4 P. L. J. 500, referred to.

Appeal against the decision of the District Judge, Gaya, dated 28th August 1920, affirming that of the Sub-Judge, Gaya, dated 15th July 1919.

Messrs. *Sultan Ahmed* and *Sultanuddin*, *Hussain*, for the Appellant.

Messrs *Siva Nandan Ray* and *Kailash Pati*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of a suit for rent. The plaintiff who is the appellant is a co-sharer landlord. He instituted a suit under section 148A of the Bengal Tenancy Act, (making his co-sharers as defendants in this suit) on the following allegations in the plaint :—

(1) The collection of rent in respect of the plaintiff's share is separate from those of his other co-sharers. (2) Although the collection of the plaintiff is separate from that of the defendants, the plaintiff in order to obtain the single rent-decree enquired of the defendants Nos. 3—13 (the co-sharer landlords) regarding the arrears of rent payable to them by defendants Nos. 1 and 2 (the tenants). But neither they said what amount was due to them nor did they agree to join in this suit. The plaintiff believes that the proportionate arrears of rent payable to them has already been realised by them. Hence he institutes this suit treating the amount due to him as the entire arrears of rent.

The amount actually claimed happens to be what the plaintiff claims as his share of the entire area. The defendants raised all sorts of pleas such as plea of payment etc., and also urged that the suit was not maintainable under section 148A of the Bengal Tenancy Act. The Sub-Judge, who tried the suit, overruled all the pleas of the defendants except the last one. He held that the plaintiff's suit was defective and did not conform to the rules laid down under section 148A of the Bengal Tenancy Act.

The District Judge on appeal by the plaintiff agreed with the view taken by the Munsif that the suit was not maintainable under section 148A of the Bengal Tenancy Act and dismissed the appeal. The plaintiff has come to this Court in second appeal. The learned District Judge does not seem to have considered the provisions of section 148A. He found that there were conflicting rulings of the Calcutta High Court and of this Court and he was of opinion that the facts of this case agreed more with the facts covered by the Calcutta decision in the case of *Baikantha Nath Sen* v. *Ramapati Chatterjee* (1). On the other hand, the appellant relies upon the case in *Brohmanand Nath Deb Sarkar* v. *Hem Chandra Mitra* (2) decided by the same learned Judge, Mookerji, J., who decided the case in *Baikantha Nath Sen* v. *Ramapati Chatterjee* (1). All these cases, however, seem to have been considered by this Court in the case of *Ram Dhyan Singh* v. *Pardip Singh* (3) Mannk, J., went elaborately into the genesis of the section. The decision of their Lordships of the Judicial Committee in the case of *Pramada Nath Roy* v. *Ramani Kanta Roy* (4) lays down the principles which should

(1) 45 Ind. Cas. 767; 27 C. L. J. 101.
(2) 23 Ind. Cas. 981; 18 C. W. N. 1016.
(3) 53 Ind. Cas. 91; 4 P. L. J. 500.
(4) 35 C. 331; 7 C. L. J. 139; 12 C. W. N. 249; 10 Bom. L. R. 66; 35 I. A. 73; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).

guide the Court, in determining whether a suit really comes under section 148A or not. His Lordship Mr. Justice Manuk held (1) that the essential principles underlying the section 148 A are that the suit should in form be for the whole rent and in substance for the separate share of rent in arrears; (2). that the whole body of landlords are impleaded with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the whole rent due must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief; if and when the impleaded co sharers appear and claim any arrears as due to themselves. We entirely agree with the enunciation of the principles laid down by Manuke, J., and we think that the facts laid in the plaint and the relief sought conform to these principles.

It is, however, contended that the plaintiff in paragraph 5 alleged that his share of the rent collection is separate from those of the other co-sharers, whereas the Court below has held that the collections of the plaintiff and of all the co-sharers were joint and, therefore, the plaintiff's allegation in the plaint upon which the suit is founded is false and the suit must be dismissed for want of cause of action. I fail to appreciate the force of this contention, for it is conceded that if the plaintiff had alleged what the Court has held that the collection of the plaintiff and his co-sharers was joint the plaint was entertainable and the cause of action for rent was not at all against the principles of section 148 A.

Upon the facts found by the Courts below and the plain meaning of section 148A, which is the result of great deliberations in order to meet conflicting authorities at that time, the plaintiff's suit comes well within that section; and it is, therefore, held that the Court below was wrong in dismissing the suit upon the ground that it was not maintainable under section 148A. We set aside the decision of the Court below and remand the case for disposal by that Court on its merits.

This order will govern the analogous appeals Nos. 041—43 of 1920. The appeals are decreed with costs.

BUCKNILL, J.—I agree.

N. K.

Appeals decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 286 OF 1920

March 28, 1922.

Present:—Justice Sir John Woodroffe, KT., and Mr Justice Ghose.

ARADHAN MONDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABHOYA CHARAN MONDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 102, 115—Suit for recovery of price of fish removed from tank after declaration of title to fish—Money suit - Appeal, second, competency of—Declaration of title to tank by Court—Revision.

No second appeal lies from a decree in a suit for declaration of right to and recovery of the price of fish alleged to have been removed from a tank by the defendant, when the value of the suit does not exceed Rs. 500. [p. 627, col. 1.]

Although in such a suit it is open to the Judge to decide the question of title to the tank incidentally in so far as it is necessary for the purpose of giving relief to the plaintiff, it is not within his jurisdiction to *declare* the plaintiff's title thereto, and it is open to the High Court, in second appeal, dealing with the question by way of revision to expunge so much of the decree of the lower Appellate Court as declares the plaintiff's title to the tank as being made without jurisdiction. [p. 627, cols. 1 & 2.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Faridpore, dated the 4th of November 1919, reversing that of the Munsif, Third Court at Madaripur, dated the 25th of March 1919.

FACTS appear from the judgment.

Babu *Satindra Nath Ray Chaudhury*, for the Respondents, took a preliminary objection that no second appeal lies. The suit was for the recovery of the price of fish removed by the defendant and was, therefore, of a Small Cause Court nature and, as the price claimed does not exceed Rs. 500; a

second appeal is barred by section 102 of the Code of Civil Procedure.

Babus *Suresh Chandra Talukdar*, *Jogesh Chandra Ray* and *Mukundi Lal Ray Chaudhury*, for the Appellants.—No doubt the suit was for recovery of the price of fish but in giving a decree to the plaintiff the lower Appellate Court has decided the question of title to the tank which was beyond the scope of the suit. As there has been a decision on the question of title the appeal is perfectly competent. But if your Lordships are inclined to hold that in the present suit the lower Appellate Court had no jurisdiction to decide the question of title, I would invite your Lordships to treat my memorandum of appeal as an application for revision under section 115 of the Code of Civil Procedure.

Babu *Satindra Nath Ray Chaudhury* was not called upon to reply.

JUDGMENT.—In this case a preliminary objection has been taken that no second appeal lies. In support of that objection it has been pointed out that the suit was described as a suit for recovery of the price of fish after declaration of title in respect thereof. The plaintiffs also prayed that the Court might be pleased to establish the plaintiffs' right in respect of the fish and to pass a decree in their favour and against the defendants for recovery of the price thereof, namely, Rs. 500, *i.e.*, the amount claimed with costs and future interest, and in support of their view as to the nature of the suit they rely upon the first ground of the memorandum of appeal, namely, that the Court of Appeal has erred in law in deciding the question of title to the tank which was beyond the scope of the suit and in declaring plaintiffs' title to the tank in the present suit which was merely a suit for damages after declaration of title to the fish and not to the tank. They contend, therefore, that the suit being a suit for money less than the sum of rupees five hundred no second appeal lies. We think this objection succeeds. The appeal must, therefore, be dismissed with costs.

But in deciding this preliminary objection we may observe that the Judge in declaring the plaintiffs' title to the tank has gone beyond the scope of the suit. It was open to the Judge to decide the question of title incidentally in so far as it was necessary for the purposes of giving relief to the plaintiffs, namely, their prayer for declaration of right to and recovery of the price of fish, but it was not within his jurisdiction at all to declare the plaintiffs' title to the tank in dispute as he has done. We are asked to deal with this matter by way of revision and we think that it is right for us to do so. We, therefore, expunge so much of the decree of the lower Appellate Court which declares the plaintiffs' title to the tank in suit which was not within the Judge's jurisdiction to declare. The rest of the decree of the lower Appellate Court will stand.

B. N. & W. C. A.

Order accordingly.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 32 OF 1922; SUIT No. 2417 OF 1919.

August 11, 1922.

Present:—Sir Lallubhai Shah, KT. Acting Chief Justice, and Mr. Justice Crump.

JIVRAJ LALOOBHAI PATEL—APPELLANT

versus

BHAGVANDAS GORDHANDAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 50 (2), (4)—Deceased partner, whether covered by sub-r. (2)—Sub-r. (4), meaning of.

The wording of sub-r (2) of r. 50 of O. XXI, of the Civil Procedure Code is wide enough to cover the case of a deceased partner and under it leave can be given against his legal representative. [p. 629, col 1.]

Sub-r. (4) of r. 50, O. XXI, of the Civil Procedure Code was intended to make clear the implication of sub-r. (1), and it does not affect the provisions of sub-r. (2). [p. 628, col. 2.]

Mr. *Desai*, for the Appellant.

Mr. *Coltman*, for the Respondent.

JUDGMENT.

SHAH, ACTG. C. J.—This appeal arises out of execution proceedings. An *ex parte* decree was passed on February 24, 192-, against the firm of Raghunathdas Mulji. The only partner of the firm that was served was Vaghbaraj. A summons was taken out by the assignees of the original decree holder, Keshavji Ramji, against the executors of Raghunathdas Premji for leave

to execute the decree against his estate on the ground that the deceased Raghunathdas Premji was a partner in the firm of Raghunathdas Mulji. Raghunathdas died on April 23rd 1919, leaving a Will dated February 7, 1919. The present appellant obtained Probate on October 24, 1921. It appears that no notice of the suit was given to partners other than Vaishbaraj.

It was contended before the learned Judge who heard the summons that the original decree holder, Keshavji, had knowledge of the death of Raghunathdas Premji, at the date of the suit, the suit having been filed in August 1919, and further that even if he had no such knowledge, under the provisions of r. 50 of O. XXI, the transferees of the original decree-holder could not execute the decree against that part of the estate of Raghunathdas Premji which did not form part of the partnership assets. The executor did not dispute that Raghunathdas Premji was one of the partners. The learned Judge found that the original decree-holder had no knowledge of the death of Raghunathdas Premji prior to the filing of the suit. He further held against the present appellant on the construction of r. 50 and accordingly granted leave for the execution of the decree against the estate of Raghunathdas Premji.

The first point argued in support of the appeal relates to the question of fact as to whether Keshavji had knowledge of the death of Raghunathdas Premji before the filing of the suit. This question of fact is important in view of the provisions of O. XXX, r. 3, as under the proviso to that rule it is clear that if the original plaintiff had knowledge of the dissolution of the partnership, before the institution of the suit, the summons should have been served upon each of the partners. We have to decide this question on affidavits. The material affidavits have been read to us. On the one hand we have the affidavits of Shamji Gillabhai and Jagjivandas Oodhavji of March 9, 1922. On the other hand, we have the affidavit of Keshavji, the original plaintiff, dated March 11, 1922. It appears that Raghunathdas Premji died at Sihor, a place in the Bhavnagar State in Kathiawar. It is quite possible, however, that as Raghunathdas Premji had his business in the market where the parties were carrying on business, the fact of his death would be known. But the case put forward by Keshavji is that he did not know at the date of the suit that Raghunathdas Premji was a partner in the firm of Raghunathdas Mulji. That is a question upon which there is a conflict of statements in the affidavits, and in that state of the evidence it is quite impossible to say that the view taken by the lower Court is wrong. It seems to me inconceivable that if Keshavji knew that Raghunathdas Premji, who apparently was a well-to-do merchant, was a partner and that he was dead, he would not take care to serve the summons on his legal representative. The present appeal must, therefore, be decided on the footing that the original plaintiff had no knowledge of the dissolution of the partnership, which was essential to invite the application of the proviso to r. 3 of O. XXX.

Two questions have been raised relating to the construction of r. 50 of O. XXI. First, it is urged that sub-r. (4) of r. 50 ought to be so read as to give practical immunity to any partner unless he has been served with a summons to appear and answer. Sub-r. (4) is really intended to make clear the implication of sub-r. (1). It does not in any sense affect the provisions of sub-r. (2) of that rule. The meaning of sub-r. (4) is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned. If the contention of the appellant were accepted, it would have the effect of abrogating the provisions of sub-r. (2). I see no justification whatever for such a construction. This point, however, was not seriously pressed after this aspect of the question was realised by the learned Counsel for the appellant in the course of the argument.

But it has been argued by Mr. Desai that sub-r. (2) applies only to the case of a living partner, and that the provisions of that sub-rule could have no application when the partner is dead. I am, however, unable to accept this contention. It really means that in a case where the decree is passed against a firm the estate of a deceased partner other than the partnership assets would practically remain entirely exempt from the liability to satisfy the

decretal debt unless, of course, the partner has been served with a summons of the suit. That is a position which does not appear to me to be just nor does it appear to have been contemplated by sub r. (2). I am slow to accept the construction suggested on behalf of the appellant which involves such a result. Further, I do not think that on the wording of sub-r. (2) that construction is proper. That sub-rule provides that where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-r. (1), clauses (*b*) and (*c*), as being a partner in the firm, he may apply to the Court which passed the decree for leave to execute it. It seems to me that the wording of the rule is wide enough to cover the case of a deceased partner, and leave could be given as against the legal representatives of a deceased partner. The result, therefore, is that the appeal is dismissed with costs.

CRUMP, J.—I concur.

W. C. A. & N. H.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISIONS NOS. 27 AND 28 OF 1922.

May 27, 1922.

Present:—Mr. Justice Adami.

Pundit RAMSHIVENDRA NARAYAN OJHA AND OTHERS—PETITIONERS

versus

AWADH BIHARY SARAN AND ANOTHER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89, application under—No specific prayer to set aside sale—Prayer to receive deposit—Prayer to withhold payment of money to decree-holder made but withdrawn on objection—Object of deposit—Deposit, whether conditional.

An application under O. XXI, r. 89, without containing a specific prayer to set aside the sale, prayed that the decretal amount may be received in deposit, but that it may not be paid to the decree-holder pending disposal of an appeal On the latter's objection the prayer as to withholding payment was withdrawn:

Held, (1) that, though there was no specific prayer to set aside the sale yet that was clearly the purpose of the deposit; [p. 631, col. 1,]

Raoji v. *Bansilal Narayan Marwari*, 53 Ind. Cas. 135; 43 B. 735; 21 Bom. L. R. 835 and *Rayapati Venkatasubba Rao* v. *Kalapatapu Narayana Rao*, 66 Ind Cas. 44; (1922) M. W. N. 171; 15 L.W. 450, distinguished. [p. 631, col. .]

(2) that, as the prayer regarding withholding payment to the decree-holder was withdrawn by the judgment-debtor the deposit was valid and not conditional. [p. 631, col. 1.]

Dulhin Mothura Koer v. *Bansidhar Singh*, 10 Ind. Cas. 880; 16 C. W. N. 904; 15 C. L. J. 83, relied upon.

Shakoti v. *Jotindra Mohan Tagore*, 1 C. W. N. 132, referred to.

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *Sultan Ahmad* and *Hurnarayan Prasad*, for the Petitioners.

Messrs. *Kulwant Sahay*, *S. N. Ray*, *S. Dayal* and *Sambhu Saran*, for the Opposite Party.

JUDGMENT.—The opposite party, having obtained two decrees against the petitioners, took out execution on the 9th December 1921, and at the sales in execution of the two decrees, bought a house belonging to the petitioner for Rs. 200 in each case, and on the 10th of December deposited the earnest money. On the 3rd of January 1922 the petitioner, judgment-debtor, filed two applications which differ in a certain degree and which are as follows. In the case which is covered by Civil Revision No. 27 before this Court the petition runs as follows:

"The petitioners' property has been sold at auction, therefore, the petitioners have brought the whole decretal money with costs and damages into Court. A *chalan* may be prepared in office and granted to the petitioners so that they may deposit the money into the Treasury. Be it known that the petitioners field a petition for setting off this decree which was disallowed. An appeal is being filed in the Court of the District Judge. Let this money be not given to the decree holder until the disposal of this appeal."

The other petition was similar except that after the words "so that they may deposit the money into the Treasury," the words "and the sale may be set aside" were added. The Court on these petitions ordered that the *challans* should be granted and that the prayer as to the withdrawal of the money by the decree holder would be heard later on. On the 6th of January the opposite party

deposited the whole of the purchase money and on the same date the petitioner put in his *challan* for the whole of the decretal amount in respect of each decree and the Court passed an order that the decretal amount should be deposited and that the petition with regard to the withholding of the money should be put up in the presence of thePleaders On the 7th it was directed that the question should be heard in the presence of the Pleaders but no order was passed until the 10th of January 1922. On that date the learned Subordinate Judge remarked that it appeared from the petition of the judgment debtor that he had deposited the decretal amount and prayed for setting aside the sale. This remark was made in both the cases. He then proceeded to say that, if the prayer in the petition had been merely for setting aside the sale, there would have been no difficulty in granting it: but in the second paragraph of the petition the judgment-debtor had asked for the money to be withheld by the Court until the disposal of the appeal which he had lodged. The learned Subordinate Judge held that this prayer made the deposit a conditional one and, although on that date the Vakil for the judgment-debtor had asked to disassociate the prayer for withholding the money from the prayer for setting aside the sale after depositing the money made in the same petition, the petition must be read as a whole and one prayer must depend upon the other and could not be divided. He was, therefore, of opinion that the deposit made by the judgment-debtor could not be held to be valid so as to set aside the sale because it was not unconditional. He then confirmed the sale and refused the petition of the present petitioners.

This finding was upheld by the District Judge on appeal. He relied on the case of *Shakoti* v. *Jotindra Mohan Tagore* (1). It is clear, I think, that the learned District Judge had not his attention called to the case of *Dulhin Mothura Koer* v. *Bansidhar Singh* (2). That is a case which is exactly on all fours with the present one, and I think I might rely on the following passage from that case:

"It appears, however, that the deposit was accepted by the Court without any question and as soon as objection was taken by the decree-holder, the petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court. Under such circumstances, we are not prepared to hold that the deposit was invalid and not sufficient for reversal of the sale. The position might have been different, if, upon objection taken by the decree-holder, the petitioner had persisted in her effort to annex a condition to the deposit. The decree-holder was not prejudiced in any manner by the insertion of the prayer in the application of the petitioner that the money should be retained in Court, and he was substantially in the same position in the end as if such prayer had never been made. We must consequently hold that there was substantially a valid deposit within the time limited by law, sufficient for reversal of the sale."

Now, in the present case the deposit was made within the time allowed by law, and as soon as the decree holder put in an objection, the Vakil for the present petitioner expressed his readiness and wish to disassociate, as the Subordinate Judge said, the prayer for setting aside the sale from the prayer for the withholding of the money pending the disposal of the appeal.

The learned Government Pleader on behalf of the opposite party distinguished this present case from that in *Dulhin Mothura Koer* v. *Bansidhar Singh* (2) in that in the latter case the Vakil for the judgment-debtor stated his wish to altogether withdraw the prayer for the retention of the money, while in the present case he does not withdraw the prayer but wishes to make it a separate prayer. I do not think that this distinction can really affect the case. What was meant was that the petitioner wished his prayer for setting aside the sale on receipt of the deposit to be considered absolutely separately and as a separate prayer. It would have been quite open to him to have put in a petition for setting aside the sale on receipt of the deposit and after he had been granted the application, to have put in a prayer that the money deposited should be retained. As I have said the payment was made within time, and though on the 10th when the application was heard, the thirty days had expired, it was no fault of the peti-

(1) 1 C. W. N. 132.

(2) 10 Ind. Cas. 880; 16 C. W. N. 904; 15 C. L. J. 88.

tioner that the delay in hearing the application deprived the petitioner from depositing the money with an application merely praying for setting aside the sale. Had the application been heard at once and decided, it would have been open to him to put in a fresh application. It is thus through no fault of his own that he was deprived of the chance of saving his property.

It is next argued on behalf of the opposite party that in one of the petitions there was no specific prayer to set aside the sale; it merely asked that the money should be received in deposit. Now it is quite clear that the learned Subordinate Judge took this as a prayer for setting aside the sale; and in fact it was quite certain that that was the purpose of the deposit. Two cases have been relied on in support of this objection, namely, the case of *Raoji* v. *Bansilal Narayan Marwari* (3) and the case of *Rayapati Venkatasubba Rao* v. *Kalapatapu Narayana Rao* (4). Those two cases, however, must be distinguished, because there no application was put in to the Court at all. The judgment debtor merely went to the Nazir of the Court and deposited the decretal amount and the Court without any knowledge of his deposit naturally confirmed the sale; and in the former of the two cases it was not until three years afterwards that objection was made that as the deposit had been made the sale should, therefore, be set aside. I do not think that the decisions in those two cases can affect the present case.

The next objection is that no question of jurisdiction arises and, therefore, this Court should not interfere, but with this I cannot agree If the deposit was a good deposit, the Subordinate Judge had absolutely no jurisdiction to refuse to set aside the sale; and I find that the deposit was a good deposit as soon as the Vakil expressed his willingness that the prayer for setting aside the sale after depositing the decretal money should be taken as a substantive prayer without any condition attached to it. In my opinion, therefore, the decision of the lower Courts should be set aside and the sale should be held to be invalid and set aside. Hearing fee three gold *mohurs* in both cases.

S. D.

Revision allowed.

(3) 53 Ind Cas. 185; 43 B. 735; 21 Bom. L. R. 835.
(4) 66 Ind. Cas. 44; (1922) M. W. N. 171; 15 L. W. 450.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 180 AND 330 OF 1918.

November 13, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Burn.

VAITHINATHA AIYAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

S. THEYAGARAJA AIYAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, who can sue under—Prayer of scheme—Enquiry as to properties belonging to charity—Hindu Law—Descendants of founder of charity, right of, to sue or nominate trustees—Interest, question of, how determined—Trustee not fit to hold office—Interference by Court—Administration of charity—Denial of existence of public trust bona fide—Disqualification for appointment as trustee—Gift—Gift of income, whether gift of property—Conveyance, forms of, in Mofassil.

The mere fact that a person suing under section 92 of the Civil Procedure Code is a Hindu and entitled to worship in a temple does not give him interest enough to maintain a suit under that section. But persons belonging to the family of the founder of a charity have an interest in the family charity and can, therefore, maintain a suit under the section. [p. 632, col. 2; p. 633, col. 1.]

Boidyo Gauranga Sahu v *Sudevi Mata*, 41 Ind. Cas. 589; 40 M. 612; 32 M. L. J. 597; (1917) M. W. N. 429 (F. B.) *Ramachandra Iyer* v. *Parameswaran Munbu*, 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370 (F.B.), referred to.

The question whether a person instituting a suit under section 92 of the Code has an interest within the meaning of its provisions or not must be determined upon the facts of each case bearing on the relation of the plaintiff to the charity with reference to which the suit is brought. [p. 632, col. 2.]

Assuming that, under the Hindu Law, the surviving heir of the founder of a charity has a right to nominate a trustee in the absence of any provision to that effect in the deed of endowment, it is a right the exercise of which a Court is not bound to uphold if, in its opinion, the person nominated as trustee is not fit to hold the office. The interests of a trust are supreme and a Court must have regard to such interests in dealing with the question whether the

persons appointed as trustees are persons who can be properly entrusted with the management of the institution. [p. 637, col 1.]

Mahomed Ismail Ariff v. *Ahmed Moolla Dawood*, 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L B. R. 517; 43 I. A. 127 (P. C.), followed.

When there is a gift in favour of a charity, it is within the competence of a Court, in a suit under section 92 of the Civil Procedure Code, to make a suitable provision for its administration in any scheme that is to be framed, especially where there exists no such provision already. [p. 636, col. 2.]

The mere denial by a person of the existence of a public trust, if *bona fide*, does not by itself disqualify him from being appointed or retained as trustee of the institution. [p. 637, col. 2.]

A gift of the income of a property without any limitation is a gift of the property itself. [p. 636, col. 2.]

Southmolton v. *Attorney-General*, (1854) 10 E. R. 796 at p. 808; 5 H. L C. 1; 23 L. J. Ch. 567; 18 Jur. 435; 101 R. R. 1 and *Mannox* v. *Greener*, (1872) 14 Eq. 456; 27 L. T. 408, followed.

In India the forms of conveyance are not strictly observed, especially in the Mofassil. [p. 635, col. 1.]

Under section 92, Civil Procedure Code, when a Court is asked to frame a scheme, one of the essential enquiries to be made is, what are the properties belonging to the charity. [p. 636, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 90 of 1916.

Mr. *T. Rangachariar*, for the Appellants.

Messrs. *S. Srinivasa Aiyangar* and *K. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—This appeal arises in a suit filed under section 92 of the Civil Procedure Code with reference to a choultry and the properties alleged to be endowed for the use of that choultry. The two plaintiffs are relations of the founder and the two defendants allege to be the lawfully appointed trustees under the Will of one Suriyanarayana Aiyar, who, according to the plaintiffs, was the last surviving trustee of this charity. Suriyanarayana Aiyar was one of five brothers, the sons of one Kalyanarama Iyer. The other four brothers were Sivasubramaniyar Aiyar, Venkatararga Aiyar, Swaminatha Aiyar, and Sivarama Aiyar. Kaliyanarama Aiyar had also several daughters, one of them being the mother of Thiyagaraja Aiyar, the 1st plaintiff. Second plaintiff is the son of the adopted son of another daughter of Kaliyanarama Aiyar. One daughter of Kaliyanarama Aiyar named Subbuthayi Ammal is still alive, all the sons and the other daughters having died previous to the institution of the suit. The first question which has been argued before us by Mr. T. Rangachariar, the learned Vakil for the defendants, is whether the plaintiffs have an interest within the meaning of section 92 of the Civil Procedure Code sufficient to enable them to maintain the suit. He relies strongly on the decision of a Full Bench of this Court in *Ramachandra Iyer* v. *Parameswaran Munbu* (1) which lays down that a person suing under the provisions of this section must have a substantial interest and not merely a remote contingent or hypothetical interest in the charity in question. Since that decision a Bench of this Court have considered its effect in Appeal No. 196 of 1918, the facts of which have much resemblance to the facts of this case. Whether the plaintiffs instituting a suit of this character have an interest within the meaning of section 92 or not has to be determined upon the facts of each case bearing on the relation of the plaintiffs to the charity with reference to which the suit is brought. In this case the plaintiffs are, as stated, the descendants of the founder of the charity. The first plaintiff, on the death of Subbuthayi Ammal, in the absence of Kaliyanarama Aiyar's Dayadees, would be entitled to succeed to the family properties.

Mr. Rangachariar has argued that there is evidence to show that there are Dayadees of Kaliyanarama Aiyar in existence. That evidence is of an extremely vague character, and, in any case, it is not shown that they are taking any interest in the preservation of the charity or in any of the affairs of the family generally. With respect to Subbuthayi Ammal also it does not appear that she interests herself in the proper maintenance of the charity. The first plaintiff resides in Madras but he occasionally visits Perumandi village, the ancestral home where the choultry is situate. The second plaintiff is a Pleader practising in the Native State of Pudukotta. He has several houses in Kumbakonam and he often visits the ancestral family house. No doubt it has been laid down that the mere fact that the plaintiff suing under section 92, Civil Procedure Code is a Hindu and is entitled to worship in a temple would

(1) 50 Ind. Cas. 693; 42 M. 360; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492; (1919) M. W. N. 370 (F. B.).

not give him interest enough to maintain a suit under section 92, Civil Procedure Code. In applying the analogy of that case to this choultry we have to bear in mind the further facts that the plaintiffs belong to the family of the founder and that fact would naturally give them an interest in the family charity. It has been ruled by a Full Bench of this Court in *Boidyo Gauranga Sahu* v. *Sudevi Mata* (2) that the heirs of the founder have considerable interest in the maintenance of the charity, and the Hindu Law gives them the right to nominate trustees in the case of a vacancy and in the absence of any provision in the deed of endowment for the appointment of trustees. In our opinion, therefore, the Full Bench decision of this Court above referred to does not preclude us from holding that the plaintiffs, having regard to the facts proved in the case, have an interest within the meaning of section 92, Civil Procedure Code, sufficient to enable them to maintain the suit.

The next question argued by Mr. Rangachariar is of a still more general character, namely, that this choultry is not a public trust, but is nothing more than a private guest house built by Kaliyanarama Aiyar, and to a suit in respect of it, therefore, the provisions of section 92, Civil Procedure Code, have no application. The appellant's contention is that a public trust of this character was created later on by the provisions of the Will of Suri Aiyar already referred to, and that until then it was private property of the family or at the most a private trust which the members of the family were entitled to put an end to in certain contingencies. At all events it is said there was no dedication to public uses except under the Will of Suri Aiyar.

The question really depends upon the inference to be drawn from the evidence in the case, mainly the documentary evidence ranging from 1864, as there was no deed executed by the founder with reference to this choultry when he built it. Some question is raised as to who the actual founder was, whether the choultry was built by Kaliyanarama Aiyar or by his father, Rajappa Iyer. But the plaintiffs in their plaint state that it was constructed by Kaliyanarama Aiyar. We think that we ought to proceed on that basis, though there is evidence, even of witnesses on the side of the defendants, to show that the choultry was sometime known as Rajappa Iyer's. The earliest document is of 1864, a deed of partition between the five brothers, Exhibit A. The document speaks of this choultry as "Perumandy Chatram which is the Dharmam and which is being conducted in the family from the beginning and it mentions the Panjah and Punjah and lands of other description which are attached to the Chatram of which some are in the Perumandi village, some in Alankurichio and some in Thennalur village. These are the lands which form the properties mentioned in the plaint B schedule, Items Nos. 1 to 17. Chatram itself and the lands surrounding it form the A schedule. Then it is provided that the five brothers shall manage the Chatram according to the order of seniority. The document speaks of these properties being given to the Chatram. It is important to note this fact that income yielding properties were attached to this Chatram and were set apart for its maintenance, and the brothers while partitioning the family properties did not think of dividing the Chatram properties. If it was merely a private guest house as argued on behalf of the appellants one would not expect any properties being set apart for its maintenance, nor would there have been a provision for its maintenance by each member of the family in turn. It was pointed out that there was no provision made for the appointment of trustees after the death of the five brothers. But that cannot make any difference. When we find that income yielding properties are set apart for the maintenance of the Chatram it might well have been within the contemplation of the brothers either that they would later on make a further provision with respect to its management or that its management should be carried on by the succeeding members of the family in succession to themselves. The next document of importance is the Will of Swaminatha Iyer, Exhibit C. The construction of this Will is one of the questions for decision in the appeal, which we shall deal with later on. It is sufficient to mention here that by this Will the executors appointed therein are directed to feed poor people "in our family

(2) 41 Ind. Cas. 589; 40 M. 612; 32 M. L. J. 597; (1917) M. W. N. 429 (F. B.).

choultry in Perumandi now under the management of K. Venkatranga Aiyar." That is not the sort of provision which would have been made if this Chatram were the private property of the original undivided family. The burden of the maintenance of the Chatram would in such cases fall on the surviving descendant of Kaliyanarama Aiyar. The Will of Swaminatha Aiyar clearly implies consciousness on his part that the Chatram is a public trust created by the ancestor of the family. Very soon afterwards, *i.e.*, in 1892, a deed of surrender, Exhibit B, was executed by Sivasubrahmania Aiyar in which he says: "as I have already left the Chatram belonging to our family and situated in Agara Perumandi village and the Nanjah and Punjah lands, etc., all matters belonging to it to the management of Venkatranga Iyer because of my inability to manage the same." In another place he speaks of Nanjah and Punjah lands "belonging to the said Chatram." We may mention here that much stress was laid by Mr. Rangachariar on the use of the phrase "Chatram belonging to our family or 'family Chatram' and similar pharases of that character used in this and other documents. But, in our opinion, such expressions do not suggest any inference against the existence of public trust with respect to this Chatram; all that they mean is that it was founded and maintained by the family. Then there is the Will of Venkatranga Aiyar executed in 1894, Exhibit H and by that Will a contingent interest is given in his properties to the Chatram and provision is made for the administration of the choultry and its properties by the Government in case the contingency happens, and it describes the choultry in so many words as a charity choultry built by the ancestors of the testator. No explanation has been suggested as to why this choultry should have been described as charity choultry and why its maintenance and of the properties attached to it should have been provided for if it was not a public trust. It could not be suggested that Venkatranga Aiyar would have thought of dealing with this choultry as a public charitable trust if, as a matter of fact, it was a private property in which other members of the family were beneficially interested, nor would he have entrusted the management to the Government in certain events if it was not a public trust." Suri Aiyar was the last survivor of the five brothers. He was a District Munsif and afterwards Subordinate Judge. He died after retirement from service in 1913. As already mentioned, the appellants' case is that it was Suri Aiyar who for the first time created a public charitable trust of this choultry and of the properties belonging to it. The Will, however, shows that he did not want to change the character of this choultry; on the other hand, what he intended was to keep up its original character and to endow it with some more properties of his own. He speaks of the choultry as his family choultry and of the building and landed properties as belonging to it. It was pointed out that he states that they were in his possession and enjoyment. That does not necessarily mean that they were in his possession and enjoyment as a beneficial owner but he only means that he was in management of them, as he makes it clear in other parts of the Will, For instance in paragraph 11 he provides for the management of the choultry and of the entire properties attached thereto. There is another document, Exhibit D, which is a deed of relinquishment executed by Sivasubramania Iyer in 1892 in favour of Suri Iyer. There he speaks of the trusteeship of the Dharma Chatram found d by forefathers and gives up all claims with respect thereto for the consideration of an annuity of Rs 20 to be paid by Suri Aiyar. Mr. Rangachariar objected to the admission of this document on the ground that only a registration copy was produced and that it was not duly proved. No such objection was taken in the lower Court and even in the grounds of appeal before us. All that is stated is that the lower Court did not construe the document properly. Then it was argued that this deed of agreement suggests that Sivasubramania Aiyar laid claim to the Chatram and its properties. With respect to this it has to be borne in mind that Sivasubramania Aiyar managed to get rid of the ancestral properties that fell to his share at rather an early date, and that he was depending more or less upon the charities or Suri Aiyar. It is evident that this man was trying to get whatever he could get from Suri Aiyar. It would seem that Suri Aiyar in order to save himself further worry or trouble agreed to give him a small stipend and obtain from him a deed of relinquishment in his favour. On

the other hand, the recital to which we have referred shows that the choultry was regarded as a charitable institution. All these documents, therefore, to which all or some of the members were parties strongly support the case of the plaintiffs that the choultry with properties attached to it is a charitable trust.

Mr. Rangachariar has relied upon a number of lease deeds and *muchilikas* in which the properties in dispute are described as ancestral property and enjoyed by the executants of the deed, that is, by one of the five brothers who at the time was in management of this choultry. But we do not think that any valuable inference can be drawn from these documents. No doubt the correct thing for a trustee of a choultry demising the charity properties is to describe the properties as belonging to the charity and to state that he was making the demise in his character as trustee. In this country the forms of conveyance are not strictly observed, especially in the districts and we should not be justified in attaching any importance to casual expressions in documents like Exhibits II series, VI series, V series and VIII series. Special reference was made to the Inam title deed with respect to some lands in Thirumallur village, Exhibit IX. We are asked to draw an inference in the defendant's favour from the absence of any description in the title deed as to the grantee being a trustee of the choultry. But we do not think that this is a matter of any importance as the description stands on the same footing, as that in the lease deeds. Much reliance was placed on the fact that in 1878 some land in Thennur village was usufructuarily mortgaged. But then, as pointed out by the Subordinate Judge, it has been redeemed and included even in Suri Aiyar's Will as property belonging to the choultry.

The other piece of evidence on which the appellants place much reliance is with reference to the exchange of a piece of vacant land in Exhibit IIIA and included in schedule A. The superstructure on the land was subsequently made a gift of to another person and purchased by Suri Aiyar under Exhibit III. In this very document it is stated that the superstructure and the building belonged to the Dharma Chatram. The documentary evidence on the whole is strongly in support of the finding of the Subordinate Judge that the choultry was a charitable public trust.

As regards the evidence of the actual use of this choultry, there can be no doubt the wayfarers were used to be accommodated there and that the Brahmins also were fed in the choultry. Even one of the defence witnesses, D. W. No. 5, an old man whom the Judge has believed on this point, speaks of the Brahmins being fed in the choultry and wayfarers being lodged there. No doubt there is evidence to show that Suri Aiyar, the last trustee, did not think that the feeding of Brahmins was very much of a charitable act, though he himself provided for the feeding of Brahmins by his own Will. It was also pointed out by the learned Vakil for the appellants that Suri Aiyar sometimes when visiting the village put up in this choultry and that some family idols were kept there. These are small matters and cannot have much significance considering that the choultry was managed all along by the members of the family. We, therefore, agree with the finding of the Subordinate Judge that this choultry was a public trust from the very beginning and, therefore, the suit with respect to it and its properties is maintainable under section 92, Civil Procedure Code.

The next question argued was whether the properties in A and B schedules form part of the endowment. It appears that one of those properties was sold long ago and Mr. Rangachariar wanted to adduce in this Court as evidence a document purporting to be the deed of sale with reference to the transaction. The defendants had not taken the trouble of finding out the document and producing it in the lower Court. That property is not claimed in this suit and there is no evidence to show the circumstances in which the property came to be sold. It might be, as suggested by the Subordinate Judge, that it was sold for purposes binding on the Chatram. We have already dealt with the question relating to the lands which are the subject-matter of Exhibits III and III-A and of usufructuary mortgage, Exhibit II. We agree in the conclusions of the Subordinate Judge that the properties in A and B schedules attached to the plaint form part of the endowment of this choultry. As regards schedules C to F some properties have been alienated and the

alienees are not parties to this suit. So far as those properties are concerned, as pointed out by the Subordinate Judge, any finding in this suit cannot bind the alienees. This question is dealt with by him under the 11th issue. We agree with the Subordinate Judge that it will be open to the trustees appointed under the scheme to sue the alienees in respect of the alienated properties.

As regards the construction of Exhibit C, the Will of Swaminatha Aiyar, the learned Subordinate Judge has held that the choultry has a claim to 7/9th of the properties. It was contended by Mr. Rangachariar that we are not entitled in this suit to go into the question of the construction of Swaminatha Aiyar's Will. But we accept the contention of Mr. K. Srinivasa Aiyangar that under section 92, Civil Prosedure Code, when we are asked to frame a scheme one of the essential enquiries to be made is what are the properties belonging to the charity. We are not directly concerned in this suit with the administration of the Will of Swaminatha Aiyar. But as the defendants who are in possession of the choultry and its properties deny that the choultry is entitled to any benefits under the provisions of Exhibit C as claimed by the plaintiff, it is open to us to go into the question. It was suggested that the gift in favour of the choultry is not to take effect until the executors appointed by the Will have paid the debts. The Will was in 1881. There is not an iota of evidence that any debts of Swaminatha Aiyar remain undischarged. The executors appointed under the Will are dead and we think we may safely conclude that there are not debts left to be paid and that the contingency upon which the charity was to get 1/3rd of the income has arisen.

As regards 2/3rds of the income of the properties given to the wife which the Will directs to be utilised for Dharmam on her death, it is argued that the reference there is not to this choultry but to charity generally. The learned Subordinate Judge has held that the word 'Dharmam' refers to this choultry and we think he is right in that construction. In view of the Will the choultry becomes entitled under Exhibit C to 7/9ths of the income of the properties.

It is next argued that we must hold that there was a special endowment or Kattalai, as it is called, created by Swaminatha Aiyar, and such a special endowment should not be mixed up with the properties originally dedicated to the choultry. No doubt the provisions of Swaminatha Aiyar's Will are to be carried out by the executors, Venkataranga Aiyar and Suryanarayana Aiyer. Both of them are, however, dead. If there is a gift, as we hold there is, in favour of this charity it is within the competence of the Court in this suit to make a suitable provision for its administration in any scheme that is to be framed, especially as there is no provision in the Will for the administration of these properties after the death of Venkataranga Aiyer and Suryanarayan Iyer.

It was further argued that the gift of the income from the properties devised under Exhibit C does not amount to a gift of the properties themselves but only creates a charge in favour of the choultry. We do not think, however, that this is a sound proposition. The gift of the income of a property without any limitation is a gift of the property itself. See *Southmolton* v *Attorney-General* (3), also *Mannox* v. *Greener* (4).

The last important question to be determined relates to the effect of Suri Aiyar's Will. It is contended on behalf of the appellants that Suri Aiyar, being a descendant of the founder of this charity, Kalyanarama Aiyar, as last trustee was entitled to appoint the first and second defendants and also one Jaya Krishnachari as trustees. Two issues were raised with reference to this question. One was whether Suri Aiyar was competent to make the appointment and, if so, whether the appointment was *bona fide*. And the 15th issue raised the question that if the defendants were appointed they should be removed from office. The learned Subordinate Judge has held that the appointment of these two persons was not *bona fide* and has also found facts which show that these persons cannot properly be trustees of these properties. He says that Suri Aiyar did not believe in the utility of feeding Brahmins in the choultry, that his conduct also shows that he was not really interested in maintaining the choultry but that he was more

(3) (1954) 10 E. R. 796 at p. 809; 5 H. L. C. 1; 23 L. J. Ch. 587; 18 Jur. 435; 101 R. R. 1.

(4) (1872) 14 Eq. 456; 27 L. T. 408.

interested in providing for a woman whom he calls his foster daughter, namely, Rangathammal, that the first and second defendants are brothers and hangers-on of Suri Aiyar, and that the 1st defendant who worked for him as a sort of *gumastah* acquired a great deal of unwholesome influence over him, and that Suri Aiyar put these properties in their charge not so much for the benefit of the charity as for their personal benefit and for the benefit of Rangathammal. We shall assume that Suri Aiyar as the surviving descendant of the founder was entitled under the Hindu Law to nominate trustees and to make provisions for the management of the trust. But it is a right the exercise of which the Court is not bound to uphold if, in its opinion, the person nominated by the founder's heir as trustee is not fit to hold the office. As laid down by the Privy Council in the well-known case from Rangoon, *Mahomed Ismail Ariff* v. *Ahmed Mcolla Dawood* (5), the interests of the trust are supreme and the Court must have regard to such interest in dealing with the question whether the persons appointed as trustees are persons who can be properly entrusted with the management of the institution. These two persons, the first and second defendants, are absolute strangers to the family, though they alleged certain relationship to the family which allegation is found to be false. The first defendant is not a man of any means, and the learned Subordinate Judge who tried the suit is not satisfied that the second defendant's career was not such as to inspire confidence. Besides, as pointed out by Mr. K. Srinivasa Aiyengar, the defendants have persistently contended that the choultry was not a public foundation at all and that the property claimed as public trust was the private property of the family. The Subordinate Judge has found that the fist defendant aided and abetted Suri Aiyar in his violations of the trust. The first defendant certainly must have known that the choultry was a public charitable trust. He must have known that the travellers used to be accommodated there, that Brahmins used to be fed there and that it was regarded by the family including his master, Suri Aiyar, as a charitable trust and not as the private property of the family. This Court has no doubt held that the mere denial of the existence of a public trust, if *bona fide*, does not by itself disqualify the man from being appointed or retained as trustee of the institution. We are convinced, as was the learned Subordinate Judge, that this is not such a case and that under the circumstances the appointment of defendants Nos. 1 and 2 as trustees should not be upheld and they should be removed from the trusteeship of this foundation. The third trustee, Jaya Krishnamachari, is dead. It will, therefore, be open to the lower Court in framing the scheme to appoint proper trustees for the institution.

Mr. Rangachariar argued that some properties mentioned in F schedule which were disposed of by Suri Aiyar by his Will did not in fact belong to him, some of them being properties belonging to some temple at Nagarkudi, some of them being service Maniams and that they were in the possession of Suri Iyer on behalf of the temples and the service-holders. These properties are mentioned in paragraphs 9 and 9 (*a*) of the written statement and there is no finding of the Subordinate Judge with respect to them.

Items Nos. 172 to 179 were purchased by Suri Iyer in execution of a decree for rent obtained by himself in 1912 and portions of Items Nos. 91 and 92 claimed in the written statement and the whole of Item No. 170 were similarly purchased by him in 1903 in execution of another decree. Mr. Ganapathi Aiyar for the defendant claimed these properties as belonging to Suri Aiyar by right of his purchase. These items belong to Nagarkudi village and the case of the plaintiffs was set out in their plaint that the Nagarkudi village belonged to Swaminatha Aiyar and was disposed of by him in his Will and under that Will, as we have held, the choultry became entitled to 7/8th property. There is no evidence to show that Suri Aiyer was in possession of these items before Swaminatha Aiyer's death. Presumably he was in possession as an executor under Swaminatha Aiyer's Will. It is argued that he might have purchased the properties from his own funds, but then it must be borne in mind that he mixed up the trust property with his own

(5) 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517; 43 I. A. 127 (P. C.).

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and alienated a number of trust properties referred to in C, D and E schedules. The defendants did not produce accounts which, if their case was true, would have shown whether the properties were purchased by Suri Aiyar with his own money or with the moneys belonging to the trust for the choultry. Under these circumstances we must hold that these items belonged to the choultry.

As regards Item No. 171, called Illuppai Tope of which Suri Aiyer was in management on behalf of a certain temple called Kailasanatha Swami temple and a Manyam belonging to the same temple and another temple of Varadaraja Perumal, *i.e.*, Items Nos. 189 and 183, Suri Aiyar was apparently in possession of these properties as Mirasidar of the village. It is contended by the learned Vakil for the plaintiff that as the choultry owns considerable lands in Nagarkudi village the trustees whoever may be appointed for the choultry should have the management of these items as Mirasidar, but we cannot accept this contention as there must be other Mirasidars: it is the entire body of Mirasidars who could make arrangement for the management of these properties as they may choose. It may be open to them to make over charge of these items to the trustees of this choultry if they so choose. But we cannot hold that the trustees would be entitled as of right to have possession and management of these properties. Seventeen Kulis of Item No. 8, 21 Kulis of Item No 19 and the whole of Items Nos. 24 to 26 belonged to Sellathammal, the widow of Swaminatha Iyer. Suri Aiyar would be the reversionary heir of Sellathammal and there is really no evidence upon which we would be justified in holding that these items belong to the Chatram. The Manyams claimed by the defendant—service Maniyam's, barber's, washerman's, carpenter's and watchman's are Items Nos. 43, 60, 78 and 84. The Mirasidars of the village would be entitled to the management of these Maniyams for the reasons already given in respect of Items Nos. 171, 180 to 183. We cannot hold that the trustees of the choultry would, as a matter of right, be entitled to possession of these Maniyams. The result is that Items Nos. 171, 180 to 183, 17 Kulis of Item No. 8, 21 Kulis of Item No. 19, Items Nos. 24 to 26, and Items Nos. 43, 50 and 84 mentioned in schedule to the written statement at page 4 will be excluded from the decree. In all other respects, the lower Court's decree is confirmed and the appeal dismissed with costs, the costs to be paid by the defendants personally, as we do not think that this is a proper case in which the costs of the appellant should come out of the trust estate.

Mr. K. Srinivasa Iyangar has asked for special Vakil's fee but we cannot say that the appeal involved any points of special difficulty. The usual fee will be allowed.

Appeal No. 330 of 1918 will be dismissed but as accounts will have to be taken, there must be a direction that the defendants do render accounts of the properties from the date of the death of Suri Aiyar. The Subordinate Judge will expedite the appointment of trustees, as there are properties in the hands of the alienees and it is apprehended that some suits might be barred if there be any further delay. The costs of both parties in this appeal will come out of the estate.

M. C. P.

S. D.

Decree varied.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 245 OF 1921.

June 13, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

KAMAL NAIN SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

Maharaja Bahadur KESHO PRASAD SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Previous application against one judgment-debtor dismissed—Subsequent application against all judgment-debors, whether in continuation—Application for possession by purchaser, not step-in-aid of execution—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182.

Where a previous application for execution has been dismissed because of a successful application made under O. XXI, r. 90 of the Civil Procedure Code, a subsequent application for execution is an

application in continuation of the previous application. But where an application has been made against one of several judgment-debtors and has been dismissed for this reason, a subsequent application made against all the judgment-debtors cannot be treated as an application in continuation of the previous application [p. 640, col. 1.]

An application for possession made by a decree-holder auction-purchaser after the confirmation of sale, is not a step-in-aid of execution, inasmuch as as soon as a sale is confirmed, the property vests in the purchaser and any further step which it may be necessary for him to take in order to secure possession is not a step taken by a decree-holder, even if he happens to be the auction-purchaser but is an application by the auction-purchaser as such and has, consequently, nothing to do with the execution of the decree. [p 640, col 2.]

Abdul Gani v. *Raja Ram*, 35 Ind. Cas. 468; 1 P. L. J. 232; 20 C. W. N. 829; 3 P. L. W. 62 (F. B.), referred to.

Sariatoolla Molla v. *Raj Kumar Roy*, 27 C. 709; 4 C. W. N. 681; 14 Ind. Dec. (N. s.) 466, *Moti Lal* v. *Makund Singh*, 19 A. 477: A. W. N. (1897) 117: 9 Ind. Dec. (N. s.) 308, *Bhagwati* v. *Banwari Lal*, 1 Ind. Cas. 416; 31 A. 82; 5 M. L. T. 185; 6 A. L. J. 71 and *Babu Ram* v. *Pearey Lal*, 50 Ind. Cas. 143; 17 A. L. J. 496; 41 A. 479, dissented from

Appeal from a decision of the District Judge, Shahabad.

Messrs. *S. C. Mitter* and *N. C. Roy*, for the Appellant.

Mr. *N. N. Singh*, for the Respondent.

JUDGMENT.

COUTTS, J.—This appeal arises out of an application for execution. Maharaja Bahadur Kesho Prasad Singh obtained a rent decree against one Ram Khelawan Singh on 29th October 1914. After the decree had been obtained Ram Khelawan died and on 7th April 1916 the decree holder took out execution against his three sons, Dwarika Singh, Kamal Nain Singh and Murli Singh. In the execution petition Kamal Nain Singh was described as a major and Murli Singh as a minor under the guardianship of his eldest brother Dwarika Singh. The properties of the three brothers were sold on 31st October 1916 and purchased by the decree holder, and on 5th December 1916 the sale was confirmed. On 7th September 1918 an application to set aside the sale was made by the three brothers on the ground that Kamal Nain Singh was a minor at the date of the sale and that Murli Singh was not properly represented by his brother Dwarika Singh. The application was successful and on 4th February 1920 the sale was set aside. On 9th October 1920 the decree-holder filed the application for execution with which we are now concerned. The execution was against Kamal Nain Singh, who was by this time admittedly major, Dwarika Singh, and Murli Singh minor represented by Dwarika Singh. Kamal Nain filed an objection on the ground that the application for execution was barred by limitation inasmuch as the first application made on the 7th April 1916 was not an application in accordance with law. The Executing Court overruled the objection finding that the application made on 9th October 1920 was an application in continuation of the first application of 7th April 1916, that Art. 181 of the Limitation Act applied and limitation accordingly ran from the date on which the sale was set aside, namely, the 4th February 1920. Against this decision the decree-holder appealed to the District Judge who has held that the application with which we are now concerned is an application in continuation of the previous application. He has, however, found that Art. 181 of the Limitation Act does not apply but that although Art. 182 applies limitation runs from the date on which the decree-holder applied for delivery of possession, as this was the last step taken in aid of execution and as this application was made on the 5th February 1918 the present application is not barred. The judgment-debtor has again appealed to this Court.

It is admitted by the learned Vakil for the appellant that if the present application is an application in continuation of the first application for execution limitation will run from the date of setting aside the sale and, consequently, the present application is within time. But he contends first that the present application cannot be treated as an application in continuation of the first application; and, secondly, that if this is so, the present application is barred because an application for delivery of possession is not a step-in-aid of execution and that limitation must run at latest from the date of the confirmation of the sale, namely, the 5th December 1916.

With regard to the first point, in my opinion, the present application for execution cannot be treated as an application made in continuation of the first application. It has been held that where a previous appli-

cation for execution has been dismissed because of a successful application made under O. XXI, r. 90, a subsequent application for execution is an application in continuation of the previous application; but I can find no case in which, where an application has been made against one of several judgment-debtors and has been dismissed for this reason, a subsequent application made against the whole of the judgment-debtors has been treated as an application in continuation of the previous application. It seems to me that in the present case the first application for execution was *ab initio* a bad application and, consequently, the subsequent application cannot be an application made in continuation.

I now come to the second point and the sole question here is whether an application for possession after confirmation of sale made by a decree-holder auction-purchaser is a step-in aid of execution. There is much divergence of opinion in the different High Courts on this point. In Calcutta in the cases in which the question directly arose it has been decided that such an application is a step-in-aid. I may refer to the case of *Sariatoolla Molla* v. *Raj Kumar Roy* (1). In the Allahabad High Court the question has been directly considered in three cases, *Moti Lal* v. *Makund Singh* (2), *Bhagwati* v. *Banwari Lal* (3) and the latest decision in the case of *Babu Ram* v. *Pearey Lal* (4). In the case of *Moti Lal* v. *Makund Singh* (2) it was held that such an application was a step in-aid. In the case of *Bhagwati* v. *Banwari Lal* (3), which is a Full Bench decision, three Judges held that it was not a step-in-aid and two Judges that it was. But in the case of *Babu Ram* v. *Pearey Lal* (4) it has been held by a Division Bench of the Allahabad High Court that the question was not definitely before the Full Bench in the case of *Bhagwati* v. *Banwari Lal* (3) and they have confirmed the decision arrived at in the case of *Moti Lal* v. *Makund Singh* (2). In Bombay and Madras the decisions appear to be that such an application is a step in-aid. So far as this Court is concerned, the point has never definitely been decided but the principle was considered in the case of *Abdul Gani* v. *Raja Ram* (5), a Full Bench decision of this Court, and if we accept the principle of that decision, there can be no doubt that such an application is not a step-in-aid of execution. The question in that case was whether an appeal lay from an order under O. XXI, r. 95, Civil Procedure Code when the decree-holder was the auction purchaser, and, in that case, following the majority of decisions in the Calcutta High Court, this Court has held that an appeal does not lie. The reason for this is that the question is either one not relating to the execution, discharge or satisfaction of the decree or because it is not a question arising between the judgment-debtor and the decree-holder as such but between the judgment-debtor and the auction purchaser as such. If we apply this principle to the question of whether an application made by a decree-holder auction-purchaser for delivery of possession is a step-in-aid of execution the answer must, in my opinion, certainly be in the negative and this is exactly what we would except from the wording of the rule itself. Order XXI, rule 95, applies to an application made by the purchaser and an application made by the purchaser cannot, in my opinion, possibly be read as an application by a decree-holder to take some step-in-aid of execution, whether the purchaser be the decree-holder or an outsider. As soon as the sale is confirmed, the property vests in the purchaser and any further step which it may be necessary for him to take in order to secure possession is not a step taken by a decree holder even if he happens to be the auction purchaser but is an application by the auction-purchaser as such and has consequently nothing to do with the execution of the decree. I have not specifically referred to the cases in the Calcutta High Court because they have all been referred to in the Full Bench decision of this Court in the case of *Abdul Gani* v. *Raja Ram* (5).

For the reasons I have given I would aside the order of the learned District Judge and that of the Subordinate Judge and would decree this appeal with costs.

DAS, J.—I agree.

S. D. *Appeal decreed.*

(1) 27 C. 709; 4 C. W. N. 681; 14 Ind. Dec. (N. S.) 466.

(2) 19 A. 477; A. W. N. (1897) 117; 9 Ind. Dec. (N. S.) 308.

(3) 1 Ind. Cas. 416; 31 A. 82; 5 M. L. T. 185; 6 A. L. J. 71.

(4) 50 Ind. Cas. 143; 17 A. L. J. 496; 41 A. 479.

(5) 35 Ind. Cas. 468; 1 P. L. J. 232; 20 C. W. N. 829; 3 P. L. W. 62 (F. B.).

KUNJ LAL v. KANHAI MAHTO.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 826 OF 1920.

July 3 1922.

Present:—Mr Justice Adami.

KUNJ LAL—PLAINTIFF—APPELLANT

versus

KANHAI MAHTO- -DEFENDANT —RESPONDENT.

Adverse possession—Mortgage, simple—Possession, adverse, against mortgagor, when adverse against mortgagee.

When *after* a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against the mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. [p 642, cols 1 & 2]

Karan Singh v. *Bakar Ali Khan*, 9 I. A. 99; 5 A. 1; 4 Sar. P. C. J. 383; 2 Ind. Dec. (N. S.) 1044 (P. C.), *Viyapuri* v. *Sonamma Boi Ammani*, 31 Ind. Cas. 412; 39 M. 811; 9 M. L. J. 645; 2 L. W. 1080; (1915) M. W N. 927; 18 M. L. T. 438, *Priya Sakhi Debi* v. *Bireshwar Samanta*, 37 Ind. Cas 277; 21 C. W. N. 177; 44 C. 425; 27 C. L. J 212, referred to.

But in the case of grant of a mortgage by a person *previously dispossessed* the adverse possession which had commenced to operate against the mortgagor would not by the grant of the mortgage be arrested but would operate equally against the mortgagee. [p. 642, col. 2.]

Nallamuttu Pillai v. *Betha Naicken*, 23 M. 37; 9 M. L. J. 258; 8 Ind Dec (N. S.) 420 and *Prannath Roy Chowdry* v. *Rookea Begum*, 7 M. I. A 323 at p. 353; 4 W. R. P. C. 37; 1 Suth. P. C. J, 367; 1 Sar. P. C. J. 692; 19 E. R. 331, referred to.

Appeal from a decision of the Subordinate Judge, Muzaffarpore.

Messrs. *S. C. Mittra* and *S. K. Mitra*, for the Appellant.

Mr. *Janak Kishore*, for the Respondent.

JUDGMENT.—The land in dispute in the suit giving rise to this second appeal was originally the *kasht* land of the defendant, but in 1898 was sold in execution of rent decrees obtained by the 16 annas proprietor of the village, the Mohunt of Patepur, to Sheonandan Prasad Singh and Raghunandan Prasad Singh, who, on the 3rd January 1899, mortgaged the land under a simple mortgage-bond to the plaintiff In 1906 the plaintiff obtained a decree on his mortgage and at the sale in execution of his decree purchased the land, and a few days after delivery of possession, on the 29th January 1914, leased it to the Bahuara Opium Factory. When the Factory sought to take possession the defendant resisted, and there was a dispute which culminated in section 145, Criminal Procedure Code proceedings and an order declaring the Factory to be in possession on 18th July 1914. After that the Factory surrendered its lease to the plaintiff, who, however, owing to the resistance of the defendant, was unable to get possession. The plaintiff then brought this suit for a declaration of his title and for recovery of possession dating his dispossession from the 2nd November 1914. In the alternative he prayed that a fair rent might be fixed as payable by the defendant, and that he should be awarded a decree for arrears of rent from 1322 to 1325 Fasli.

The defendant pleaded that the suit was barred by limitation since the plaintiff had never held possession of the plaint lands. He denied that Raghunandan and Sheonandan had been in possession after purchase in a sale under a decree for rent; or that the plaintiff had bought the land and taken possession in execution of mortgage-decree. He claimed title by adverse possession.

The Munsif in a very short judgment, and for reasons which are quite unconvincing, found that the plaintiff was not entitled to obtain *khas* possession of the land, and, for some unexplainable reason, held that the plaintiff was entitled to rent from the defendant, as his tenant. He held that the defendant was not entitled to the land by adverse possession.

On appeal and cross-appeal the Subordinate Judge held that the defendant was admittedly an occupancy tenant originally and, if he remained in possession of the disputed land after the sale in execution of the rent-decree, he was a trespasser, and the plaintiff must come to Court within 12 years from the date of sale under the rent decree, unless he could prove possession within 12 years. He upheld the Munsif's finding that the writ of delivery of possession made to the plaintiff after his purchase in the mortgage-decree could not have any bearing upon the question of the defendant's actual possession, as the defendant was not a party to the mortgage-decree. He held also that the order passed under section 145, Criminal Procedure Code, did not necessarily amount to an ouster of the defendant, and that an admission of the plaintiff in a title suit in 1919 showed that the defendant was in

possession all along. He relied also on certain rent receipts granted by the Mohunt of Patepur to the defendant. He found that the defendant had been in possession of the land since 1898 as a trespasser, and that his possession was adverse to the predecessors-in-interest of the plaintiff and to the plaintiff himself for more than 12 years. He decided that the plaintiff's suit was time-barred.

Now, it appears that the sale under the rent decree was in 1898, and the mortgage to the plaintiff was executed in 1899, so that, if in spite of the sale to Raghunandan and Sheonandan, the defendant remained in possession of land the commencement of his adverse possession as against the purchasers was prior to the mortgage to the plaintiff. The learned Subordinate Judge appears to be in error in thinking that, for the purposes of computing the duration of adverse possession against a mortgagee who has, under a simple mortgage-bond, brought the property to sale and purchased it himself, the duration of adverse possession held against the mortgagor before the sale can be tacked on to the duration of adverse possession against the mortgage after his purchase in execution of the mortgage-decree.

Mr. Mitter has cited the cases of *Karan Singh* v. *Bakar Ali Khan* (1), *Viyapuri* v. *Sonamma Boi Ammani* (2) and *Priya Sakhi Debi* v. *Bireshwar Samanta* (3). These cases clearly show that when, after a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land.

A careful consideration of these cases shows, however, that the decisions do not relate to a case where adverse possession against the mortgagor has commenced prior to the execution of the simple mortgage, and in fact in the case of *Priya Sakhi Debi* v. *Bireshwar Samanta* (3), Sanderson, C. J., points out that, if in the case of *Karan Singh* v. *Bakar Ali Khan* (1) the possession by the Collector previous to the mortgage could have been treated as possession by the defendant who claimed adversely, the operation of adverse possession would not have been affected by the subsequent grant of the mortgage security.

The case of *Nallamuttu Pillai* v. *Betha Naicken* (4) was distinguished on this very ground. Mukerjee, J., in the same case points out that in the case of the grant of a mortgage by a person previously dispossessed "the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested, but would operate equally against the mortgagee, for in the words of Lord Kingsdown in *Prannath Roy Chowdry* v. *Rookea Begum* (5), 'a cause of action is not prolonged by mere transfer of the title.'"

If, then, the defendant was not in possession as against Sheonandan and Raghunandan prior to the mortgage by them to the plaintiff in 1899, the period during which they were in possession up to 1913 or 1914, when the plaintiff executed his decree and obtained writ for delivery of possession, cannot be counted as against him in respect of adverse possession.

In 1914, the Factory, the lessee, was declared to be in possession, and, if the Factory was in possession as lessee, that possession would count as possession of the plaintiff.

Both the lower Courts have failed to appreciate the questions to be decided in the case, and have failed to come to a distinct finding necessary for the answer to these questions. It was necessary to find whether the defendants were in possession adverse to Raghunandan and Sheonandan prior to the mortgage. It is true that the learned Subordinate Judge has stated that the plaintiff admitted in a written statement in a suit instituted in 1919 that the defendant had been all along in possession, but the learned Subordinate Judge's statement is based on no evidence. What the plaintiff stated in his written statement was that defendant was in possession of the land at the time the written statement was drawn up, that is to

(1) 9 I. A. 99; 5 A. 1; 4 Sar. P. C. J. 382; 2 Ind. Dec. (N. S.) 1044 (P. C.).

(2) 31 Ind. Cas. 412; 39 M. 811; 29 M. L. J. 645; 2 L. W. 1080; (1915) M. W. N. 927; 18 M. L. T. 436.

(3) 37 Ind. Cas. 277; 21 C. W. N. 177; 44 C. 425; 27 C. L. J. 212.

(4) 23 M. 37; 9 M. L. J. 258; 8 Ind. Dec. (N. S.) 420.

(5) 7 M. I. A. 323 at p. 353; 4 W. R. P. C. 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331.

say, in 1919. There is no statement there that the defendant had all along been in possession.

With regard to the order under section 145, Criminal Procedure Code, a finding should be come to whether the Factory was in fact in possession, if such a finding is possible on the evidence.

It is clear to me that the Subordinate Judge has misconceived the points to be decided in the case, and I, therefore, set aside his decree and remand the case for a re-hearing of the appeal and disposal according to law.

The appeal is allowed, costs will abide the result.

R. N. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 285 OF 1921.

May 10, 1922.

Present :—Mr. Hallifax, A. J. C.

SHANKERRAO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANIKRAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, O. XXI, r. 57—Execution transferred to Collector—Power of Collector to dismiss application—S. 141, whether applicable to execution proceedings—Execution of decree, application for—Dismissal in default—Power of restoration—Attachment, flaw in—Attachment, absence of—Auction-sale, whether nullity.

In execution proceedings transferred to him by a Civil Court, a Collector has power to dismiss the application under r. 57 of O. XXI of the Civil Procedure Code, and on such dismissal the attachment ceases. [p 644, col. 1.]

Section 141 of the Civil Procedure Code does not apply to execution proceedings, and a Court is not empowered thereby to restore to the file under O. IX an application in execution which has been dismissed in default. [p. 644, col 1.]

Thakur Prasad v. *Fakir Ullah*, 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C J. 526; 8 Ind. Dec. (N. S.) 303 (P. C.) and *Hari Charan Ghosh* v. *Manmatha Nath Sen*, 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343, followed.

Manakji v. *Surajmal*, 10 Ind. Cas. 705; 7 N. L. R. 32, distinguished.

In a proper case, however, a Court has the inherent power mentioned in section 151 of the Civil Procedure Code to restore to the file an application for execution which has been dismissed in default, and if the attachment has not in fact been removed such a restoration will revive it. [p. 644, col. 2.]

Debi Bakhsh Singh v. *Habib Shah*, 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 194; 40 I. A. 151 (P. C.), *Ajant Singh* v. *Sundar Mall*, 16 Ind. Cas. 567; 17 C. W. N. 862 and *Sonubai Baburao* v. *Shivajirao Krishnarao*, 60 Ind. Cas. 919; 45 B. 648; 23 Bom. L. R. 110, followed.

An auction-sale duly held without material irregularity or fraud in publishing or conducting it cannot be considered a nullity merely by reason of a flaw in the attachment, or the absence of an attachment. [p. 664, col. 2.]

Harlal Tewari v. *Narayan*, 64 Ind. Cas. 420, *Muniappa Naik* v. *Subramania Ayyan*, 18 M. 437; 5 M. L. J. 60; 6 Ind. Dec. (N. S.) 654, *Kishory Mohun Roy* v. *Mahomed Muzaffar Hossein*, 18 C. 188; 9 Ind. Dec. (N.S.) 126, *Ramasami Naik* v. *Ramasam Chetti*, 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167, followed.

Appeal from a decree of the District Judge, Nagpur, dated the 19th January 1921, in Civil Suit No. 13 of 1920.

Mr. *K. P. Vaidya*, for the Appellants.

Mr. *V. R. Pandit*, R. B., for the Respondents.

JUDGMENT.—The plaintiffs-appellants purchased certain village shares belonging to the second defendant from another person who had bought them at an auction sale held by the Collector in execution of a decree. They were obstructed in taking possession by the first defendant, whose title rested on a deed of lease, and they have, therefore, claimed possession in this suit. The plea in defence on which the suit was decided in both the lower Courts was that the execution proceedings were once dismissed in default by the Collector and his restoration of them to the file was without jurisdiction and did not restore the attachment, after it had been raised by the dismissal, so that the sale was of property not legally under attachment and, therefore, void.

It appears that when the execution case was transferred to the Collector, on the first date fixed for hearing the matter, which was 22nd October 1917, he passed the following order. "Decree-holder absent. He knew of the date. Judgment-debtor absent though served. Case be struck off in default and Civil Court informed." Later in the same day the Collector passed another order in these words: "Mr. Chorghade appears for the decree holder who is absent on account of illness. Case *ex parte* against judgment debtor. Valuation statement has not been sent. It be sent at once. Case for 15th November 1917."

Both the lower Courts considered themselves bound by a judgment delivered on 19th March 1918 by Findlay, A. J. C., in *Dalchand* v. *Narayan* (1) (Second Appeal

(1) 51 Ind. Cas. 237.

No. 326 of 1917) which has not appeared in the Nagpur Law Reports but has been printed in an unofficial publication. That is to the effect that the passing of an order of dismissal in default by the Collector, though re-called on the same day and though known to no body in the world but the decree-holder's Pleader, in some occult way caused the attachment which did in fact continue to rest on the property and to have exactly the same practical and material effect on it as it had before, to lose some subtle but essential property of legality to such an extent that the sale duly held later was entirely void.

The appellants seek first to attack the judgment of the lower Appellate Court by contending that the Collector has no power to dismiss execution proceedings before him in default, and, therefore, the dismissal was of no effect, so that it does not matter whether the restoration was within his powers or not. It was not contended in the original memorandum of grounds of appeal that the order of restoration is right even if the Collector had power to dismiss the case in default, or that the illegality of the attachment or even the absence of an attachment is not such an irregularity as would vitiate the sale. These points were, however, taken in a supplementary memorandum filed at the hearing.

I have considered all these matters at considerable length in a judgment delivered on 19th March 1921, in *Harlal Tewari* v. *Narayan* (2). The following is a succinct statement of my conclusions:—

(*i*). In execution proceedings transferred to him by a Civil Court a Collector has power to dismiss the application under r. 57 of O. XXI of the Civil Procedure Code, and on such a dismissal the attachment ceases.

(*ii*). Section 141 of the Civil Procedure Code does not apply to execution proceedings, and a Court is not empowered thereby to restore to the file under O. IX an application in execution which has been dismissed in default. *Manaki* v. *Surajmal* (3) distinguished. *Thakur Prasad* v. *Fakir Ullah* (4) and *Hari Charan Ghosh* v. *Manmatha Nath Sen* (5) followed.

(2) 64 Ind. Cas. 420.
(3) 10 Ind. Cas. 705; 7 N. L. R. 32.
(4) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).
(5) 19 Ind. Cas. 688; 41 C. 1; 18 C. W. N. 343.

(*iii*). In a proper case, however, a Court has the inherent power mentioned in section 151 of the Civil Procedure Code to restore to the file an application for execution which has been dismissed in default, and if the attachment has not in fact been removed such a restoration will revive it.

Debi Bakhsh Singh v. *Habib Shah* (6), *Ajant Singh* v. *Sundar Mall* (7), and *Sonubai Baburao* v. *Shivajirao Krishnarao* (8), followed.

(*iv*). When a sale has been duly held, without material irregularity or fraud in publishing or conducting it, it cannot be considered a nullity merely by reason of a flaw in the attachment or the absence of an attachment. *Munisppa Naik* v. *Subramania Ayyan* (9), *Kishory Mohun Roy* v. *Mahomed Muzaffar Hossein* (10), *Ramasami Naik* v. *Ramasami Chetti* (11), followed.

I have re-considered all these matters and can find no reason for taking any other view in regard to any one of them as applied to the present case, except possibly the applicability of the principle mentioned in section 151 of the Civil Procedure Code to the order of the Collector in this case restoring the execution case to the file. In *Ritu Kuer* v. *Alakhdeo Narain Singh* (12), it was held that an execution case ought not to be restored in that way, because the refusal to restore it would not lead to any injustice, as the decree-holder in most cases would merely have to file a fresh application for execution and make a fresh attachment to be restored to the position he was in before the dismissal due to his default. In *Harlal Tewari's case* (2), that was not so, as the original judgment-debtor had died after the attachment was made and the property could not have been attached again in the hands of his legal representatives. In the present case, however, I am by no means prepared to say that it would not have been unjust to force the decree-holder to go to all the trouble and expense of a fresh attachment and to take all the risks attend-

(6) 19 Ind. Cas 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566, 25 M. L. J. 148; 16 C. C. 194; 40 I. A. 151 (P. C.).
(7) 16 Ind. Cas. 567; 17 C. W. N. 862.
(8) 60 Ind. Cas. 919; 45 B. 648; 23 Bom. L. R. 110.
(9) 18 M. 437; 5 M. L. J. 60; 6 Ind. Dec. (N. S.) 654.
(10) 18 C. 188; 9 Ind. Dec. (N. S.) 126.
(11) 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167.
(12) 47 Ind. Cas. 154; 4 P. L. J. 330; (1918) Pat. 265; 5 P. L. W. 208.

ing it on account of the very venial default of which he was guilty.

But even if the Collector's order of restoration was entirely wrong and *ultra vires* there are two very good reasons why that cannot affect the decision of the present suit. One is the applicability of the principle stated in section 151 of the Civil Procedure Code to the case itself as a whole. It would be not only allowing but aiding the defendant Manik Rao to misuse the process of the Court to his own unrighteous advantage to hold that the sale was void merely because for an hour or two at the most there was an order in existence dismissing the application, which made not one atom of difference to anybody in the world and was only known to the decree-holder. The other reason is that I still hold entirely to the view stated in *Harlal Tewari's case* (2) that a sale duly held, without material irregularity in publishing or conducting it, cannot be considered a nullity merely by reason of a flaw in the attachment or the absence of an attachment, so that in this case it really does not matter whether the Collector has power to dismiss the application in default or to restore it after dismissal or not.

The appeal having been decided on a preliminary point, and that decision having been set aside, the appeal must be remanded for a decision on the merits under r. 23 of O. XLI of the Civil Procedure Code. The lower Appellate Court will presumably remand the case to the first Court under the same rule. All costs incurred by the appellants in this Court will be paid by the two respondents, each of whom will pay his own costs. There will be no certificate for the refund of Court-fees.

G. R. D. & W. C. A. *Case remanded.*

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 195 OF 1912.

May 5, 1922.

Present :—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.

JADUNANDAN SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

SHEONANDAN PRASAD SINGH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Witness—Summons—Wrong person summoned—Court's duty to re-summon right witness on application—Irregularity—Civil Procedure Code (Act V of 1908), s. 47, O XXI, r. 2, cls. (2), (3)—Judgment-debtor's application for enquiry as to payment out of Court—Order dismissing application—Appeal—Certificate of payment—Application of cls. (2), (3).

Where a summons is issued for the attendance as a witness of a person who is cognizant of the fact on which his testimony is required, and a person unable to give relevant evidence appears, it is the duty of the Court, on the application of the party at whose instance the summons was issued, to enforce the attendance of the right witness, and the refusal of the Court to do so amounts to a grave irregularity. [p. 647, col. 2]

An order dismissing a judgment-debtor's application made under r. 2 (2) of O. XXI, Civil Procedure Code, for certifying payment said to have been made to the decree-holder out of Court amounts to a decree passed in a proceeding under section 47 of the Code and is appealable as such. [p. 646, col. 2.]

A judgment-debtor's application under clause (2) of r. 2, O. XXI, Civil Procedure Code, inviting an enquiry as to the payment alleged to have been made by him to the decree-holder cannot be thrown out on the ground that the payment was not certified under clause 3 of that rule, inasmuch as the stage contemplated by that clause does not arise until the question raised in the enquiry is decided. [p. 647, col. 1.]

Appeal against the District Judge, Patna, dated the 8th August 1921, confirming that of the Subordinate Judge, Patna, dated the 20th April 1921.

Messrs. *Shiveshwar Dayal*, and *Bri Kishore Prasad*, for the Appellant.

Messrs. *N. C. Sinha*, *Guru Rai Sharan Prasad* and *Anand Prasad*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of an order of the District Judge of Patna dated the 8th August 1921 whereby he dismissed an appeal preferred before him against an order of the Subordinate Judge dated the 20th April 1921. The appellant is the judgment-debtor before us against whom an execution of a decree was levied. In the course of this execution he filed an application under O. XXI, r. 2 of the Code of Civil Procedure in which he stated and prayed that a certain sum be duly recorded and certified as payment of the decree in question. He also filed a receipt granted by the decree-holder, Sukhan Singh, purporting to bear his thumb impression, his (Sukhan's) grandson, Sheonandan Singh having signed the said receipt for him. The decree-holder denied having received the money or granted the receipt in question. He also stated that the thumb impression on the receipt was not his,

JADUNANDAN SINGH v. SHIONANDAN PRASAD SINGH.

In order to prove that the thumb impression was that of the decree-holder, the judgment-debtor applied for examination of a finger print expert. The expert was accordingly examined who took sample thumb impressions of the decree-holder, but he could not give any definite opinion, inasmuch as the impression on the receipt appeared to be blurred. He got the impression enlarged and photographed and then the thumb impressions of the decree-holder which were taken by him were compared in the Government Finger Print Bureau and a report was submitted to the Court by the Inspector General of Crimes. The report stated that the thumb impression on the receipt in question was similar to those on the bonds B and C which were the admitted thumb impressions of the decree-holder. The judgment debtor then applied to the Court for summoning an expert from the Government Finger Print Bureau who could prove the opinion embodied in the report of the Inspector-General: and accordingly summons was served upon the Inspector-General to send the expert who could prove the opinion stated in the report. But unfortunately the person sent from the Bureau was not able to give any opinion and he does not appear to be connected with the examination of the thumb impressions upon which the report was based. He was not able to give any opinion in the case and accordingly his evidence was useless. The judgment-debtor then applied for summoning the proper person, namely, the person who was competent to prove the opinion set forth in the report of the Inspector-General. The learned Subordinate Judge refused this application in the following words:—

"The applicant then put in a petition for time to take further steps to call another witness from the Bureau. The petition cannot be granted. The expert was here and has been examined and he does not prove the applicant's case. There is no reason for adjourning the case again. The applicant is called upon to examine his other witnesses but he does not examine any witness and his Pleader informs that he has no further instruction after the petition for time is rejected as no further adjournment will be given as prayed for by him. The application is, therefore, dismissed for want of prosecution."

Against this order the judgment-debtor appealed to the District Judge of Patna. He was of opinion that no appeal lay from the order of the Subordinate Judge inasmuch as the application of the judgment-debtor was dismissed for default. He also held that the application of the judgment-debtor under O. XXI, r. 2, clause (3) could not be entertained in execution proceedings inasmuch as the alleged payment was not certified.

Both these grounds upon which the learned District Judge dismissed the appeal appear to me to be untenable. The application of the judgment-debtor for certifying payment under O. XXI, r. 2, clause (2) could not be dismissed for default inasmuch as some evidence was given in Court and the Court held that the evidence was useless and dismissed the application. It is obvious that the learned Subordinate Judge is wrong in using the words "for want of prosecution." Virtually his order amounts to a dismissal of the application for the reason that the evidence adduced was worthless. The application of the judgment-debtor for certifying payments by him to the decree-holder out of Court was an application in course of the execution of the decree obtained by the decree-holder. That application was, therefore, an application under section 47, Civil Procedure Code, for it raised the question as to the execution and satisfaction of the decree sought to be executed. The dismissal of that application certainly gives rise to a right of appeal to the judgment-debtor. If an order of dismissal for want of prosecution is passed in a suit, it is conceded that an appeal does lie; but it is contended that an order of dismissal for default in execution proceedings in unappealable. That may be so, but here is the dismissal of an application for certifying payment said to have been made by the decree holder out of Court; the order amounts to a decree passed in a proceeding under section 47 of the Code and as such it is appealable. In any case the order in the present case disposed of the application on merits upon the findings that the evidence adduced by the judgment-debtor was useless and of no avail

to him. Undoubtedly such an order is appealable.

The second ground urged by the learned District Judge is equally unsubstantial, for an application for certifying a payment, in the present case was made under O. XXI r. 2, clause (2) within the period prescribed for making such an application; the application may be made either to the Court which passed the decree or to the Court whose duty is to execute the decree, as is expressly stated in clause (1) r. 2 of that Order. The judgment-debtor could, therefore, make his application either to the Court which passed the decree or to the Court which was executing the decree. In the present case the decree was under execution and the application was properly made to the Court which was executing the decree. In the present case the Court executing the decree was the Court that passed the decree. The enquiry was, therefore, invited by the judgment-debtor as to the payment alleged to have been made by him to the decree-holder during the pendency of the execution proceedings; therefore, his application could not be thrown out upon the ground that it was not certified under clause (3) of that rule. The application was made for the purpose of having the payment certified and until that question was decided, the stage of clause (3) did not arise. The learned District Judge was, therefore, wrong in throwing out the application on the above technical grounds. He ought to have gone into the merits of the appeal. The appeal before him was, therefore, not legally disposed of and he failed to exercise the jurisdiction vested in him by law. The decision of the District Judge is, therefore, set aside.

Now, the District Judge has not gone into the merits of the case, and the issue before him was whether the application was properly and legally disposed of by the Subordinate Judge; in other words, whether the Subordinate Judge was right in refusing the application of the judgment-debtor for the adjournment of the case and for summoning the proper person from the Finger Print Bureau in order to prove the opinion set forth in the report of the Inspector-General as to the indentity of the thumb impressions on the receipt in question and on the bonds B and C. The judgment debtor had been making strenuous efforts and taking all possible steps in order to have a definite opinion and evidence of a Finger Print Expert as to the thumb impression of the decree-holder on the receipt in question. He paid the necessary expenses and the expert who first came was not able to give definite opinion unless the impressions were enlarged and photographed. To this also the judgment-debtor submitted and paid all the necessary expenses. This was done with the result that an opinion decidedly in his favour was obtained. He was, therefore, naturally anxious to place upon the record the testimony of the witness who could prove the opinion contained in the report. He put in all the necessary expenses and necessary summons was issued upon the department to send the person cognizant of the opinion expressed in the letter. Through no fault of his the man sent from the Bureau turned out to be not the proper person and was not able to give any relevant evidence in the case. He accordingly applied to the Court and expressed his willingness to defray all the necessary expenses for summoning the proper person from the Bureau. When once the Court issued the summons it was the duty of the Court, unless the judgment-debtor was guilty of gross laches, to assist the judgment-debtor and to enforce the attendance of the proper person who could give evidence relevant to the case. The refusal to grant the prayer of the judgment-debtor on the 30th April was a grave irregularity and contravened the recognised principles embodied in the Code of Civil Procedure regarding the enforcement of the attendance of witnesses. The order of the Subordinate Judge, therefore, contravend the rules of procedure in the Code and the recognised principles which produced error in the decision of the case on the merits.

The question before the lower Appellate Court was whether the discretion was properly used by the Subordinate Judge in refusing the application of the judgment-debtor for enforcing the attendance of the witness from the Bureau. This question was, as observed above, left undecided by him. The question affects the merits of the case and we are entitled in second appeal under section 103 of the Code of Civil Procedure to determine the question which

the District Judge ought to have determined. We, therefore, hold that the order of the District Judge dismissing the appeal was illegal. We also hold that the order of the Subordinate Judge dismissing the application of the judgment-debtor and refusing him an adjournment of the case so as to enable him to produce evidence was also improper.

We, therefore, set aside both the judgments of the Courts be ow and remand the case to the Subordinate Judge for disposal of the original application of the judgment-debtor under section 47 and O. XXI, r. 2 of the Code of Civil Procedure in accordance with law.

The judgment-debtor in this case, however, acted indiscreetly and foolishly in not examining witnesses present on the date when the Court called upon him to give evidence after having rejected his application for adjournment. The practice of not going on with the case after the rejection of an application of this kind is fast creeping into the Courts below and must be put a stop to. The judgment-debtor would have been in a far better position, and so also the Courts, if he had examined the witnesses present in Court on the 30th April. Perhaps, much of the time and harassment of the opposite party would have been saved. I have no hesitation in holding that the conduct on the part of the judgment-debtor or his legal representative was improper in refusing to go on with the case when the witnesses were present, simply because the Court rejected the application for summoning the expert. Besides the costs awarded to the decree-holder by the Courts below, the judgment-debtor must pay to the decree-holder Rs. 64 as costs of hearing in this Court, as a condition precedent to the hearing of the case in the Court below, within a fortnight from the notice given to the judgment-debtor by the Subordinate Judge on the arrival of the records in his Court.

BUCKNILL, J.—I agree.

S. D. & W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1137 OF 1922.

June 14, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr Justice Chotzner.

DHIRENDRA KUMAR BOSE, MINOR, BY HIS GUARDIAN, MOTHER, *Srimati* SAROJINI BOSE, DEFENDANT No. 1—APPELLANT

versus

CHANDRA KANTA ROY—PLAINTIFF—AND OTHERS DEFENDANTS NOS. 2—6 AND ANOTHER *Pro forma* DEFENDANT—RESPONDENTS.

Government Servant—Acquisition of immoveable property benami—*Government Servants Conduct Rules—Fraud—Public policy—Contract Act (IX of 1872), s. 23, operation of.*

The acquisition of an interest in immoveable property by a Government servant in the name of another to evade the rules made in that behalf for regulating the conduct of public servants, may be very reprehensible by reason of his violation of the said rules, but it cannot simply for that reason be described as fraudulent or opposed to public policy so as to attract the operation of the law laid down in section 23 of the Contract Act. [p. 650, col. 2; p. 651, col. 1]

Bhagwan Dei v. *Murari Lal*, 36 Ind. Cas. 259; 39 A. 51 14 A. L. J. 962, *Kamala Devi* v. *Gur Dial*, 36 Ind Cas. 319; 39 A. 58; 14 A. L. J. 660, *Lobo* v. *Brito*, 21 M. 23; 7 Ind. Dec. (N. S.) 518, followed.

Shiam Lal v. *Chhaki Lal*, 22 A. 220; A. W. N. (1900) 30; 9 Ind. Dec. (N. S.) 1177, *Sheo Narain* v. *Mata Prasad*, 27 A. 73; 1 A. L. J. 412; A. W. N. (1904) 167, disapproved.

Petherpermal Chetty v. *Muniandy Servai*, 35 C. 551; 35 I. A. 98; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 4 M. L T. 12; 4 L B. R. 266 (P. C.), *Jadu Nath Poddar* v. *Rup Lal Poddar*, 33 C. 977 4 C. L. J. 22; 10 C W. N. 651, *Rajab Ali* v. *Hedayet Ali*, 29 Ind. Cas 699; 22 C. L. J. 197; 19 C. W. N. 161, *Akhil Prodhan* v. *Manmatha Nath Kar*, 22 Ind. Cas. 86; 18 C. L. J. 6 6, distinguished.

No Court can invent a new head of public policy or condemn an agreement because, in its opinion, it is not consistent with public interest. [p. 651, col. 2.]

Janson v. *Driefontein Consolidated Mines*, 1902 A. C. 484; 71 L. J. K. B 857; 87 L. T. 72; 50 W. R. 142; 7 Com Cas. 268; 18 T. L. R 796, referred to.

Government Servants Conduct Rules are rules of conduct and not statutory prohibitions so that a disregard of those rules does not necessarily taint transactions by Government servants with immorality or illegality. [p 652, cols. 1 & 2.]

Ramkrishna Trimbak v. *Narayan Shivrao Aras*, 31 Ind Cas. 301; 40 B, 126; 17 Bom L. R. 955, referred to.

Appeal against a decree of the District Judge, Noakhali, dated the 30th January 920, reversing that of the Subordinate Judge, Noakhali, dated the 28th November 1918.

DHIRENDRA KUMAR BOSE v. CHANDRA KANTA ROY.

FACTS appear from the judgment.

Babu *Mohendraath Roy* (with him Babus *Rupendra Kumar Mitter* and *Framathanath Banerjee*, for the Appellant.—The defendant No. 1 is the appellant. The appeal arises out of a suit for establishment of title and for recovery of possession. The plaintiff's case is that he got an *amalnama* of the land in suit from Narendra Kisore Roy and others who were *ijaradars* under the Government, in the name of Sasi Kumar Bose, the father of defendant No. 1 the appellant. Sasi thereafter obtained a fresh *ijara* in his own name and executed a *kabuliyat* to the Secretary of State for India in 1906. According to the plaintiff's allegation he is all along in possession. My defence was that Sasi was the real owner and that the plaintiff could have no title to the lands. The First Court dismissed the suit. On appeal that decision has been reversed. The plaintiff was a servant of the Government from 1897 to 1907. My submission is, that under the Regulations framed by the Government for regulating the conduct of public servants and on the allegations of the plaintiff himself the plaintiff's acquisition of title is clearly fraudulent, and is, therefore, opposed to public policy. That being so the case would be governed by section 23 of the Indian Contract Act. Refers to *Petherpermal Chetty* v. *Muniandy Servai* (1), *Jadu Nath Poddar* v. *RupLal Poddar* (2), *Sham Lal* v. *Ohhaki Lal* (3), *Sheo Narain* v. *Mata Prasad* (4), *Mohun Lal Babu* v. *Udai Narain Bhaduri*(5), *Sitarampur Coal Co Limited* v. *Colley* (6), *Sayad Mirza* v. *Nanhi Khanam* (7). I submit that upon the facts and circumstances of the case the plaintiff's action is tainted with fraud throughout. In view of the above decisions the judgment of the lower Appellate Court is manifestly wrong and ought to be set aside and that of the First Court restored.

Sir *Asutosh Chaudhury* (with him Babus *Nagendranath Bose*, *Asiranjan Chatterjee* and *Satyendra Chandra Mitra*), for the Respondents.—I submit the appellant has not stated all the facts. They have said much on the morality and purity of the public servants. They should have also stated some facts about my conduct. I have informed the Government that I was the beneficial owner. The Government have condoned my fault, if any, and have registered my name in the records. The defendants are more anxious than the Government to punish me for breach of the rules of service. These rules are not statutory prohibitions. They are merely rules of conduct. See *Ramkrishna Trimbak* v. *Narayan Shivrao Aras* (8). That being so, the question about the applicability of section 23 of the Indian Contract Act does not at all arise. There is nothing in the object or the consideration of the agreement that is unlawful. See *Janson* v. *Driefontein Consolidated Mines* (9), *Bhogwan Dei* v. *Murari Lal* (10), *Kamala Devi* v. *Gur Dial* (11), *Balkissen* v. *Debi Singh* (12). The decision in *Sitarampur Coal Co. Limited* v. *Colley* (6) and *Mohun Lal Babu* v. *Udai Narain Bhaduri* (5) are clearly distinguishable. The mere intention to perform an illegal object would not bar an action for recovery by the assignor. See *Rojab Ali* v. *HedayetAli* (13) and *Lobo* v. *Brito* (14). I submit the learned Judge is perfectly right in his decision,

Babu *Mahendranath Roy* replied in brief.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal, is a tenure covered by a *kabuliyat* executed by one Sashi Kumar Bose in favour of the Secretary of State on the 3rd July 1906. The case for the plaintiff is that, on the 20th April 1905, he obtained an *amalnama* in respect of the disputed land, in the name of Sashi Kumar Bose, from Narendra Kishore Roy and others who were, at the time, *ijaradars* under the Secretary of State, and that, upon the expiry of their *ijara*, when a fresh settlement was made by the Revenue Authorities, Sashi Kumar Bose, as the ostensible tenure-holder, executed the *kabuliyat* previously

(1) 35 C. 551; 35 I. A. 98; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P.C.).

(2) 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650.

(3) 22 A. 220; A. W. N. (1900) 30; 9 Ind. Dec, (N. S.) 1177.

(4) 27 A 73; 1 A. L. J. 412; A. W. N. (1904) 167.

(5) 7 Ind. Cas. 2; 14 C. W. N. 1031.

(6) 1 Ind. Cas. 351; 13 C. W. N. 59.

(7) 47 Ind. Cas, 694.

(8) 31 Ind. Cas. 301; 40 B. 126; 17 Bom. L. R. 955.

(9) (1902) A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R 142; 7 Com. Cas. 268; 18 T. L. R. 796.

(10) 36 Ind. Cas 259; 39 A. 51; 14 A. L. J. 962.

(11) 36 Ind. Cas 319; 39 A. 58; 14 A. L. J. 669.

(12) 52 Ind. Cas. 153; 16 N. L. R. 25.

(13) 29 Ind. Cas. 699; 22 C. L. J. 197; 19 C. W. N. 1151.

(14) 21 M. 231; 7 Ind. Dec. (N. S.) 518.

mentioned, Sashi Kumar Bose died in 1912. The plaintiff alleges that, since then, the first defendant, the minor son of Sashi Kumar Rose, and the second defendant, his widow, have set up an unfounded claim to the tenure, though the plaintiff has been in possession throughout. The result was a proceeding under section 145 of the Criminal Procedure Code, which terminated on the 19th April 1913, in an order adverse to the plaintiff. The plaintiff was thus constrained to institute this suit on the 19th September 1916 for establishment of his title and for recovery of possession. The defendants resisted the claim on the allegation that the plaintiff had no title and repudiated the assertion that Sashi Kumar Bose held the property for the benefit and on behalf of the plaintiff. The Court of first instance held upon the evidence that Sashi Kumar Bose was the real tenure-holder, and dismissed the suit. Upon appeal, the District Judge has reversed the decision and decreed the suit, finding that Sashi Kumar Bose was *benamidar* for the plaintiff. On the present appeal, the decree of the District Judge has been assailed, substantially on the ground that, on the allegations of the plaintiff himself, the mode of acquisition of his title was so tainted with fraud that it would be opposed to public policy to assist him in its enforcement. The facts, which form the basis of this argument, are not disputed and may be concisely stated.

The plaintiff was an *amin* and an Inspector in the Survey and Settlement Department under the Government from 1897 to 1907. He was consequently subject to the operation of the following rule framed by the Governor General-in-Council for regulating the Conduct of Public Servants:

"Any Government servant belonging to the Provincial or Subordinate Civil Services may continue to hold any immoveable property actually held by him at the time of his entry into Government service and may thereafter acquire any immoveable property by succession, inheritance or bequest, or, with the previous sanction of the Local Governemnt or such Heads of Departments as may be specially empowered by the Local Government in this behalf, by purchase or gift. He will, however, be liable to be debarred from employment within the district or other local limits within which such immoveable property is situated. Any Government servant may hold or acquire immoveable property in good faith for the purpose of residence.

"Every Government servant must make to the Government, through the usual channel, a declaration of all immoveable property which may from time to time be held or acquired by him or by his wife or by any member of his family living with or in any way dependent upon him. Such declaration should state the district within which or the Native Prince or Chief within whose territories, the property is situated and should give such further information as the Government may, by general or special order, require".

The plaintiff, it cannot be disputed, took the settlement of the disputed land from the Government, in the name of Sashi Kumar Bose, with a view to evade the rule mentioned. The defendants contend that such acquisition of interest in land was illegal, and that it would be contrary to public policy to allow the plaintiff to enforce a title acquired in such circumstances. In support of this position, reliance has been placed upon the decision of the Judicial Committee in *Petherpermal Chetty* v. *Muniandy Servai* (1) which is an authority for the proposition that although where an intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality which he has once cast off in order to defraud others, yet, if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another, whose retention of it is an act of gross fraud. This principle has clearly no application to the circumstances of the present case.

The history of the rule recognized by the Judicial Committee in *Petherpermal Chetty* v. *Muniandy Servai* (1) was fully examined in the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (2). That principle is based on the doctrine that where a party admits that he has made a fictitious transfer of his property to another with a view to effect a fraud, but asks to have his act undone, the Court would refuse relief and would leave the parties to the consequences of their misconduct, dismissing the claim when the suit was brought by the real owner to get back

possession of his property and refusing to listen to the defence when he set it up in opposition to the person whom he had invested with the legal title. Upon this rule has been engrafted the distinction that although where the intended fraud has been carried into effect, the Court will not assist the true owner, yet if he has not defrauded any one, and the purpose for which the assignment was made has not been carried into execution, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. This distinction between fraud merely intended and a fraudulent purpose actually accomplished, is recognized in section 84 of the Indian Trusts Act, 1882, and is illustrated by the cases of *Akhil Prodhan* v. *Manmatha Nath Kar* (15) and *Rojab Ali* v. *Hedayet Ali* (13) These well-established rules are of no assistance to the defendants, because the conduct of the plaintiff, howsoever reprehensible by reason of his violation of the rules prescribed for the conduct of Public Servants, cannot be described as a fraudulent transfer of property.

This view is supported by the decision in *Lobo* v. *Brito* (14). In that case, the plaintiff sued for declaration of his title to land which had been purchased by him in the name of the defendant. The object of the transaction was to conceal from the Collector the fact that the palintiff, who was a Tahsildar, had acquired property in his *Taluq* contrary to the rules of his Department. Shephard and Subramaniya Iyer, JJ. held that the plaintiff was entitled to the declaration sought, he may have acted dishonestly and in contravention of the rules of his Department, but he could not be said to have acted illegally so as to bring the case within the scope of the rule that a man is precluded from obtaining relief in respect of a transaction, the purpose of which was illegal and has been accomplished.

We are not unmindful that a different view was adopted by the Allahabad High Court in the cases of *Shiam Lal* v. *Chhaki Lal* (3) and *Sheo Narain* v. *Mota Prasad* (4) where it was held that the contract made by a Public Officer for the purchase of land in his Circle, contrary to the rules, is opposed to public policy, specially when, with a view to conceal that purchase from his superiors, he takes the conveyance in the name of another person. These cases were, however, overruled by the decision of a Full Bench in *Bhagwan Dei* v. *Murari Lal* (10) which was followed by another Full Bench in *Kamala Devi* v. *Gur Dial* (11). Sir Henry Richards, C. J., declined to hold that the transfer or assignment, in contravention of the rule, was void as against public policy, though a prohibitory rule made it objectionable for the Public Officer concerned to acquire property or interest in property in his Circle. Walsh, J., pointed out that the case did not fall within the terms of section 23 of the Indian Contract Act and that the earlier cases overlooked the distinction between the conduct of a person and the subject-matter of a contract. The section provides that the consideration or object of an agreement is unlawful, if the Court regards it as opposed to public policy, and every agreement, of which the object or consideration is unlawful, is void. The section thus provides for cases where the consideration or object of the agreement is opposed to public policy. There can be no question that having regard to the Regulations governing the appointment of the officer his conduct was reprehensible, but that does not show that the creation of the tenure was opposed to public policy. Rafique, J., emphasised the well-known principle affirmed by the House of Lords in *Janson* v. *Driefontein Consolidated Mines* (9), namely, that no Court can invent a new head of public policy or condemn an agreement, because, in its opinion, it is not consistent with public interest. The case could not thus be brought within one or other of the recognized heads in the classification of agreement to do that which it is the policy of the law to prevent:

(*i*) agreements which injure the State in its relations with other States;

(*ii*) agreements tending to injure the public service;

(*iii*) agreements which tend to prevent the course of justice;

(*iv*) agreements which tend to abuse of legal process.

(15) 22 Ind. Cas. 86; 18 C. L. J. 616.

(*v*) agreements which are contrary to good morals;

(*vi*) agreements which affect the freedom or security of marriage;

(*vii*) agreements in restraint of trade.

The case before us cannot be placed in the same category as agreements whose object is to induce an officer of the State whether Judicial or Executive, to act partially or corruptly in his office as happened in the case of *Egerton* v. *Brownlow* (16) decided by the House of Lords or of *Marshall* v. *Baltimore and Ohio Railroad Co.*, (17) decided by the Supreme Court of the United States. The decision in *Mohun Lal Babu* v. *Udai Narain Bhaduri* (5) is clearly distinguishable. There, the Court invalidated a contract by the intending purchaser to re convey the property to the defaulter; such a contract, if permitted, would clearly defeat the provisions of section 9 of the Patni Regulation and would thereby attract the operation of section 23 of the Indian Contract Act. Nor is there any analogy between the present case and that of *Sitarampur Coal Co. Ltd.* v. *Colley* (6) which holds that a contract with a Public Servant, which might cast upon him obligations inconsistent with his public duty, is void. In view of these principles we are unable to hold that the plaintiff is disentitled to the assistance of the Court on grounds of public policy. It may be conceded that there is room for argument on both sides, as is sufficiently indicated by the circumstances that the two Full Bench decision of the Allahabad High Court in *Bhagwan Dei* v. *Murari Lal* (10) and *Kamala Devi* v. *Gur Dial* (11) were disapproved of in the Court of the Judicial Commissioner of Oudh in *Sayad Mirza* v. *Nanhi Khanam* (7) but approved of without hesitation, shortly afterwards, in the Court of the Judicial Commissioner of Nagpur in *Balkissen* v. *Debi Singh* (12). There is, however, much to be said in favour of the view maintained by Sir Basil Scott, C. J., in *Ramkrishna Trimbak* v. *Narayan Shivrao Aras* (8), namely, that Government Servants Conduct Rules are rules of conduct and not statutory prohibitions, so that a disregard of these rules does not necessarily taint transactions by Government servants with immorality or illegality. We are not, on the whole, much impressed by the argument that the cause of good Government would be seriously prejudiced, if a Government servant in the position of the plaintiff were not deterred from trusting knaves like the predecessor of the defendants, and that consequently in the interest of the public good, as it were, they should be permitted to keep for themselves the property into the possession of which he was so unwisely and unrighteously put. The obvious answer is that the plaintiff in suing to recover possession of his property is not carrying out an illegal transaction but is seeking to put every one, as far as possible, in the correct position. The plaintiff has already intimated to the Revenue Authorities that he was the beneficial owner under the Settlement. They have raised no objection, and are content to register his name in their records. They have not taken steps for cancellation of the settlement, as they might have done if it were shown, for instance, that the plaintiff had abused his position as a Government servant and had successfully conspired with his fellow officers to obtain a *benami* settlement on terms unfair to the State and unduly advantageous to himself. It is the defendants who are anxious to utilise the breach of the Conduct Rules by the plaintiff, to enable them to retain possession of the property to which they cannot make out a vestige of title; plainly, they cannot be permitted to achieve this object, despite their anxiety to effect great moral ends and to secure the purity of the public services. We hold accordingly that the Court should not refuse to assist the plaintiff in the enforcement of his rights as against the defendants.

The result is that the decree made by the District Judge is affirmed and this appeal dismissed with costs,

B, N. & N. H.

Appeal dismissed.

(16) (1853) 4 H. L. C. 1; 94 R. R. 1; 23 L. J. Ch. 348; 18 Jur. 71; 8 St. Tr. (N. S.) 194; 10 E. R. 359.

(17) (1853) 16 Howard 314; 14 Law. Ed. 953.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 89 AND 95 OF 1921.

December 19, 1921.

Present :—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

BUDHAN TELI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MADAN MOHAN LAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 91—Ejectment suit—Tenants pleading permanency—Settlement papers not produced—Oral evidence—Inference of lease being temporary—Tenant building while landlord stands by—Estoppel.

In an ejectment suit where the tenant pleads permanency of title but does not produce settlement papers in support of it, s. 91 of the Evidence Act prevents him from giving any oral evidence at all as to the terms of the settlement of land with him and the only inference that can be drawn is that his lease is temporary and that he is a tenant-at-will. [p. 654, col. 2.]

In such a case if the landlord stands by while the tenant builds his house, there can be question of estoppel because the tenant knows his rights perfectly well and any inaction on the part of the landlord cannot deceive him. [p 654, col. 2.]

Obiter.—Where by the terms of a lease no power whatsoever is given to the tenant to erect anything in the nature of a permanent building and the landlord either by his omission to interfere or by his active intervention encourages the tenant in the mistaken idea that he has power to build such a house and that he has permanent interest in the land, the landlord cannot afterwards turn round and say that he had only a temporary interest. [p. 654, col. 2.]

In such case it must also be shown that the landlord was aware of what his rights were and had power to prevent the tenant from building. [p 654, col 2.]

Letters Patent Appeal against the judgment of Mr, Justice Adami, reversing that of the District Judge, Gaya.

Mr. *Satyadeva Sahai*, for the Appellants.

Mr. *Kailashpati*, for the Respondent.

JUDGMENT.

MILLER, C. J.—The appellants in these cases are two of eight tenants of the respondent who sued to eject them and recover possession of the property. The case for the landlord was that the holdings of the defendants were yearly holdings or that they were merely tenants at-will and liable to ejectment. There were eight cases altogether and the Munsif found that the character of the tenancy in these cases could not be determined, they were apparently of some age, that no fixed rent could be established on the evidence, that there was no custom of transferability, and eventually decreed the plaintiff's suit.

The defendants appealed to the District Judge and the District Judge held that the tenants had been in possession for a long period and that, from the facts, he was entitled to draw an inference that the tenancies were permanent. He also found in favour of the custom of transferability and, further, upon the question of estoppel, he found that the landlord was estopped from denying the permanency of the defendants' interest.

From this decision a second appeal was brought and heard before Mr. Justice Adami in this Court. The learned Judge of this Court agreed with the decision of the District Judge in six of the cases and as to those there is no appeal. In the other two cases it had been found as a fact by the Munsif and was not in dispute in the First Appellate Court that the defendants' settlement papers or *banaobast* papers showing their title were in their possession and not produced. He, therefore, came to the conclusion that in such circumstances it was not competent for these defendants to give any evidence as to the nature of the terms contained in their documents of title. Therefore, he allowed the appeal in so far as these two tenants were concerned, finding that they had in the circumstances failed to make out that they had anything more than a yearly interest in the land.

From that decision the two defendants in question have appealed, and it is argued before us to-day that it was not competent to the learned Judge of this Court to overrule the findings of fact of the learned District Judge. The question, however, raises a point of law arising under the Evidence Act. It is quite clear by the terms of section 91 of the Evidence Act that where a contract or a grant or any other disposition of property has been reduced to writing no evidence shall be given in proof of its terms except the document itself or except secondary evidence in certain cases. It was admitted here that the documents of title were in existence, that the defendants, upon whom the onus lay, had them in their possession and they failed to produce them. The cases in which secondary evidence of a

document may be given do not include cases such as the present. It was, therefore, no longer open, to my mind, to the defendants, the present appellants, to give any evidence at all as to what were the terms of the settlement of the land with them, they having failed to produce what after all was not only the best but was conclusive evidence as to those terms. The findings of the learned District Judge, therefore, which were arrived at by drawing inference from such facts as long possession and the acts of the parties and so on can have no application to a case such as this, and the learned District Judge was, in my opinion, not entitled to draw these inferences, which, after all, were merely inferences drawn from evidence which was given to prove what were the terms of a written grant or contract, and to this extent it seems to me that the learned Judge of this Court was perfectly right.

A further point was taken that the evidence showed to the satisfaction of the District Judge that the landlord was estopped from denying the permanency of the defendants' holding. The findings of the learned District Judge upon this point were stated thus:—

"I find that the sites of the houses were settled with the defendants for the purpose of providing them with a home; and in accordance with that settlement they built brick foundations in the sub soil, and for generations maintained superstructures of a quality which, in the circumstances of an Indian village, both they and the landlords must have recognised as appropriate to the making of permanent family abodes. In one year they may have put up a new thatch, that in another they may have renovated a wall, but the permanent house remained. In the light of ordinary experience it seems likely that the tenants expended this money in expectation of a permanent home and the landlord acquiesced; otherwise the tenants would have been foolishly wasting money and the landlord would have been standing inactive while the tenants were injuring his property."

In the circumstances of this case it does not seem to me that that finding of the learned District Judge can have any possible bearing upon our decision. The finding is that the tenants built what has been described as a *katcha pucca* house, that is, a house with brick foundations and mud walls and a thatched roof as a permanent abode, and that the landlord stood by and took no action to prevent them from doing so. If by the terms of their lease it was quite clear that the lease gave them no power whatever to erect anything in the nature of a permanent home or a building of this nature and the landlord either by his omission to interfere or by his active intervention encouraged the tenants in the mistaken idea that they had power to build such a house and that they had a permanent interest in the land, no doubt the landlord could not afterwards turn round and set up a case that they only had a termporary interest, but in this case the terms of the lease have not been proved though they might have been proved by the defendants and it has been found that the leases were granted for the purposes of building some sort of a home. If that is so it may well be that, although they had power to build a house of this nature, the lease was only a temporary lease. Whether it was or not, the defendants could easily have proved. They have failed to do so and, therefore, the inference must be drawn against them that this was only a temporary lease making them tenants from year to year or tenant-at-will although they had power to build some sort of house. If that is the inference that must be drawn, it does not really matter in the least that the landlord stood by whilst they built their houses, because it must in such circumstances be presumed that the tenants knew perfectly well what their rights were and, therefore, that they were not deceived or encouraged in any way merely by the landlord standing by and taking no action. Further, in cases where the landlord stands by and takes no action it must also be shown that he was aware of what his rights were and had power to prevent the tenants from building. But the finding is that they had power to build, and the facts necessary in order to bring about an estoppel have not been proved in these cases. In my opinion, these appeals, in so far as they rest upon any estoppel, must also be dismissed with costs and the decision of

the learned Judge of this Court must be upheld.

MULLICK, J.—I agree.

N. K.

Appeal dismissed.

MADRAS HIGH COURT.
FULL BENCH.
REFERRED CASE No. 1 OF 1922.
April 12, 1922.
Present:—Sir Walter Schwabe. KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts-Trotter.
SECRETARY TO THE BOARD OF REVENUE (INCOME-TAX) MADRAS—
REFERRING OFFICER
versus
MESSRS. MOHAMAD SHERIFF HUSSAIN MEAH SAHIB & Co. MADRAS
—ASSESSEE.

Income Tax Act (VII of 1918), ss. 19, 51—S. 19, meaning of—Income of firm—Year of registry and prior year in which firm not registered—Adjustment.

S. 19 of the Income Tax Act, 1918, means that if, at the end of the year, it is found that the amount at which the income was assessed has been either exceeded or reduced, there is a right and a duty to deal with the matter accordingly.

An adjustment of income-tax can be made during a Financial year in which the Collector's certificate of registration under section 12-A of the Income Tax Act is in force in respect of the income of a firm for the previous year in which the firm was not registered.

Case stated under section 51, Act VII of 1918 and section 6 of the Super Tax Act XIX of 1920, by the Secretary to the Board of Revenue (Income-Tax) Madras, in S. T. A. No. 10 of 1921-1922.

The Government Pleader on behalf of Government.

Mr. *D. Chamier*, for the Assessee.

JUDGMENT.

SCHWABE, C.J.—This reference, under section 51 of the Income-Tax Act and section 6 of the Super Tax Act now in force is as to "whether an adjustment can be made during a financial year in which the Collector's certificate of Registration under section 12-A is in force in respect of the income of a firm for the previous year in which the firm was not registered". In my judgment it clearly can. The whole scheme of income-tax and super-tax in this country is based on the principle that the tax is assessed at the beginning of the year on an anticipated income and is paid in anticipation on the assessment, but when the year is over and the actual earnings have been discovered, there is not a fresh assessment but an adjustment. As far as super-tax is concerned, a registered firm is exempt from super-tax as a firm, although the partners are personally liable for super-tax if their separate incomes are large enough to bring the provisions of the Super Tax Act into operation against them.

In the year 1920 21 this firm of Messrs. Mohammad Sheriff Hussain Meah Sahib & Co. through carelessness or for some other reason which I am not able to appreciate, having made its return for the assessment purposes at Rs. 90,000 omitted to get registered in time to take advantage of the exemption granted to registered firms. At the end of the year or the beginning of the next year in due course there was an adjustment, because it turned out that the profits were Rs. 1,37,000 instead of Rs. 90,000. It is contested that adjustment cannot be made because under section 19 of the Income-Tax Act, VII of 1918, "when the Collector has, in any year after the commencement of this Act for which income-tax is leviable, ascertained the total income actually received" is said to mean in any year in which super-tax is leviable, and it is argued that, as this firm was registered in the following year *i. e.*, 1921 22 and, therefore, escaped from super-tax that year, the Collector has no power to call for an adjustment for the preceding year. In my judgment that is an entire misinterpretation of the section. The section simply means that, if at the end of the year it is found that the amount at which the income was assessed has been either exceeded or reduced, there is a right and a duty to deal with the matter accordingly. For the year in question this firm

was not registered, and not being registered they must be dealt with on an adjustment in the same way in which they were dealt with on assessment, and the amount on which they have to pay is the amount actually earned in 1920-21 and not the anticipated earnings for that year.

It follows that the answer to the question is in the affirmative.

The costs of the reference shall be paid by the assessee and such costs shall include the Government Pleader's fee. The Taxing Officer will fix a reasonable fee under the terms of r. 38 of the Appellate Side Fee Rules which is in those words: "In cases in which the subject-matter of the claim does not admit of valuation, the Court or in the case of the High Court, the Taxing Officer shall fix a reasonable fee, regard being had to the time occupied in the preparation and hearing of the case and the nature of the questions raised therein as also to the minima fees prescribed by r. 31." It cannot be right that there should be a fixed amount payable to the Government Pleader as fee in respect of a case which may last a week and may take days for preparation and that the same fixed amount should be payable in respect of a case like this which cannot take very long to read and prepare for argument and it cannot be right that the assessee who has a small case is to pay an unnecessarily large fee to the relief of an assessee who has a large case.

OLDFIELD, J.—I agree.

COUTTS TROTTER, J.—I agree.

M. C. P.

Reference answered.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 79 OF 1922.

June 8, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Adami.

BANWARI LAL CHOWDHURY—PETITIONER—APPELLANT

versus

MOTI LAL CHOWDHURY—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of—Applicant's duty to convince Court of prima facie *case.*

In cases where an application is made for the appointment of a Receiver, the applicant should at least present a *prima facie* case and convince the Court that there is a fair chance of his succeeding in the suit.

Appeal against an order passed by the Sub-Judge, Bhagalpur.

Messrs. *Hasan Imam, C. C. Das and Nirod Chandra Ray*, for the Appellant.

Messrs. *Sultan Ahmad, P. N. Sinha, Jagannath Prasad S. N. Rai* and *Bindheshwar Prasad* for the Respondent.

JUDGMENT.—This appeal arises out of an application for the appointment of a Receiver which has been allowed in a partition suit. The main question for decision in the suit is said to be whether the parties are joint or separate. The learned Subordinate Judge has declined to consider this question at this stage because it is virtually deciding the whole suit; but in cases where a Receiver is applied for, it is settled law that the applicant should at least present a *prima facie* case and should convince the Court that there may be a fair chance of succeeding in the suit. The learned Subordinate Judge has come to no conclusion that the applicant has presented a *prima facie* case, or that he is convinced that there may be a fair chance of the plaintiff succeeding in the suit. In this position of affairs the learned Government Advocate, who appears for the opposite party, agrees with the learned Counsel for the petitioner, that the best course will be for the matter to be sent back to the Subordinate Judge for a decision of this point after considering the evidence of which there is said to be a considerable mass on the record.

It is agreed, however, that the Receiver should remain for the present, until this matter has been decided by the learned Subordinate Judge in accordance with law. The Receiver will accordingly remain for the present in possession of such property as he has already taken possession of, and the learned Subordinate Judge will decide the question of whether a Receiver should be appointed or not at as early a date as possible.

The records with the affidavits will be sent down as soon as possible.

N. S. *Case remanded.*

INDRA RAJ SINGH v. MORADKHAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No 66 OF 1921.

July 8, 1922.

Present:—Mr. Batten, J. C., and Mr. Hallifax, A. J C.

INDRA RAJ SINGH AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

MURADKHAN AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 41—Decree transferred for execution—Certificate, sending of, to original Court—Certificate of failure to execute decree—Certificate of result of each application for execution—Jurisdiction of Executing Court, determination of.

Section 41 of the Civil Procedure Code requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of *each application for execution* that is made to the Executing Court. In any case such certificates have to be sent under the executive orders of this Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree and the sending of a certificate of the latter kind cannot do so at all. [p. 658, cal. 2, p. 659, col 1.]

Manorath Das v. *Ambica Kanta Bose*, 1 Ind. Cas 57; 13 C W. N. 633; 9 C. L J. 443, *Maharaja of Bobbili* v. *Narasaraju Peda*, 15 Ind. Cas 738; 37 M. 231; 12 M. L. T. 109; (1912) M. W N 721; 23 M. L. J. 236, *Abda Begam* v. *Muzaffar Husen Khan*, 20 A. 129; A. W. N. (1897) 218; 9 Ind. Dec. (N. S.) 443, *Harbhaj Rai* v. *Makand Lal*, 168 P. R. 1882, referred to.

Mathura Nath Sen v. *Kailas Chandra Roy*, 3 C. W. N. ccxi (211), cited,

Appeal from an order of the District Judge, Bhandara, dated the 14th March 1918, in execution in Civil Suit No. 3 of 1917, passed on the 7th May 1921, and order, dated the 3rd May 1921 by District Judge, Jubbalpur.

Mr. *G. R. Bapat*, for the Appellants.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—A decree passed in favour of the appellants by the Court of the District Judge, Bhandara, was sent for execution by that Court, under section 39 of the Civil Procedure Code, on the 4th of May 1918, to the Court of the District Judge, Jabalpur, with a certificate, as prescribed by r. 6 (*b*) of O. XXI, that satisfaction of the decree had not been obtained. The decree-holders made an application for execution to the Jabalpur Court on the 15th of May 1918 and warrants of attachment were issued, but, as they were unexecuted and the decree-holders did not desire to proceed further, the application was dismissed on the 21st of June 1918. The certificate of failure to execute the decree was duly sent to the Bhandara Court on the 29th of June 1918. On the 3rd of May 1921 the decree-holders put in a second application for execution in the Jabalpur Court. This was not registered but was returned to the decree-holders on the same day with an order endorsed on it in the following terms: "The intimation has been sent to the Court concerned on 29th June 1918. This application is, therefore, returned for presentation to proper Court."

(2) The decree holders presented this to the Bhandara Court, together with a petition for a fresh transfer of the decree and a fresh certificate under section 39, r. 6 of O. XXI. On this petition the learned District Judge endorsed the following order on the 7th of May 1921: "Petition returned. No fresh certificate is necessary. Execution can issue on the original certificate from time to time until either the decree is satisfied or the execution for any reason becomes impossible. The mere fact that an intimation is sent to this Court concerning the result of each petition for execution does not put an end to the jurisdiction of the Court to which the decree is sent for execution. Petition for issue of fresh certificate is rejected in this Court." The decree holders then presented the same application for execution once more to the Jabalpur Court on the 11th of May 1921, but the learned Additional District Judge passed no written order on it and, apparently, refused to have anything to do with it, stating that he could not revise his former order. The decree-holders have accordingly come here in appeal, praying that whichever of the two conflicting orders is wrong may be set aside.

(3) The view taken by the learned Additional District Judge of Jabalpur seems to be that, when a Court to which a decree has been sent for execution has reported the failure of one attempt to execute, the decree is thereby re-transferred to the Court which made it. No warrant whatever is to be found for this in the words of the

Civil Procedure Code. Section 39 speaks of a decree being sent for disposal. Section 42 makes the point still clearer by saying that the Court to which the decree is sent, "shall have the same powers in executing such decree as if it had been passed by itself": the Court which passed a decree would certainly have power to entertain further applications for execution after the failure of the first, even if it were bound by law or by executive instructions to report that failure to some other Court and had done so. On the words of the Code, there seems to be no doubt about the matter, but certain rulings have been cited which show that the point has been raised.

(4) The difficulty seems to arise from a doubt whether, under section 41, the Executing Court has to report to the Court which passed the decree the result of the first application made to it for execution, even if it is only partial success or complete failure, or to report only complete execution and final failure, leaving no possibility of further execution by it. It is probable that the section was meant to ensure that a Court which passes a decree shall be kept informed all along of the proceedings of the Court to which it is sent for execution. That is undoubtedly the more convenient course, and executive orders that it shall be followed have been issued by this Court. But a certificate of execution, or failure does not put an end to the power of the Court to execute just because it is prescribed by section 41. When a Court certifies that it is unable to execute a decree that has been sent to it any further, either because it has been fully executed or there is no possibility of executing what is left of it, it certainly has lost its power of executing that decree, but not because it reports the fact. Still less, can the mere fact of certifying only partial execution or of failure that is not necessarily final put an end to the jurisdiction of the Court to execute the decree or re-transfer it to the Court which passed it, whether such a certificate is prescribed by section 41 of the Civil Procedure Code or only by the executive order of this Court.

(5) In the Calcutta case of *Manorath Das* v. *Ambica Kanta Bose* (1) decided in 1907 and the Madras case of *Maharaja of Bobbili* v. *Narasaraju Peda* (2) decided in 1912, the failure of the first infructuous application to the Court to which the decree was sent for execution had apparently not been certified to the Court which passed it, and the question whether that certificate, if it had been sent, would have put an end to the jurisdiction of the Executing Court cannot be said to have been decided; indeed, in the Calcutta case the learned Judges expressly refrained from stating an opinion on it as it did not arise. It follows, however, from both judgments that the certificate of the first failure was considered not to be required by law and an unnecessary intimation of result of one application for execution cannot be called a certificate such as is required by section 41 of the Procedure Code and, therefore, cannot have the effect of such a certificate, whatever that effect may be. But in the Allahabad case of *Abda Begam* v. *Muzaffar Husen Khan* (3) and in *Harbhaj Rai* v. *Mukand Lal* (4) decided by the Chief Court of the Punjab, a certificate of the failure of the first application had been sent, and the same view of its effect was taken as has been set out above. The case of *Mathura Nath Sen* v. *Kailas Chandra Roy* (5) reported in the Calcutta Weekly Notes has also been cited before us. A mere summary of the ruling on this point is there given, and even that does not appear to be a quotation of the words of the judgment.

(6) Our decision of the question before us may be summarised as follows. Section 41 of the Civil Procedure Code requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the Executing Court, but in any case such certificates have to be sent under the executive orders of this Court. But the

(1) 1 Ind. Cas. 57; 13 C. W. N. 538; 9 C. L. J. 443.

(2) 15 Ind Cas. 733; 37 M. 231; 12 M. L. T. 119; (1912) M. W. N. 721; 23 M. L. J. 236.

(3) 20 A. 129; A. W. N. (1897) 218; 9 Ind. Dec. (N S.) 443.

(4) 168 P. R. 1883.

(5) 3 C. W N, ccxi (211).

sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate of the latter class cannot do so at all. In this view, we set aside the order passed on the 3rd of May 1921 by the Additional District Judge of Jabalpur and order him to admit the application for execution on which that order is passed as an application filed on that date and to deal with it according to law. The costs of this appeal will be paid by the respondents.

G, R. D. & N. H. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL REVISION No. 332 OF 1921.

February 21, 1922.

Present:—Mr. Justice Jwala Prasad

KUNJ BEHARI SINGH—PLAINTIFF—PETITIONER

versus

SHEODAHIN PANDEY AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. III, r. 4 (1), O. IX, r. 4—General Rules and Circular Orders of Calcutta High Court, Chap XI, r. 46 cls. (e), (f)—Court's power to refuse permission to Pleader to sign vakalatnama previously filed—Court, when justified to object to Pleader's appearance—Dismissal for default in presence of recognized agent, legality of.

In view of the provisions of clauses (e) and (f) r. 46, Chapter XI of the General Rules and Circular Orders of the Calcutta High Court, which is followed by the Patna High Court, a Court has no power to refuse permission to a Pleader to sign a *vakalatnama* which is already on the file of the Court and in the body of which appears the name of that Pleader. [p. 660, col. 2; p. 661, cols. 1 & 2.]

A Court can only object to a Pleader appearing in a case when he does not comply with the aforesaid rule regarding the acceptance and endorsement of the *vakalatnama*. [p. 661, col. 1.]

Two Pleaders, In the matter of, 41 Ind. Cas. 328; 2 P. L. J. 259 at p. 261: 1 P. L. W. 483; (1917) Pat. 217; 18 Cr. L. J. 808, relied upon.

Shama Prosad Ghose v. *Taki Mullik*, 5 C. W. N. 816, *Jogesh Chandra Gupta, In the matter of*, 33 Ind. Cas. 831; 20 C. W. N 283: 17 Cr L. J 491 and *Mohesh Chandra Addy* v. *Pancha Madali*, 32 Ind Cas. 890; 20 C. W. N. 287; 23 C. L. J. 297; 43 C. 884, referred to.

It is illegal on the part of a Court to dismiss a suit for default under O. IX, r. 4 of the Civil Procedure Code in the presence in Court of an authorised agent with his witnesses. [p. 661, col. 2.]

Application against an order passed by the Munsif, Arrah, dated the 7th July 1921.

Mr. *Sambhu Saran*, for the Petitioner.

JUDGMENT.—The present petitioners have been substituted in place of the original petitioner who was the plaintiff in the Court below. The plaintiff instituted a rent-suit out of which this application has arisen in the Court of the Munsif of Arrah, No. 712 of 1920. The defendants did not appear and the case was set down for an *ex parte* hearing on the 23rd May 1921. On that day the suit was dismissed for default. On the 25th, the plaintiff filed a petition under O. IX, r. 4, of the Civil Procedure Code for setting aside the aforesaid order of dismissal of the suit and for its restoration. This application was rejected by the judgment of the Munsif, dated the 7th July 1921. The plaintiff has, therefore, come to this Court in revision and asks to have the order of the Munsif set aside.

The short ground urged in support of the application is that in fact there was no default in the appearance of the plaintiff, and the Munsif had, therefore, absolutely no right to dismiss the suit for the non-appearance of the plaintiff under O. IX, r. 3. The contention appears to be sound and is borne out by the facts and circumstances of the case. On account of his old age the case of the plaintiff was looked after by his son, Ram Radhya Singh, and his *am mukhtear* Lakhmi Prasad, under a duly registered power-of-attorney. The plaint was duly signed and verified by the *am-mukhtear*, Lakhmi Prasad, for the plaintiff. The *vakalatnama* filed on behalf of the plaintiff was also executed by Lachmi Prasad It contains the names of a number of Pleaders of the Arrah Bar; but at the time of filing the plaint and the *vakalatnama* the Pleader Moulvi Abdul Aziz only accepted the *vakalatnama* and made the necessary endorsement. On the 23rd May, the date of the hearing of the suit, the *hazri* of the plaintiff's witnesses was filed under the signature of the said Pleader Moulvi Abdul Aziz This gentleman is also very old being of about 80 years of age and was on those days observing the *ramzan* fast. He left the Court a

10-30 A. M. and the case till then was not taken up. It was taken up at 11-26 A. M as the order-sheet shows. Lachmi Prasad, the *mukhtear* of the plaintiff, and Ram Rachya Singh, his (petitioner's) son were both present in the *ijlas* room and were also the witnesses on behalf of the plaintiff: The plaintiff's witness went into the box. As Pleader Moulvi Abdul Aziz had left the Court, Lachmi Prasad and Ram Rachya Singh wanted Rai Jang Bahadur, Pleader, who happened to be present in Court, to appear and examine the witnesses in the case which was heard *ex parte*. No fresh *vakalatnama* was filed, and on behalf of the plaintiff it was urged that the stamp vendor was not available so late in the day. This explanation has not been accepted by the Munsif. The name of Rai Jang Bahadur, however, happened to be in the body of the *vakalatnama* along with the names of several other Pleaders of the Bar. The plaintiff's *am-mukhtear* asked Rai Jang Bahadur to act on his behalf as Pleader, and Rai Jang Bahadur did give his consent. He then wanted permission of the Court to sign the *vakalatnama* which had already been filed. This prayer made on behalf of the plaintiff for Rai Jang Bahadur to sign the *vakalatnama* was refused, and the learned Munsif passed the following order:—

"Pleader of the plaintiff does not appear. The suit is dismissed for default. There is no one to examine the witness-in-chief. Time 11-27."

Now, on behalf of the plaintiff it is urged in this Court that the order of the Munif is wholly without jurisdiction, illegal and irregular. It is said that he had no power to refuse Rai Jang Bahadur to accept the *vakalatnama* and sign the same. This contention appears to me to be borne by the law and the authorities on the subject. O. III, r. 4 (1) of the Code of Civil Procedure requires:

"The appointment of a Pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person, by his recognised agent or by some other person duly authorised by power-of-attorney to act in this behalf."

This rule was complied with, inasmuch as there was a written *vakalatnama* filed on behalf of the plaintiff as executed by his *am-mukhtear* under a registered power-of-attorney. This *vakalatnama* was accepted by Moulvi Abdul Aziz and was already filed in Court. Rai Jang Bahadur was also there on the *ijlas*; the *am-mukhtear* and the plaintiff's son engaged him as the Pleader and he accepted the same. His name being already in the *vakalatnama* he was competent to sign the same in accordance with the rules prescribed by the High Court. Formerly, it was held in some cases that even the signature of the Pleader is not essential, provided his name is in the body of it. However, in 1914 the Calcutta High Court (which is followed by this Court) prescribed the rules on the subject: *vide* Chapter XI, r. 46 of the General Rules and Circular Orders. Clause (*b*) of the rule requires that,

"A Pleader accepting a *vakalatnama* purporting to be executed by his client in person is bound to satisfy himself that it was so executed. When it purports to be executed by a third party, on behalf of his client, he is bound to ascertain that such person has been duly empowered by the client to appoint a Vakil, and has himself executed the *vakalatnama*."

Clause (*c*) requires that,

"No Vakil or Pleader shall receive a *vakalatnama* from any person other than the party himself, or his recognized agent, or a person duly authorized by power-of-attorney to act in this behalf, or his servant or relation or a Pleader or Vakil or *mukhtear* specially authorized in writing in that behalf."

Clause (*e*) says that,

"When a *vakalatnama* is filed by a Vakil or Pleader, he shall endorse on the back of it the date of acceptance, the name of the person from whom it is received, and, if such person is neither the client himself nor a Vakil, Pleader, or *mukhtear*, shall state the precise nature of the authority with date of that person."

Clause (*f*) says:—

"A *vakalatnama* which has been filed in Court may be subsequently accepted by a Vakil or Pleader whose name appears in the *vakalatnama* at the time when it was first filed: in the case of such subsequent acceptance, an endorsement shall be made as in the case of the first acceptance."

I have considered all the authorities cited by the Munsif on the subject, namely,

Shama Prosad Ghose v. *Taki Mullik* (1), *Jogesh Chandra Gupta, In the matter of* (2) and *Mohesh Chandra Addy* v. *Panchu Mudali* (3). As to the recognized practise upon the subject, reference may be made to 19 Calcutta Weekly Notes xxv (25), XXVI (26) Notes. This has been referred to in the case of *Mohesh Chandra Addy* v. *Panchu Mudali* (3). In *Two Pleaders, In the matter of* (4) it was observed by a Special Bench of this Court that the Court can only object to a Pleader appearing in a case when he does not comply with the aforesaid rule on the subject of the acceptance of *vakalatnama*, that is to say, when the Pleader does not sign the *vakalatnama* and record the endorsement required by clauses (*e*) and (*f*) of r. 46 of Chapter XI of the General Rules and Circular Orders. The Pleader in the present case, Rai Jang Bahadur, was ready to make the necessary endorsement. The Munsif refused it only on the ground that a fresh *vakalatnama* was not filed and the *vakalatnama* already filed was not sufficient. The refusal was against the express provisions in r. (*f*) which says,

"A *vakalatnama* which has been filed in Court may be subsequently accepted by a Vakil or Pleader whose name appears in the *vakalatnama* at the time when first filed; in the case of such subsequent acceptance an endorsement shall be made as in the case of the first acceptance"

The argument advanced by the learned Munsif appears to be very ingenious indeed. He says,

"He did not appoint him his Vakil from before. He appointed Rai Babu Jang Bahadur orally. He did not appoint him to be his Vakil by *vakalatnama*. At the time he executed his *vakalatnama* he intended to appoint as his Vakil only the person or persons of whom he took or he intended to take signatures. At the time of appointing Mr. Abdul Aziz as his Vakil he had no intention to appoint any other Vakil. He only gets signature of the Vakil whom he appoints at the time of executing *vakalatnama*."

We are not here to investigate into the intentions of the parties. The fact is that names of various Pleaders including that of Rai Jang Bahadur were in the *vakalatnama*, and obviously it was with a view to get the acceptance of any of the Pleaders whose names appeared in the *vakalatnama* when an emergency would arise. The names of other Pleaders than the one who was engaged and accepted at the time are only mentioned with a view to obviate the necessity of filing a fresh *vakalatnama*, else there was no meaning in encumbering the *vakalatnama* by putting down a number of Pleaders' names if when subsequently in appointing the Pleaders named in the *vakalatnama* fresh *vakalatnamas* were necessary. But we are relieved from going into the intention of the parties in the case when the rule expressly says that a *vakalatnama* once filed in Court may be subsequently accepted by a Vakil or Pleader whose name appears in the *vakalatnama*. The Court has only to see whether the name of the Pleader proposed to be appointed appears in the *vakalatnama* or not, and if his name does appear then the Pleader is entitled to sign the *vakalatnama* and appear and act in the case.

Again, apart from the question whether Rai Jang Bahadur could or could not be permitted to sign the *vakalatnama* in question, there was no default on behalf of the plaintiff when there was a duly authorized agent with a registered power-of-attorney, present in Court with his witness, and the order dismissing the suit was bad in law: O. III of the Code of Civil Procedure. This agent had signed and verified the plaint, had appointed Vakils and was looking after the case. The Munsif could have, with his assistance, examined the witness which would have taken only a few minutes, or should have adjourned the case as it was taken up so late in the day, instead of disposing of it at 11-27 A. M., particularly when the plaintiff's Pleader had filed *hazri* and left the Court at 10.30 A. M. The plaintiff only wanted to use the Record of Right and to examine only one witness. The zeal of the Munsif does not rest there. While hearing the application for setting aside the order of dismissal under O. IX,

(1) 5 C. W. N. 816.

(2) 33 Ind. Cas. 831; 20 C. W. N. 283; 17 Cr. L. J. 191.

(3) 32 Ind. Cas. 395; 20 C. W. N. 287; 23 C. L. J. 297; 43 C. 884.

(4) 41 Ind. Cas. 328; 2 P. L. J. 259 at p. 261; 1 P. L. W. 483; (1917) Pat. 217; 18 Cr. L. J. 808.

r. 4, two witnesses were examined on behalf of the plaintiff, namely, Lachmi Prasad, *am-mukhtear*, and Moulvi Abdul Aziz, Pleader, who was engaged originally to act in the case. Naturally the evidence-in-chief was very short, but the cross examination was by the Munsif himself, as nobody appeared to oppose the application, and that appears to be too searching and inordinate, and the judgment rejecting the rehearing petition also appears to be pretty long. The learned Munsif seems to have been carried away in this case from the beginning to the end more from vindicating his own view of the technical point as to the right of a Pleader signing the *vakalatnama* already filed in Court than from the justice of the case. He would have been well-advised had he reserved this point for a more appropriate case. In any view the discretion used in this case by the Munsif both in dismissing the suit and not restoring it was not proper.

The result is that I set aside the order of the Munsif under O. IX, r. 4, and restore the case to its original file to be disposed of in accordance with law.

S. D.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 485 OF 1903.

December 8, 1904.

Present:—Mr Justice Brett.

JOGESH CHANDRA ROY—PLAINTIFF—APPELLANT

versus

ANNODA CHARAN CHOUDHURY—DEFENDANT—RESPONDENT.

Cess Act (IX B. C. of 1880), ss. 4, 41, sub-s. (3)—Cesses, whether recoverable from tenants paying rent in kind.

There is nothing in law to prevent a landlord from recovering cesses from his tenants in the case of lands held by them on rents payable in kind.

Appeal against a decree of the Subordinate, Judge, First Court, Chittagong, dated the 11th of December 1902, modifying that of the Munsif, Patiya, Third Court dated the 24th of June 1901.

Babu *Hari Bhusan Mukerjee*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff appellant for arrears of rent of three plots of land. Money-rent was claimed in respect of two of the plots and rent in kind in respect of the third. There was also a claim for the usual cesses.

The Court of first instance decreed the entire claim but on appeal the lower Appellate Court has modified the decree of the Court of first instance by disallowing the claim for cesses in respect of the plot of land for which rent was claimed in kind. The Subordinate Judge gives as his reason for disallowing that part of the claim for cesses that there is no provision in the law for the payment of cesses when rent is payable in kind and there is no proof on behalf of the plaintiff of any agreement to pay such cesses.

On behalf of the appellant it is contended that the Subordinate Judge is in error in supposing that the law does not contemplate that cesses should be paid by the tenants in the cases of lands held on rents payable in kind. The contention is, in my opinion, correct. Section 41 of the Cess Act clearly provides that the cess is payable in respect of all lands held by a cultivating *raiyat* and sub-clause (3) of that section lays down the amount of cesses which the *raiyat* is bound to pay. The Subordinate Judge was possibly unaware of the rules provided for the levy of cesses in respect of rents payable in kind, and his attention is, therefore, invited to the explanation given under section 4 of the Cess Act, B. C. of 1880, in the edition of the Act published by the Board of Revenue, with the Boards Rules attached. In my opinion, the Subordinate Judge is in error in disallowing the claim of the plaintiff for the tenants' share of the cesses on the plot of land paying rent in kind and I, therefore, set aside the judgment and decree of the Subordinate Judge on this point and restore the judgment and decree of the Munsif.

As no one appears on the other side to contest the appeal, I make no order as to costs.

B. N. *Decree set aside.*

BISHUN PRASAD SINGH v. NARSINGH DAS.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 10 OF 1921.

July 5, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

BISHUN PRASAD SINGH AND OTHERS —DEFENDANTS—PETITIONERS

versus

NARSINGH DAS—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to His Majesty in Council—Suit to set aside transfer as not justified by necessity—Necessity for sale of part of transferred property established—Appeal, valuation of.

Where in a suit to set aside a transfer of property made by a Hindu widow on the ground that it was not justified by legal necessity, the Court finds that the transfer was justified only to the extent of a certain sum for which there was necessity, the value of the appeal to His Majesty in Council is the value of that part of the transferred property whose sale is not found to be for legal necessity, and if the value of the same be less than Rs. 10,000 leave to appeal will not be granted.

Application, under section 110 of the Civil Procedure Code, against the decision of Mr. Justice Das and Mr. Justice Ross, in First Appeal No. 4 of 1918, dated the 4th January 1921.

Mr. *Sunder Lall* for Mr. *Bimala Charan Sinha*, for the Petitioners.

Messrs. *L. N. Singh*, *Raghu Prasad* and *Kailaspati*, for the Opposite Party.

JUDGMENT.

MILLER, C. J.—This is an application for leave to appeal to His Majesty in Council from a decision of this Court, dated the 4th January last.

The applicants are the defendants in the suit. The defendants claimed the property under a sale made to their father by the grandmother of the present plaintiff. The plaintiff is the reversioner of the estate of the grandfather after the life-interest of his grandmother and her daughter.

The lower Court awarded a decree in favour of the plaintiff on the ground that the transfer made by the grandmother was not justified by legal necessity. On appeal to this Court that decision was varied, the Court finding that out of a total sum of Rs 3 800, the purchase price, Rs. 1,412 was justified by legal necessity at the time of the transfer. The Court accordingly varied the decree of the Trial Court by ordering that the plaintiff's title to the property in question should be declared and that he should recover possession thereof upon condition that he first paid to the defendants Rs. 1,412 with interest from the date of the decree. From that decision the defendants seek leave to appeal to His Majesty in Council.

So far as the decision appealed from is concerned, it was one of affirmance and decided upon questions of fact and no question of law arises. It is contended, however, by the defendants that the Court having come to the conclusion that the sale of the property was justified to the extent of Rs. 1,412 for which there was necessity on the part of the family at that time, the Court ought to have ordered that there was valid transfer of the property, at all events to the extent of rather more than a third of the property, and, therefore, instead of setting aside the sale ought to have confirmed the sale of a proportionate part of the property. It appears that for many years it has been the practise in such cases, where a portion of the purchase price is shown to have been justified by legal necessity, to set aside the sale upon payment by the plaintiff of that portion. Even if this question might possibly be considered a substantial question of law, it is not necessary to decide it in the present case, for, assuming that the defendants were entitled to that proportion of the property which Rs. 1,214 bears to Rs. 3,800, the value of their appeal would not come up to the statutory requirements. The value of the whole property is said to be Rs. 10,000. Therefore, if the defendant should be successful on the point of law in their appeal to His Majesty in Council, the result would be that they would only recover property of the value of a slightly more than a third of Rs. 10,000 instead of its cash equivalent. For these reasons, it does not appear to me that this is a proper case in which to grant leave to appeal to His Majesty in Council.

The respondent is entitled to costs; hearing fee five gold *mohurs*.

MULLICK, J.—I agree.

W. C. A.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 224 OF 1921.

March 27, 1922.

Present:—Mr. Batten, J. C.

ALAMSINGH—DEFENDANT—APPELLANT

versus

Seth GOPALDAS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 99—Witness, deposition of, not signed by Judge—Trial, whether vitiated—Irregularity—Re-trial, whether should be ordered.

The mere fact that the deposition of a witness is not signed by the Judge who recorded it, would not vitiate the trial of the suit. The omission to sign is an irregularity merely, and, so long as there is no doubt whatever that the deposition was recorded by the Judge, section 99 of the Civil Procedure Code does not afford ground for a new trial.

Appeal from a decree of the District Judge, Hoshangabad, in Civil Appeal No. 171 of 1920, dated the 9th February 1921.

Mr. *S. C. Dutt Chowdhry*, for the Appellant.

Mr. *K. V. Deoskar*, for the Respondent.

JUDGMENT.—The first ground of appeal is to the effect that the plaintiff has not proved that the former tenant died without heirs. The plaintiff asserted that the former tenant died without heirs, and the plaintiff's pleading on this point was not contradicted by the defendant who in fact admitted that he believed it to be true.

As to the second ground, it certainly lay upon the appellant to prove that he was a tenant. He was not recorded as a tenant and the landlord did not admit that he was a tenant and it was for him to prove it. The question whether he has proved it is a different matter. It was argued that it was proved by the *jamabandi*. The Patwari who made the entry in the *jamabandi* says that he made it on information given by the appellant. It was admitted that the appellant was in possession, but as sub-tenant of Kanhaiyalal and not as tenant. This ground of appeal, therefore, fails.

As to the third ground of appeal the Expert evidence is not rebutted by any expert evidence to the contrary, and I do not see any reason why the lower Courts should not have relied upon it. It is pointed out that the deposition of the Expert in Handwriting is not signed by the Munsif, though it is signed by the Expert. This, however, does not vitiate the trial. It is an irregularity and, under section 99, Civil Procedure Code, does not afford a ground for a re-trial, since there is no doubt whatever that the deposition was recorded by the Munsif.

The fourth and fifth grounds of appeal simply attack the decision upon questions of fact arrived at by the lower Appellate Court and do not afford a ground for interference in second appeal.

The appeal is dismissed with costs.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1719 OF 1919.

March 3, 1922.

Present:—Mr. Justice Newbould, and Mr. Justice Panton.

KUMUD KANTA CHAKRABURTTY—PLAINTIFF—APPELLANT

versus

E. BIGNOLD, MANAGER, COURT OF WARDS, MYMENSINGH—DEFENDANT—RESPONDENT.

Trespass, civil—Unlawful entry, if essential—Force, use of, to trespasser, without giving opportunity to withdraw peaceably—Cause of action—Assault—Slight push—Damages.

Under the Civil Law, unlawful entry is not an essential element of trespass. [p. 666, col. 1.]

A trespasser, before force is used to eject him, even such force as a slight push, must always be given an opportunity of withdrawing peaceably notwithstanding the fact that the trespass is committed in a place where a notice forbidding entry is stuck up. [p. 666, col. 2.]

Where a trespasser without being given an opportunity of withdrawing peaceably is given a slight push, whereby he suffers neither in person nor in reputation, he has a cause of action owing to the infringement of a civil right but is not entitled to more than nominal damages. [p. 666, cols 1 & 2.]

Appeal against a decree of the Second Additional District Judge, Mymensingh, dated

the 26th of May 1919, modifying that of the Subordinate Judge, First Court at Mymensingh, dated the 29th of January 1919.

FACTS appear from the judgment.

Babu *Sarat Chandra Ray Choudury* (with him Babus *Kali Kinkar Chakraburtty*, *Birendra Kumar De* and *Jatindra Nath Sanyal*), for the Appellant.—The law of civil trespass is the same in the case of a Railway property as in the case of individual property. Reads section 122 of the Railways Act and Halsbury's Laws of England, Volume 27, paragraphs 1492, 1495 My entry was not unlawful as I was there on invitation. There is no civil trespass unless the entry was unlawful. Refers to Indermaur's Common Law, 11th Edition, page 328, Halsbury's Laws of England, Volume 23, paragraphs: 1487-88. If there was an entry by license there can be no civil or common law trespass.

[NEWBOULD, J.—But if a man abuses an authority given him by the law, he becomes a trespasser *ab initio*. See *Six Carpenters' case* (1)].

The case of a trespasser *ab initio* is different. If I enter upon another's land by leave and license, I can under no circumstances be made liable for civil trespass. If I committed any offence I might be liable for that. From the *Six Carpenters' case* (1) it is clear that there is a distinction between authority of law and private authority. There is no trespass *ab initio* by abuse of private authority. Refers to Pollock on Torts, 10th Edition, page 413.

[NEWBOULD, J.—Assuming that you are a trespasser, how does that justify the assault?]

That is my second point. If I was there unlawfully no body has a right to use physical force and drive me out without requesting me to leave. See Halsburys' Laws of England, Volume 27, paragraph 1505, Volume 23, paragraph 1488.

Then comes the most important question, the question of damages. Reads Ratanlal on Torts, 6th Edition, page 178, Indermaur's Common Law, 11th Edition, page 461. Special damage need not be proved in a case of assault. So that there is no justification for giving me only nominal damages Lastly, there is no reason why I should not be entitled to my full costs. I have succeeded on the merits and the lower Appellate Court has exercised an unsound discretion in not allowing me my full costs. Refers to *Justin Hull* v. *Paull* (2).

Mr. *Langford James*, Counsel (with him Babu *Ambicapada Chaudhury*), for the Respondent. —Having regard to the findings arrived at by the lower Appellate Court it cannot be seriously argued that the plaintiff was not a trespasser. The entry of the plaintiff need not be unlawful from the beginning. Even if unlawful entry were an essential element of trespass, the plaintiff has nothing to complain, for the finding of the final Court of fact amounts to a finding that his entry on the Railway property was unlawful from the beginning. As the plaintiff was a trespasser the assault, if any, was justifiable. See *Pratab Doji* v. *Bombay Baroda and Central India Railway Co.* (3). Then on the question of the amount of damages, as the plaintiff has neither suffered in person nor in reputation, he has only a technical cause of action owing to an infringement of a civil right which caused him no real damage. Under the circumstances the plaintiff can claim nothing beyond nominal damages.

In the cross-objection my contention is that there was no cause of action even in the technical sense. Much has been made of the fact that there was no request to leave, but the fact that there was a notice prohibiting trespass, was sufficient to render any such request to withdraw unnecessary. On the question of costs also, my submission is that as the defendant succeeded in reducing the major portion of the damages claimed, he should have been given his full costs.

Babu *Sarat Chandra Ray Choudhury* replied.

JUDGMENT.—This appeal arises out of what has rightly been described by the learned Counsel for the respondent as a storm in a tea cup. The plaintiff and the defendant are two gentlemen residing at Mymensingh. On the 15th July 1917 the first train from Mymensingh to Netrokona was run across a newly erected bridge. On the evening of that day the plaintiff and defendant were both on the embankment leading to this bridge. The defendant was accompanied by two ladies. The plaintiff passed in front of those ladies not noticing

(1) (1610) 1 Sm. L. C. (11th Ed.) 132; 8 Coke 146*a*; 77 E. R. 695.

(2) 58 Ind. Cas. 421; 24 C. W. N. 352.

(3) 1 B. 52; 1 Ind. Dec. Dec. (N s.) 34.

that they were there. The plaintiff's conduct caused annoyance to the ladies and the defendant did not realize that the plaintiff's rudeness was unintentional. The defendant had authority from the Agent of the Railway Company to remove trespassers from that place and he went and gave the plaintiff a slight push. He did not go through the formality of asking the plaintiff to go and waiting for his refusal before using physical force. On these finding the lower Appellate Court has awarded the plaintiff damages amounting to 5 rupees. These findings must be accepted in second appeal, and on these findings we think that the lower Court was perfectly right.

It is contended that these findings are insufficient for holding that the plaintiff was a trespasser. With that we cannot agree. The plaintiff's case on this issue is based on the facts that there was an implied permission to the public to go to the quarters of one Mr. Mookerjee which was on the Railway land. But it is found that there could be no reasonable claim on the part of the plaintiff that he had the right to take the route he did. It is strongly contended that either under section 122 of the Railways Act or under the Civil Law there can be no trespass without an unlawful entry. We are unable to accept this proposition of law. Section 122 of the Railways Act has no application to the present case. Section 122 defines a specific criminal offence and has no bearing whatever on the rights of an occupier of land to eject trespassers therefrom. But even if unlawful entry were an essential element of trespass the finding we have just quoted amounts to a finding that the entry on this part of the Railway property was unlawful, that is to say, without the consent of the Railway Authorities.

As regards damages we think that on these findings it is absurd to contend that the plaintiff has a claim to anything beyond nominal damages. He has certainly not suffered in person, and although the learned Subordinate Judge who tried the case in the first instance took a more favourable view of the plaintiff's case and held that he was not a trespasser yet he did not find the plaintiff suffered any loss of reputation. The case is one in which the plaintiff has cause of action owing to infringement of civil right but in which no real damage has been caused to him.

The last point taken in this appeal was the question of costs. Certain English cases were cited and also the decision of this Court—*Justin Hull* v. *Faull* (2). This is a case of the Original Side of this Court. The practice in the Muffusil is that costs should depend on the result of the case and it is usual when the suit partly succeeds for proportionate costs to be given. The important difference between cases in England and on the Original Side of this Court and cases in the Muffasil is that in cases in the Muffasil costs are much more directly proportionate to the amount claimed. In the present case we are unable to hold that the learned District Judge in following the usual practice in granting costs exercised an unsound discretion.

In the cross-objection it is urged that the mere fact that there was a notice forbidding trespass at the place where the plaintiff was, was sufficient to render any request to withdraw unnecessary. That contention we are unable to accept. Before force is used even such slight force as in the present case a trespasser must always be given an opportunity of withdrawing peaceably. It is further contended in cross-objection that the defendant should have been given full costs in the lower Appellate Court as he succeeded in reducing the damages awarded from Rs. 700 to Rs. 5. But for the same reason as we have rejected the appellant's contention as regards costs we reject the defendant's also.

We accordingly dismiss the appeal and disallow the cross objection. As both parties failed before us we make no order as to costs in this Court.

N. H.

Appeal dismissed.

RAGHUNATHASWAMI IYENGAR *v.* S. GOPAUJ RAO.

MADRAS HIGH COURT.

CIVIL APPEAL No. 377 OF 1919.

August 31, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

S. N. RAGHUNATHASWAMI IYENGAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

S. GOPAUJ RAO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 50, O. XXI —'May apply,' meaning of—Death of party defendant after decree and before execution sale—Legal representative not brought on record—Sale, whether nullity —Suit on mortgagee—Puisne mortgagee impleaded as defendant—Compromise decree—Puisne mortgagee, whether "judgment-debtor."

The words 'may apply' in section 50, Civil Procedure Code, are equivalent to 'shall apply', for, except in the sense that the decree-holder may, if he chooses, drop execution altogether, there is no option left to him and it is imperative on him to follow the procedure enjoined by the section if he desires further execution. [p. 669, col. 1.]

Proceedings taken in execution of a decree without the legal representatives of a deceased judgment-debtor being brought on the record are void and do not amount to a mere irregularity, and, if the proceedings have culminated in a sale, the sale is altogether void and is a nullity and need not be set aside, for this purpose no distinction can be drawn between the case of a judgment-debtor's death before the order for sale is passed and the case of a death after the order. [p. 669, col. 2; p. 670, col. 1.]

Malkarjun v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 27 I. A. 216; 7 Sar. P. C. J. 739; 2 Bom. L. R. 927 (P. C.), *Sheo Prasad* v. *Hira Lal*, 12 A. 440 (F. B.); A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026, *Abdur Rahman* v. *Shankar Dat*, 17 A. 162; A. W. N. (1895) 35; 8 Ind. Dec. (N. S.) 429, *Aba* v. *Dhondu Bai*, 19 B. 276; 10 Ind. Dec. (N. S.) 187, *Ramasami Ayyangar* v. *Bagirathi Ammal*, 6 M. 180; 2 Ind. Dec. (N. S.) 404, *Krishnayya* v. *Unnissa Begam*, 15 M. 399; 5 Ind. Dec. (N. S.) 680, *Narayana Kothan* v. *Kaliana-sundaram Pillai*, 19 M. 219; 6 Ind. Dec. (N. S.) 858, *Muhammad Rafi* v. *Muhammad Askari*, 37 Ind. Cas. 433; 1 P. L. J. 261; 3 P. L. W. 390. *Seshagiri Row* v. *Tangaluri Jagannadham*, 32 Ind. Cas. 391; 39 M. 1031; 19 M. L. T. 93, *Sri Krishnasawmy Iyengar* v. *Soorikutti Ganapathy Iyer*, 68 Ind. Cas. 903; (1921) M. W. N. 194; 14 L. W. 638, *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*, 56 Ind. Cas. 274; 39 M. L. J. 108; 18 A. L. J. 55; (1920) M. W. N. 382; 12 L. W. 59; 2 U. P. L. R. (P. C.) 108; 24 C. W. N. 954; 47 I. A. 91; 28 M. L. T. 230; 47 C. 924 (P. C.), *Net Lall Sahoo* v. *Sheikh Kareem Bux*, 23 C. 688; 12 Ind. Dec. (N. S.) 456, *Bepin Behari Bera* v. *Shashi Bhushan Datta*, 22 Ind. Cas. 95; 18 C. W. N. 766; 18 C. L. J. 628, *Jagadish Bhattacharjee* v. *Bama Sundari Dasya*, 51 Ind. Cas. 972; 28 C. W. N. 608; 29 C. L. J. 411, *Rukmin* v. *Jodha Singh*, 19 Ind. Cas. 120, distinguished and explained.

Groves v. *Administrator-General of Bengal*, 22 M. 119; 8 M. L. J. 288; 8 Ind. Dec. (N. S.) 84 and *Samandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan*, 23 Ind. Cas. 251; 26 M. L. J. 287, followed.

Khiaraj Mal v. *Daim*, 32 C. 296 at p. 315; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23; 8 Sar. P. C. J. 734 P. C., *Rashidun-nissa* v. *Muhammad Ismail Khan*, 3 Ind. Cas. 864; 31 A. 472; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.) and *Pasumarti Payidanna* v. *Ganti Lakshminarasamma*, 29 Ind. Cas. 314; 38 M. 1076 at p. 1080; 28 M. L. J. 525, referred to.

Section 50, Civil Procedure Code, covers all applications in execution even after attachment. [p. 669, col. 1.]

Vuppu Sitaramayya v. *Minchula Gopalakrishnamma*, 53 Ind. Cas. 257; 43 M. 57; 0 L. W. 190; 37 M. L. J. 216; (1919) M. W. N. 568 and *Raghunath Das* v. *Sundar Das Khetri*, 24 Ind. Cas. 304; (1914) M. W. N. 747; 42 C. 72; 41 I. A. 251; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154 (P. C.), distinguished.

In a suit by a first mortgagee impleading the puisne mortgagee as party defendant the latter filed a statement stating that he had no objection to the passing of a decree and praying that the balance remaining, after selling the property and paying the plaintiff, might be applied towards his mortgage. The plaintiff and other defendants filed a compromise petition in terms whereof a decree was passed. The puisne mortgagee, who was, however, not removed from the record died after decree. In due course the mortgage decree was executed and properties sold without the representatives of the deceased puisne mortgagee being brought on record. In the present suit by the heirs of the puisne mortgagee to enforce their mortgage:

Held, (1) that the puisne mortgagee was a judgment-debtor in the prior suit; [p. 669, col. 1.]

(2) that the mortgage security was not extinguished as the sale in execution of the decree in the prior suit was a nullity. [p. 669, col. 1.]

Appeal against a decree of the Court of the Temporary Subordinate Judge, Salem, in Original Suit No. 9 of 1919.

FACTS appear from the judgment.

Messrs. *T. Rungachariar* and *N. C. Vijiaraghava Chariar*, for the Appellants.—The plaintiff's mortgage security had been extinguished by the decree in Original Suit No. 11 of 1898 and the execution proceedings therein which culminated in the sale. Aiyasawmi, the puisne mortgagee in that suit, was only a *pro forma* defendant and is not a judgment debtor. It was not necessary to bring his legal representatives on the record.

The sale is not a nullity. The failure to bring on record legal representatives is only an irregularity which makes the sale voidable.

Besides the sale has not been set aside within the limitation period. See *Malhorjun* v. *Narhari* (1), *Sheo Prasad* v. *Hira Lal* (2), *Abdur Rahman* v. *Shankar Dat* (3), *Aba* v. *Dhondu Bai* (4) and *Krishnayya* v. *Unnissa Begam* (5).

Messrs. *T. Narasimha Iyengar* and *A. Ganesha Aiyar*, for the Respondents.—Aiyasawmi, the puisne mortgagee, was not virtually a party to the decree in the prior suit.

The sale in the prior suit was an absolute nullity as it was held without bringing on record the legal representatives of Aiyasawmi. It is not an irregularity. *Groves* v. *Administrator-General of Bengal* (6) and *Samandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan* (7).

JUDGMENT.

OLDFIELD, J.—I agree with the judgment about to be delivered and have nothing to add to it.

RAMESAM, J.—The suit out of which this appeal arises was brought on the foot of a mortgage-deed dated 3rd November 1896 for the recovery of the mortgage amount, by an assignee from the heir of the mortgagee, Ayyasami Pillai. The main defence is that the mortgage was extinguished by reason of the decree in Original Suit No. 41 of 1898 and the proceedings in its execution. That suit was based on a prior mortgage dated 17th March 1896 and Ayyaswami was the 8th defendant therein. In his written statement (Exhibit V C) he stated that he had no objection to the passing of a decree and prayed that the balance, after selling the property and paying off the amount due to the plaintiff, might be paid towards his mortgage. The other defendants in that case originally contested the suit but afterwards filed a compromise petition (Exhibit C) by which the amount to be decreed was determined and a compromise decree (Exhibit D) was passed. The learned Vakil for the respondent argued that Ayyasami was not a party to that decree. I cannot agree to this contention. His name appears in the cause title of the decree and the Court was not even asked to strike his name out of the record. The suit cannot be regarded as still pending so far as he is concerned nor can it be said that it was dismissed as against him. It follows, therefore, that the decree directing the sale of the properties without reserving his right (*i. e.*,) free of his mortgage [*Vide Sri Gopal* v. *Pirthi Singh* (8)] is a decree affecting him and is binding on him. If duly executed it ought to extinguish his mortgage.

The property was sold on the 9th July 1904 (Exhibit VII) sometime before the sale, *i. e.*, on 6th April 1904, Ayyasami died and his legal representatives were not brought on record. In these circumstances, the Subordinate Judge held that the sale could not affect his interest. It is contended for the appellant that Ayyasami was a *pro forma* defendant and cannot be regarded as a judgment-debtor and it was not necessary that his legal representatives should be brought on the record. This contention is inconsistent with the main plea that he was a party to the decree and his mortgage was, therefore, extinguished. A second mortgagee when impleaded in a first mortgagee's suit is not a *pro forma* defendant. He can redeem the earlier mortgage by paying up the decree amount at any time before the sale. He can apply to set aside the sale under O. XXI, r. 89 or 90. He can apply that the balance of the sale proceeds after discharging the prior mortgagee's dues may be paid to him. Though it is true that, what was mortgaged to the plaintiff in that suit was the mortgagor's property as it stood on 17th March 1896 and, therefore, the plaintiff could not get the property sold free of subsequent encumbrances; the plaintiff could do this only by a properly constituted suit and proceedings in execution, *i. e.*, by impleading the puisne mortgagee or his representatives, and the interest of the mortgagor which the prior mortgagee would then be entitled to sell may be said to comprise, at the time of the sale, the interest of the subsequent

(1) 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 27 I A. 216; 7 Sar. P. C. J. 739; 2 Bom L R 927 P. C.).
(2) 12 A. 440 (F. B.); A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026.
(3) 17 A. 162; A. W. N. (1895) 35; 8 Ind. Dec. (N. S. 429.
(4) 19 B. 276; 10 Ind. Dec. (N. S.) 187.
(5) 15 M. 399; 5 Ind. Dec. (N. S.) 630.
(6) 22 M 119; 8 M. L. J. 289; 8 Ind. Dec. (N. S.) 84.
(7) 23 Ind. Cas. 251; 26 M. L. J. 267.
(8) 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 116; 8 Sar. P. C. J. 293 (P. C.).

mortgagees and the mortgagor's equity of redemption. I am, therefore, of opinion that Ayyasami was a judgment debtor in Original Suit No. 11 of 1898.

It is next contended that the sale is not a nullity. It is said (1) that the proceedings in the execution of a mortgage-decree after the order for sale is passed (and the proceedings in the execution of a money-decree after the order for attachment is made) are administrative, and (2) that the irregularity in not bringing the legal representatives of the judgment-debtor on the record will only make the sale voidable and as it has not been set aside within thirty days of the sale (Art. 166, Limitation Act) or within one year (Art. 12) the sale stands, not being a nullity. It may be that some proceedings in execution after an order for sale is made do not amount to "determination of any question within section 47 of the Code of Civil Procedure, 1908" so as to amount to a decree, for the purpose of being appealed against [see *Sivagami Achi* v. *Subrahmania Ayyar* (9)] and may be said to be "administrative" as opposed to "adjudicating" in the sense that they do not adjudicate a right but carry out some prior order but they are nonetheless judicial proceedings in the sense that they are proceedings of a Court of justice and not of an executive authority and if not legally carried out, may be materially defective. This leads me to the next question as to the nature and effect of the defect in the proceedings.

Section 50 of the Civil Procedure Code (corresponding to section 234 of the old Code) lays down that "where a judgment-debtor dies before the decree has been fully satisfied the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased." It is obvious that the word 'may' in this section is equivalent to 'shall,' for except in the sense that the decree holder may, if he choses, drop the execution altogether there is no option left to him and it is imperative on him to follow the prosedure enjoined by the section, if he desires farther execution. As it is opposed to all notions of justice to allow legal proceedings to be taken against an estate without there being some person in the record to represent the estate, one would suppose that such proceedings in execution taken without having the legal representatives of a deceased judgment-debtor on the record are void and do not amount to a mere irregularity. It is difficult to see how, for this purpose, any distinction can be drawn between the case of a judgment-debtor's death before the order for sale is passed and the case of a death after the order. The estate has to be represented on the record by some one interested in watching the proceedings until the sale is confirmed. I will now examine the cases on the point.

The case of *Malkarjun* v. *Narhari* (1) was very much relied on for the appellants but, in my opinion, does not help them. In that case the procedure laid down by the Code was followed. "An application was made to bring the legal representatives of the deceased judgment-debtor on the record. The Court received the application and did issue notice to the party named as the heir. He contended that he was not the right person, but the Court, having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true: but a Court has jurisdiction to decide wrong as well as right" (Lord Hobhouse at page 347). These observations do not apply to the case now before us. The prosedure laid down by the Code was not followed in this case. This is not, therefore, the case of an erroneous decision, ruling or exercise of discretion of the Judge in a matter in which the Court had jurisdiction. I think that the interests of Aiyasami was not represented in law or in fact in the proceedings in execution after 6th April 1904 and the sale of the property, so far as his interest was sought to be affected by it, was, therefore, without jurisdiction and null and void [*vide Khiaramal* v. *Daim* (10) which is a case of the decree being itself void]. But there is no substance in the distinction that, when the decree was duly obtained against the deceased judgment-debtor, the sale in execution after a decree without the heir of the judgment debtor properly on the record is not a nullity. This is clear from the case of *Rashid-un-nissa* v. *Muhammad Ismail*

(9) 27 M. 259; 14 M. L. J. 57.

(10) 32 C. 296 at p. 315; 2 A. L, J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

Khan (11) *vide* also *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (12) where it was held that execution proseedings obtained against a minor legal representative of a deceased judgment-debtor without his being represented by a proper guardian *ad litem* are void. *A fortiori*, a sale in execution carried out against a dead person (or no person) is void and should be regarded a nullity and has not got to be set aside. It seems to me that the decisions of Indian High Courts prior to *Rashid-un-nissa* v. *Muhammad Ismail Khan* (11) *i.e*, (*a*) those in favour of the appellant such as *Sheo Prasad* v. *Hira Lal* (2) and *Abdur Rahman* v. *Shankar Dat* (3) which merely follows it, (*b*) *Aba* v. *Dhondu Bai* (4) which, while seeming to disapprove of *Sheo Prasad* v. *Hira Lal* (2) are based finally on grounds not quite clear and (*b*) decisions like *Ramasami Ayyangar* v. *Bogirathi Ammal* (13) and *Krishnayya* v. *Unnisa Begam* (5), (where Shephard, J, said that it was not a case of mere irregularity but the learned Judges in Letters Patent Appeal described the defect, as a material irregularity causing substantial injury), which are rightly commented on by Mr. Rangachari, the learned Vakil for the appellants, as inconclusive, are not of much value. But the other Madras decisions cited before us *viz.*, *Groves* v. *Administrator-General of Bengal* (6) and *Samandan Karkat Edathil Rayarappan Nambiar* v. *Malikandi Aketh Mayan* (7) are decidedly against the appellants. The language of the learned Judges in these cases is clear and unambiguous. I agree with the remarks of Boddam, J. in *Groves* v. *Administrator-General of Bengal* (6) where he disagrees with *Sheo Prasad* v. *Hira Lal* (2). It is said that Art. 12 of the Limitation Act was not considered in those cases as the matter arose in execution and not in a separate suit. On the view taken by their Lordships in those cases, *viz.*, that the sale was a nullity, no such question could arise. I may add that, if the sale in pursuance of an order for sale against the judgment-debtor (when living) is not a nullity but only voidable, as contended by the appellants any attempt to set aside the sale must be made in execution and not by a regular suit and no occasion for the application of Art. 12 can arise. The cases in *Narayana Kothan* v. *Kalianasundaram Pillai* (14) [which Boddam, J., described in *Groves* v. *Administrator-General of Bengal* (6) as supporting his view], *Muhammad Rafi* v. *Muhammad Askari* (15), *Sechagiri Row* v. *Tangaluri Jagannadham* (16), [*Sri Krishnasawmy Iyengar* v. *Soorikutti Ganapathy Iyer* (17)] and *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh* (18) are not cases of the judgmen-debtor's death and need not be considered. As to the cases decided in Calcutta, in *Net Lall Sahoo* v. *Sheikh Kareem Bux* (19) the heirs were parties to the proceedings in execution. In *Bepin Behari Bera* v. *Shashi Bhushan Datta* (20) the sale was a sale under the Public Demands Recovery Act of the Bengal Code and may perhaps be distinguished on that ground. But it must be admitted that the manner in which the Madras cases were referred to at page 763 supports the appellants. So far as the reference to *Groves* v. *Administrator-General of Bengal* (6) is concerned, I would observe with great deference to the eminent Judges that decided *Bepin Behari Bera* v. *Shashi Bhushan Datta* (20) that, though Boddam, J. concludes saying that the sale should be set aside, there is no doubt as to what the learned Judge meant (*vide* pages 123—125) *viz.*, that the sale should be declared void. In *Jagadish Bhattacharjee* v. *Rama Sundari Dasya* (21) (case of a money-decree) Richardson, J merely follows *Sheo Prasad* v. *Hira Lal* (2), *Aba* v. *Dhondu Bai* (4), *Net Lall Sahoo* v. *Sheikh Kareem Bux* (19) and Shamsul Huda, J. was content to follow *Bepin Behari Bera* v. *Shashi Bhushan Datta* (20). The decision in *Rukmin* v. *Jodha Singh* (22) might be also

(11) 3 Ind. Cas. 864; 31 A. 472; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279, 19 M. L. J. 631; 36 I. A. 168 (P C.).

(12) 29 Ind. Cas. 314; 38 M. 1076 at p. 1080; 28 M. L. J 525.

(13) 6 M. 180; 2 Ind. Dec. (N. s.) 404.

(14) 19 M. 219; 6 Ind. Dec. (N. s.) 858.

(15) 37 Ind. Cas. 433; 1 P. L. J. 261; 3 P. L. W. 390.

(16) 32 Ind. Cas. 391; 39 M. 1031; 19 M. L. T. 93.

(17) 63 Ind. Cas. 903; (1921) M. W. N. 394; 14 L W. 638.

(18) 56 Ind. Cas. 274; 39 M. L. J. 109; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 2 U. P. L. R (P. C) 103; 24 C. W. N. 954; 47 I. A. 91; 28 M. L. T. 330; 47 C. 924 P. C.).

(19) 23 C. 686; 12 Ind. Dec. (N. s) 456.

(20) 22 Ind. Cas. 95; 18 C. W. N. 766; 18 C. L. J. 628.

(21) 51 Ind. Cas. 972; 23 C. W. N. 603; 20 C. L. J. 411.

(22) 19 Ind. Cas. 120.

described as inconclusive but for the manner in which *Malkarjun* v. *Narhari* (1) was distinguished by the learned Judges. In my opinion, the cases in *Malkarjun* v. *Narhari* (1) might have been distinguished on the ground that it was not, whereas the case before their Lordships is, a case of nullity.

The distinction made between an application for attachment and an application for sale in *Vuppa Sitaramayya* v. *Minchula Gopalakrishnamma* (23) in the course of applying the decision in *Raghunath Das* v. *Sundar Das Khetri* (24) (a decision on O. XXI, r. 22) cannot help the appellants. The application there was made against the judgment-debtor himself and no question arose as to the effect of section 50, Civil Procedure Code, which would certainly cover even all applications in execution after attachment. I, therefore, hold that the execution of the decree in Original Suit No. 11 of 1898 not being carried out so as to affect Aiyyasami's interest, his mortgage is not extinguished.

The only other question is whether the payment of Rs. 240 on 15th February 1904 is true. The evidence is all one way and I accept the finding of the Court below. The suit is, therefore, not barred.

In the result, the appeal fails and is dismissed with costs.

There is a memorandum of objections by the plaintiff. He objects to those portions of the judgment and decree which direct that the plaintiff should execute an indemnity bond for Rs. 3,775 to be answerable to the reversioners of Ayyasami on the death of the 8th defendant. The reversioners are not parties to the suit. I do not think that the directions for the benefit of the absentee reversioners is justified. I agree with the plaintiff's contention and allow his cross-objections with costs and direct that clause (3) of the decree should be deleted.

Time for redemption is extended to 28th February 1922.

M. C. P.

Appeal dismissed.

(23) 53 Ind. Cas. 257; 43 M. 57; 10 L. W. 190; 37 M. L. J. 216; (1919) M. W. N. 568.

(24) 24 Ind. Cas. 304; (1914) M. W. N. 747; 42 C. 72; 41 I. A. 251; 18 C. W. N. 1053; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. J. 353; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154 (P. C.).

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 183 OF 1920.

February 13, 1922.

Present:—Mr. Justice Pratt and Mr. Justice Duckworth.

MAUNG TUN YIN—PLAINTIFF—APPELLANT

versus

MA SEIN YIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata, *rule of, application of—Proceedings for grant of Letters of Administration—Finding as to title to property—Finding, whether* res judicata *in, subsequent suit to establish title—Probate and Administration Act (V of 1881), s. 83, meaning of.*

In applying the rule of *res judicata* Courts should be influenced by no technical considerations, but by matters of substance within the limits applied by law. [p. 672, col. 2.]

Sheoparsan Singh v. *Ramnandan Prashad Singh*, 33 Ind. Cas. 914; 43 C. 694; 14 A. L. J. 466; 20 C. W. N. 738; 18 Bom. L. R. 397; 23 C. L J. 621; (1916) 1 M. W. N. 419; 20 M. L. T. 1; 3 L. W. 514; 31 M. L. J. 77; 43 I. A. 91 (P. C.), referred to.

In a proceeding for grant of Letters of Administration, the question before the Court is one of representation to the estate and not of distribution, and it is only for the purpose of determining the question of representation that the Court is called upon to decide whether the applicant is entitled to the whole or any part of the estate of the deceased within the meaning of section 24 of the Probate and Administration Act, and such finding is not *res judicata* in a suit in which the question of title to the properties has to be determined. [p. 672, col 1.]

Ma Tok v *Ma Thi*, 4 Ind. Cas 719; 5 L. B R. 78 and *Maqbul Shah Ahmad* v. *Muhammad Azmat*, 43 Ind. Cas. 723 49 P. R. 1918; 34 P. W. R. 1918; 46 P. L. R. 1918, followed.

Section 83 of the Probate and Administration Act is merely a rule of procedure and does not lay down that proceedings under the Act shall become or be deemed to be a suit [p. 673, col 1.]

Kalyanchand Lalchand v. *Sitabai Dhanasa*, 23 Ind. Cas. 325; 38 B. 309; 16 Bom L. R. 5, not followed.

First appeal against the judgment passed by the District Judge, Amherst.

Mr. *Lentaigne* (with him Mr. *J. A. Maung Gyi*), for the Appellant.

Mr. *May Oung* (with him Mr. *Eusoof*), for Respondent No. 1.

JUDGMENT.

PRATT, J.—Plaintiff, Maung Tun Yin, sued for the administration of the estate of his deceased step mother, Ma Nyein Me, claiming that he and the second and third defendants were the sole heirs of the deceased. The District Court found that the suit was *res judicata* by reason of the proceedings in Suit No. 19 of 1919 of the same Court, wherein Letters of Administration to

the estate of Ma Nyein Me were granted to Ma Sein Yin. In the proceedings under section 83 of the Probate and Administration Act the Court found, after recording evidence, that the present plaintiff-appellant had no right of inheritance to Ma Nyein Me's estate.

The only point for decision is, therefore, whether the plaintiff's right to inherit must be considered to be *res judicata* in view of the decision in Suit No. 19 of 1919.

In *Ma Tok* v. *Ma Thi* (1) a Bench of this Court pointed out that findings of fact arrived at in cases of application for Letters of Administration would not operate as *res judicata* in suits for administration or possession of property.

The learned District Judge apparently was of opinion that this finding was merely an *obiter dictum*, but a perusal of the judgment of this case makes it clear that the Bench declined to go into a question of adoption in an appeal from an order granting Letters of Administration, on the ground that such a question could subsequently be fought over again in a regular suit.

The finding on the question of *res judicata* was, therefore, necessary for the decision of the appeal and cannot be brushed aside as an *obiter dictum*. It was arrived at after a consideration of the rulings on the subject and it was pointed out that no decisions to the contrary were cited.

In *Maqbul Shah Ahmad* v. *Muhammad Azmat* (2), decided, in 1918, a Bench of Punjab Chief Court taking the same view held that in a proceeding for grant of Letters of Administration the question before the Court is one of representation to the estate and not of distribution, and it was only for the purpose of determining the question of representation that the Court was called upon to decide whether the applicant would be entitled to the whole or any part of the estate of the deceased within the meaning of section 23 of the Probate and Administration Act, and that such a finding was not *res judicata* in a suit in which the question of title to the properties had to be determined. With this decision I am in entire agreement.

Sheorarsan Singh v. *Ramnandan Prashad Singh* (3) is quoted as an authority for the opposite view, but does not appear to be so in reality. In that case their Lordships of the Privy Council laid down that the application of the rule of *res judicata* by the Courts in India should be influenced by no technical considerations, but by matter of substance within the limits applied by law. This is sound common sense. The application of this principle would not seem to justify a finding that the question decided in the Letters of Administration proceeding in the present case was *res judicata* in the subsequent administration suit.

In the Calcutta case above cited the District Court granted Probate of a Will and the decision was affirmed by the High Court on appeal.

The appellants, therefore, sued for a declaration that they were next reversioners to the estate according to the Hindu Law in the case of an intestacy, and as such entitled to obtain revocation of Probate.

The Judicial Committee *without deciding the question of res judicata* held that the suit was not maintainable.

The Bombay case of *Kalyanchand Lalchand* v. *Sitabai Dhanasa* (4), which is in favour of the District Court's view, was also a Probate matter. A Will had been held not proved and Probate refused. In a suit brought by the widow of the deceased for recovery of the property from the executors under the Will a Full Bench held that the judgment in the Probate proceeding operated as *res judicata* between the parties under section 83 of the Probate and Administration Act and section 11 of the Civil Procedure Code.

The ground for the finding was that as contentious Probate proceedings must take the form of a suit, they constitute a suit within the meaning of section 11 of the Civil Procedure Code.

This is to my mind a dangerous doctrine. Section 83 of the Probate and Administration Act says that in any case where there is contention the proceeding shall take as nearly as possible the form of a suit

(1) 3 Ind. Cas. 719; 5 L. B. R. 78.
(2) 43 Ind. Cas 723; 49 P. R. 1918, 34 P. W. R. 1918; 46 P. L. R. 1918.
(3) 33 Ind. Cas. 914; 43 C. 694; 14 A. L. J. 466; 20 C. W. N. 738; 18 Bom. L. R. 397, 23 C. L. J. 621; (1916) 1 M. W. N. 419. 20 M. L. T. 1; 3 L. W. 544; 31 M. L. J. 77; 43 I. A. 91 (P. C.).
(4) 23 Ind. Cas. 325; 38 B. 309; 16 Bom. L. R. 5,

according to the provisions of the Code of Civil Procedure in which the petitioner shall be the plaintiff, and the person, who may have appeared to oppose the grant, shall be the defendant.

The section says the proceedings shall take the form of a suit, which seems to be merely a rule of procedure; it does not say the proceedings shall become or be deemed to be a suit.

In the District Court there were no less than four claimants or sets of claimants to letters in the present instance.

It is an arguable thesis that, on the strict letter of the law, the miscellaneous proceedings under the Probate and Administration Act should have been converted into four suits.

In a case of this description regard must be had to the formality of the proceedings in the matter of the applications for Letters.

Although the matters at issue were apparently well understood, no issues were actually framed and no formal issues were drawn up.

It is admitted that plaintiff Tun Yin was a step-son of the deceased. The District Court found that he had forfeited his right to inherit by his unfilial conduct, although there was no allegation to this effect in the pleadings.

The parties confined themselves almost entirely to proving their right to obtain Letters as heirs and made practically no effort to rebut their opponents' case. Under the circumstances, it would be unjust to declare that the parties are debarred from proving their right to inherit in a regular suit.

I would set aside the finding of the District Court on the preliminary issue and the decree dismissing the suit and remand the suit for disposal on its merits.

Costs of this appeal to be borne by the estate.

DUCKWORTH, J.—I concur.

W. C. A.

Suit remanded.

MADRAS HIGH COURT.

CIVIL APPEAL No. 184 OF 1920.

September 8, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

P. S. NARAYANA AIYAR—DEFENDANT—APPELLANT

versus

BIYARI BIVI *alias* KATHUN BIVI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64—Decree passed on award pending attachment, whether void—Muhammadan Law—Lien for unpaid dower on husband's property in possession of wife—Lien, nature and extent of.

A decree embodying an arbitration award and passed pending an attachment is not a private transfer which can be treated as void under section 64, Civil Procedure Code. [p. 674, col. 2.]

Qurban Ali v *Ashraf Ali*, 4 A. 219; A. W. N. (1882) 17; 2 Ind. Dec. (N S.) 840 and *Kasi Visvanatha Chettiar* v. *Ramaswami Athitha Nadar*, 48 Ind. Cas. 123; 35 M. L. J. 441; 8 L. W. 582; 24 M. L. T. 477, referred to.

The lien of a divorced Muhammadan wife or widow for unpaid dower attaches her to her husband's property in her possession. No lien exists during the continuance of the marriage relation. [p. 675, col. 1.]

Abi Dhunimsa Bibi v. *Muhammad Fathi Uddin*, 44 Ind Cas 293; 41 M 1026; 23 M. L. T. 78; (1918) M. W. N. 446; 35 M. L. J. 468, referred to.

Appeal against a decree of the Court of the Temporary Subordinate Judge, Madura, in Original Suit No. 14 of 1918, (Original Suit No 111 of 1917 on the file of the Court of the Subordinate Judge, Madura.)

The Advocate General instructed by Messrs. *Brightwell* and *Morseby*, for the Appellants.

Mr. *K. Rajah Aiyar* (with him Messrs. *K. S. Vaikuntam Aiyar* and *M. Krishna Bharati*), for the Respondent.

JUDGMENT.—The decision appealed against gives plaintiff a charge for two *lakhs* of rupees on the properties purchased by third defendant, appellant at a sale held in execution of first defendant's money-decree against 2nd defendant, after the dismissal of plaintiff's claim.

The nature and extent of plaintiff's right over the properties depends on the effect of a series of transactions originating in the liability of 2nd defendant, her husband, for *mahar* settled at £ 22,500 when their marriage took place in 1884. This liability is referred to in Exhibits E and F and is not disputed before us, although those documents are not registered and may not affect the

security for its satisfaction, to which they refer. This attempt to provide security was due to second defendant becoming indebted; and in 1909 he further gave Exhibit A undertaking (1) to re-pay to plaintiff a loan taken for the discharge of his debts, within five years from the income of the properties, which had fallen to him as his share under the partition, Exhibit G, and (2) to sell her at the end of five years those properties for two *lakhs* of the *mahar* debt or to give her possession thereof apparently as security for that sum. This document also was unregistered and, therefore, was valid only as an agreement to sell. On this the loan was, as Exhibit H series and K show, advanced; but nothing was done in pursuance of the provision for sale or delivery and on the 11th December 1914 the properties were attached by 1st defendant. Second defendant, however, in defiance of his obligations under Exhibit A and the attachment gave a lease for three years, Exhibit B, for an advanced rent of Rs. 7,500 to P. W. No. 1 and another; and this was followed within two months by a reference on the part of plaintiff and 2nd defendant to arbitrators of the differences, which, according to the *muchilika* Exhibit J, had arisen between them, the arbitration ending in an award Exhibit J-1 which was made a decree of Court, Exhibit. J-3. It is with the effect of Exhibit J 3 that we are concerned, its terms being that (1) 2nd defendant should within one month execute a sale-deed conveying to plaintiff the properties referred to in Exhibit A or that in case of his default the Court should execute one on his behalf, (2) he should borrow Rs. 7,500 from plaintiff, re-pay the lessee under Exhibit B the amount received from him and then put plaintiff, in possession of the properties which, until he did so, should be charged with two *lakhs* of rupees for her benefit and (3) he should re-pay the plaintiff within two years another amount already borrowd on a pronote.

In pursuance of this, the lease, Exhibit B, was terminated and plaintiff alleges that she was put in possession of the properties, her claim was made and dismissed, and third defendant purchased, at the sale, which followed. In her suit plaintiff asked generally for a decree vacating the order on her claim and declaring that the properties were not liable to be sold. But the lower Court refused the latter relief on the ground that she had not perfected her right by obtaining a sale-deed and it is not suggested on her behalf that this refusal was wrong. The question is only whether the lower Court was entitled to grant her a charge for two *lakhs* on the property.

The charge it allowed was not created by Exhibit A which was unregistered, and, therefore, it must be supported, if at all, as created by Exhibit J-3. That decree was, however, passed after the attachment of the property; and it is argued with reference to section 64, Civil Procedure Code, that, as the award, which it embodied, resulted from the consent of plaintiff and 2nd defendant to a reference to arbitration it must be regarded as a private transfer of the property attached or, consistently with plaintiff's case of an interest in it and as void against third defendant's claim, which is enforceable under the attachment. It is not necessary to consider whether a decree embodying an award can be so regarded, in case it is proved that the reference to arbitration was collusive and the whole proceedings a device to invest a private arrangement between the parties with the appearance of a public adjudication. For, the learned practitioners who appear for third defendant, have expressly disclaimed any intention to attack the lower Court's finding that the contrary was the case. And then in accordance with *Qurban Ali* v. *Ashraf Ali* (1) and *Kasi Visvanatha Chettiar* v. *Ramaswami Athitha Nadar* (2), the former being a decision of a Full Bench, and proceeding on general principle, not on any of the particular facts before the Court, we must hold that a decree such as Exhibit J-3 which embodied an award is not a private transfer, which can be treated as void under section 64.

Plaintiff has, however, still to establish that the charge she is claiming is created by Exhibit J-3. The lower Court held that she did so on the ground that, as her claim to two lakhs, as part of her *Mahar* was in fact accompanied by possession of the

(1) 4 A. 219; A. W. N. (1882) 17; 2 Ind. Dec. (N. S.) 840.

(2) 48 Ind. Cas. 123; 35 M. L. J. 441; 8 L. W. 582; 24 M. L. T. 477.

suit properties, she had under Muhammaden Law a lien on them and a right to retain possession until that *mahar* debt was discharged. It referred in support of this to Mulla's Principles of Muhammadan Law, 4th Edition, Rr. 206, 207 and before us, the dictum of Seshagiri Aiyar, J., in *Abi Dhunimsa Bibi* v. *Muhammad Fathi Uddin* (3) that "Muhammadan wife has a lien over the property of her husband in her possession for unpaid dower," has been relied on. But this contention rests on a misapprehension, due perhaps to indiscriminate use by the learned author and the learned Judge just referred to, of the term "wife" to denote both a divorced wife and a widow, since the law recognises such a lien as that now claimed in both of these cases. We have not, however, been shown that the right of the wife to a lien before the marriage is dissolved, is recognized by any authority; and in fact the context of the learned Judge's dictum with its reference to "the estate of the deceased husband" and two cases, in which only a widow's possession of such an estate was in question, shows that he had no such extension of this well-defined doctrine, as plaintiff requires, in mind. This failing, it is necessary to consider her claim, as it is put forward before us, with direct reference to the terms of Exhibit J.3.

One term relied on provides that "defendant (here 2nd defendant) shall after paying the lessees and redeeming the lease, put the plaintiff in possession of the properties covered by it and till then the properties shall be under a mortgage charge for Rs. 2,00,000." This is the only provision for charge and in fact the decree directs elsewhere as regards the *mahar* generally that plaintiff is entitled to it during 2nd defendant's lifetime only when he pays it of his own accord, and it is, therefore, on this term if it all, that plaintiff can succeed. Reading as it stands, it provides for a charge to continue only until plaintiff is given possession, as she was shortly after Exhibit J.3 was passed; and, if so, it had ceased to be operative before the present suit began and no claim to relief therein can be founded on it. Plaintiff, however, contends that the words "till then" cover, not only the contingency specified in their immediate context, but also the performance of the other obligation imposed on 2nd defendant in the preceding portion of the decree, the execution within a month of a sale-deed and further that this interpretation is in accordance with the award in the terms of which the decree is drawn up. The answer is, firstly, that the words "till then," can most naturally be read in connection with the contingency, the transfer of possession referred to in the distinct clause in which they stand, and that after that transfer, when plaintiff would be in enjoyment of the property, the right to a charge would be useless, since it would not assist her to obtain performance of 2nd defendant's remaining obligation, the giving of a sale-deed, her remedy by execution being available. And, secondly, although it is true, that for some purpose, which is obscure, Exhibit J.2, the award, provides in clause 9 (b) in accordance with plaintiff's contention for a charge "for a period extending from this day to the date of the completion of the said sale" we are not at liberty to import those words into a decree which is easily intelligible in itself and without them, which was passed at plaintiff's own instance against which she did not appeal and which had become final in its present form before 3rd defendant made his purchase.

The grounds, on which plaintiff claims a charge, being, unsustainable, the appeal must be allowed and her suit must be dismissed with costs in both Courts.

M. C. P.

Appeal allowed.

(3) 44 Ind. Cas. 293; 41 M. 1026; 23 M. L. T. 78; (1918) M. W. N, 246; 35 M. L. J. 468.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1665 OF 1921.

January 25, 1922.

Present:—Mr. Justice Martineau.

GANGA RAM—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL COMMITTEE, AMRITSAR, THROUGH HARI KISHEN—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 3 (13), 172, 193—"Street," what is—Lane looked after by mahaldars but accessible to public, whether street—Committee, refusal of, to allow projection over such land—Jurisdiction of Civil Court to interfere.

SADHU SARAN v. AMBIKA LAL.

A lane which is accessible to the public, whether permanently or temporarily, is a 'street' within the meaning of the definition contained in section 3 (13) of the Punjab Municipal Act.

The fact that the arrangements for lighting and clearing the lane are made by the *mahalladars* at their expenses, and that the lane is cemented by them, is not material; ner the fact that the *mahalladars* have a right to close the lane to the public, if, as a matter of fact, the public have never been prevented by any physical obstruction from entering it.

A Municipal Committee has full power to withhold permission for the building of a structure that will project over a street, and a Civil Court has no jurisdiction to interfere in such a matter.

Section 193 of the Punjab Municipal Act refers only to buildings to be erected on private property and has no application to a structure that projects over a street.

Municipal Committee of Delhi v. *Devi Sahai*, 62 P R. 1907; 105 P. L. R. 1908; 147 P. W. R. 1907; relied upon.

Second appeal from a decree of the District Judge, Amritsar, dated the 18th June 1921, reversing that of the Munsif, First Class, Amritsar, dated the 23rd December 1920.

Lala *Ram Chand Manchanda*, for the Appellant.

Lala *Sham Das* for the Respondent.

JUDGMENT.—The plaintiff applied to the Municipal Committee of Amritsar for permission to build a balcony in front of his house. The Committee required him to pay Rs. 20 which he refused to do, and finally it rejected his application. He then sued for an injunction to restrain the Committee from preventing him from building the balcony, He was given a decree in the First Court, but the District Judge on appeal has dismissed the suit. The plaintiff has filed a second appeal.

It is contended for the appellant that as his application for permission to build the balcony was refused more than two months after he had made it the building of the balcony should, under the proviso to section 193 of the Punjab Municipal Act, be deemed to have been sanctioned absolutely. This contention, however, is not correct if, as the defendant Committee maintains, the lane in which the plaintiff's house opens is a "street" as defined in section 3 (13) of the Act, as section 193 refers only to buildings to be erected on private property. See [*Municipal Committee of Delhi* v. *Devi Sahai* (1).]

(1) 62 P. R. 1907; 105 P. L. R. 1908; 147 P. W. R. 1907.

The fact that the arrangements for lighting and clearing the lane are made by the *mohalladars* at their expenses, and that the lane is cemented by them, is not material. A lane which is accessible to the public whether permanently or temporarily is a "street". The lane in which the plaintiff's house is situate is closed by a wall at one end, and at the other end, where it opens on to the main street, there is a door, but it is not alleged that that door is ever closed. Whether or not the *mohalladars* have a right to close the door and exclude the public need not be determined. Even if they have that right the lane would be a "street" as the public have not, as a matter of fact, been prevented by any physical obstruction from entering it although it would not be a "public street". I agree, therefore, with the lower Appellate Court that the lane in question is a "street" as defined in the Municipal Act. This being so, it is clear from section 172 that the plaintiff is not entitled to build the balcony without the permission of the Committee. The Committee has full power to withhold permission for the building of a structure that will project over a street, and a Civil Court has no jurisdiction to interfere in such a matter.

I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 963 OF 1920.

July 17, 1922.

Present:—Mr. Justice Adami.

SADHU SARAN—DEFENDANT—APPELLANT

versus

AMBIKA LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant—Tenancy, denial of, by landlord—Road Cess Return, admissibility of, in evidence—Batwara khasra, *admissibility of*—Batwara khasra *if "record"—Evidence Act (I of 1872), ss. 13, 35, applicability of.*

A Road Cess Return signed by a landlord is admissible as against him to prove the relationship of landlord and tenant. [p. 678, col. 1.]

SADHU SARAN v. AMBIKA LAL.

A *batwara khasra* is not a "record" within the meaning of section 35 of the Evidence Act and an entry made therein of the name of a tenant in possession is not admissible to prove the fact of his tenancy. [p 678, col. .]

Perma Roy v. *Kishen Roy*, 25 C. 90; 13 Ind. Dec. (N. S.) 61, *Nanda Lal Pathak* v. *Mohunt Chanurpat Das*, 18 Ind. Cas. 143; 17 C. W. N. 779; 17 C. L. J. 462, referred to.

There is nothing, however, to prevent a tenant rom putting the *batwara khasra* in evidence under section 13 of the Evidence Act to show the past history of the land before the creation of the tenancy in his favour if that can in any way lend support to his contention [p. 678, col. 1.]

Appeal from a decision of the District Judge of Shahabad.

Mr. *L. N. Singh*, for the Appellant.

Mr. *ParmeshwarDayal*, for the Respondents.

JUDGMENT.—In this suit the plaintiffs sought to redeem a usufructuary mortgage, executed some 22 or 23 years before the suit, in favour of his landlords-defendants Nos. 1 to 5.

According to the plaintiffs, one Bilati Ahir had an occupancy holding of 5 *bighas* 6 *kathas* 17 *dhurs*, his son, Sansar Ahir, and two others sold 3 *bighas* 1 *katha* 3 *dhurs* of this land to the mother of the plaintiff No. 1 who in 1898 or 1897 mortgaged it to his landlord stipulating that they should remain in possession appropriating the profits till re-payment of the debt. The defendants Nos. 1 to 5, however, at the time of the Survey managed to get defendants Nos. 6 and 7, Thag Koeri and Ratan Koeri, recorded as the occupancy *raiyats* of the land which was measured in the survey as two plots Nos. 1069 and 1070, comprising 2 *bighas*, 18 *kathas* 5 *dhurs*. In 1324 *F. S.* the plaintiff No. 1 tendered the principal amount due under the bond but the defendants Nos. 1 to 5 refused to receive it. The plaintiffs then instituted the suit giving rise to this second appeal joining as defendants Thag Koeri and Ratan Koeri and certain persons who claimed interest through purchase from them.

Defendants Nos. 1 to 5, the mortgagee, landlords, did not contest the suit, and though some of the other defendants filed written statements, it was defendant No. 15, the present appellant, who alone really resisted the claim. He denied that the plaintiff or his predecessors ever held the land under any title or ever mortgaged it. According to him the land was the *bakasht* land of defendants Nos 1 to 5 who settled it with Bhagbat Koeri who was succeeded by his cousin Thag Koeri. In execution of a decree against Thag Koeri the land was sold and purchased by Paltan Koeri who in 1915 sold it to defendant No. 15, the present appellant.

The Munsif found that there was a sale of the land now in dispute to the mother of the plaintiff, and that the land mentioned in the *kabala* Exhibit 4 was identical with plots Nos. 1069 and 1070. He relied on a *batwara khasra* Exhibit 1 and a map showing that Bilati Ahir was in 1866 acknowledged by the signature of the landlords to be a tenant of plots identifiable with those in dispute. He relied also on a Road Cess Return (Exhibit 5) of 1888 signed by the landlords showing the plaintiff as tenant, and on the landlords *amabandis* of 1872. He found that the entry in the Record of Rights was merely based on the lease given by the landlords to defendants Nos. 6 and 7 and that the presumption of its correctness was rebutted by the evidence produced by the plaintiff. He disbelieved the defence evidence as to possession, and found that the sale certificate granted to Paltan Koeri and receipts granted after the lease to Bhagbat could have no weight in the case and were not binding on the plaintiffs. He held that the plaintiff had proved the mortgage. He, therefore, granted a decree.

The learned District Judge on appeal has upheld the decree of the Munsif. He held that the *batwara* papers of 1866 proved that Bilati Ahir was then tenant of the plots now in suit, and that the plots in suit were the lands sold by the son of Bilati Ahir to the mother of the plaintiff He found the sale-deed to be genuine. He laid special stress on the Road Cess Return signed by the landlords showing a holding to the extent of the disputed plots in the plaintiff's name. He disbelieved the oral evidence of the defence witnesses, and believed in the genuineness of the mortgage bond. He described the documents put forward by the defence as fictitious ones evidently executed with a view to the Survey proceedings without any title.

On the face of the judgment the findings of fact by the learned District Judge would preclude access by the appellant in second appeal. It has been found that defendants

Nos. 1 to 5 did in fact take the lands in suit in usufructuary mortgage.

It is contended, however, that the appellant was a *bona fide* purchaser without notice and that the Record of Rights entitled him to assume that his vendor had a good title. It is urged, too, that the Courts below were not entitled to rely on the *batwara khasra* and map or to use the Road Cess Return against the appellant.

The case of *Perma Roy* v. *Kishen Roy* (1) is authority for the proposition that a *batwara khasra* is not a "record" within the meaning of section 35 of the Evidence Act, 1872, and that an entry made therein of the name of a tenant in possession is not admissible in evidence, and *Nanda Lal Fathak* v. *Mohunt Ohanurpat Das* (2) is to the same effect. However, in the present case the *batwara khasra* was used to show the past history of the plots long before the defendant's predecessors in interest obtained a settlement and to show that in 1866 the land was *raiyati* land of Bilati. The above cited cases deal only with admissibility under section 35 of the Evidence Act. There is no reason why section 13 of the Evidence Act should not apply. Relief was being claimed against the landlords who signed the *batwara* papers. A *batwara* entry made under the old Act would not be admissible against the tenant if made after the creation of the tenancy, but here the partition was in 1856 and the tenancy on which the appellant relies was not created till 1906.

The Road Cess Return being signed by the landlords would be admissible as against them, and it shows, as against them that the plaintiffs were their tenants, and lends support to the case that Thug Koeri was never a tenant in possession.

With regard to the contention that the appellant had no notice of the mortgage and was an innocent purchaser, the mortgagees have been found to have entered into a fictitious transaction with a view to the Survey proceedings, as mortgagees they had no power to take away any of the mortgagor's rights; the mortgage still subsisted and any possession by the appellant must be subject to the mortgage, the appellant is merely a representative of the mortgagee and is not entitled to the relief asked for.

The appeal is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 25 C. 20; 13 Ind. Dec. (N.'s.) 61.
(2) 18 Ind. Cas. 143; 17 C. W. N. 779; 17 C. L. J. 462.

LAHORE HIGH COURT

FIRST CIVIL APPEAL No. 1452 OF 1920.

January 21, 1922.

Present:—Mr. Justice Abdul Raoo and Mr. Justice Harrison.

RANJIT SINGH—PLAINTIFF—APPELLANT

versus

KARIM BAKHSH—DEFENDANT—RESPONDENT.

Interest—Suit on balance struck after account—Agreement or notice as to interest, absence of—Interest Act (XXXII of 1839)—Contract Act (IX of 1872), s. 73.

No interest is chargeable either under Act XXXII of 1839, or as damages under section 73 of the Contract Act on a balance struck after an account between the plaintiff and the defendant wherein no mention is made of interest and where no notice has been given that interest would be charged.

Arjan Das v. *Hakim Rai*, 20 Ind. Cas. 299; 39 P. R. 1913; 263 P. L. R. 1913; 302 P. W. R. 1912, followed.

First appeal from the decree of the Senior Subordinate Judge, Hissar, dated the 14th April 1920.

Mr. *Manohar Lal*, for the Appellant.

Mr. *Abdul Razak*, for the Respondent.

JUDGMENT.—This was a suit brought on *bahi* account on the allegation that on the 9th January 1914 Rs. 2,712 was found due by the defendant and a balance was struck, which was thumb-marked by the defendant. The suit was instituted on the 8th January 1920 for the recovery of principal, *viz.*, Rs. 2,712 and interest, *viz.*, Rs. 2,988, total Rs. 5,700 in all. The claim in respect of the principal has been decreed but that relating to interest has been dismissed on the ground that no agreement to pay interest has been alleged or proved.

The plaintiff has preferred this appeal and it has been contended on his behalf by Mr. Manohar Lal that interest ought to have been allowed as damages though there was no agreement to pay interest. The decision of

the Court below is supported by authority and we are not prepared to hold that the order refusing to decree interest is wrong. In the case of *Arjan Das* v. *Hakim Rai* (1) it was held that no interest was chargeable either under Act XXXII of 1839 or as damages under section 73 of the Contract Act on a *rugga* which made no mention of interest, and where no notice had been given that interest would be charged.

In this case also it is not alleged that any notice was given. There is no force in this appeal and we dismiss it with costs.

Z. K. *Appeal dismissed.*

(1) 20 Ind. Cas. 299; 39 P. R. 1913; 263 P. L. R. 1913; 302 P. W. R. 1912.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1526 OF 1920.

June 7, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

JAN AND SON—DEFENDANTS—APPELLANTS

versus

CAMERON A.—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), Ch. IX, s. 151—Hotel-keeper and guest—Hotel-keeper, liabilities of, by what law regulated—Theft of property of guest—Hotel-keeper, liability of.

The liabilities of a hotel-keeper in India to his guests are regulated by the Contract Act, and not by the Common Law of England in force against inn-keepers, and in the absence of any specific agreement in a given case, the rules in Ch. IX of the Contract Act are applicable. [p. 680, col. 2.]

Whateley v. *Palanji Pestonji*, 3 B. H. C. R. 137, *Waghela Rajsanji* v. *Shekh Masludin*, 14 I. A. 89 at p. 96; 11 Ind. Jur. 3 5; 5 Sar. P. C. J. 16; 11 B. 55; 6 Ind. Dec. (N. S.) 364 (P. C.), *Rampal Singh* v. *Murray & Co.*, 22 A. 164; A. W. N. (1900) 3; 9 Ind Dec. (N. S.) 1140, referred to and considered.

It is the duty of a hotel-keeper to keep his premises in such a condition of safety as would reasonably prevent theft and take such care of the property of his guests as a man of ordinary prudence would, under the circumstances, take of his own goods. Where he fails in such a duty, he is, in case of a theft of the property of a guest, liable for its value. [p. 681, col. 1.]

Second appeal from a decree of the District Judge, Cawnpore, confirming that of the Subordinate Judge.

Mr. *Kailas Nath Katju*, for the Appellants.

Mr. *Sital Prasad Ghosh*, for the Respondent.

JUDGMENT.—The facts out of which this appeal arises are these:—The plaintiff (respondent) who is a commercial traveller, went to Cawnpore, in September 1918, and put up as a guest at the Civil and Military Hotel, Cawnpore, which was owned by the defendant-appellant. While staying in the hotel, he alleged that a suit-case of his, containing valuables to something over Rs. 3,000 in value, was stolen from the room he occupied while he was at dinner in another part of the building. He claimed to recover the value of the goods stolen from the defendant on the ground that the loss was due to the neglect of the defendant in keeping the premises in an unsafe condition. The defendant (appellant), among other pleas, pleaded that if the theft was committed, it was due to the fault or connivance of the plaintiff's own servant and that the defendant was not liable, and that the defendant had kept proper care and had taken proper steps to provide for the security of travellers staying in the hotel, and that there was no negligence on his part. The Trial Court came to the conclusion that there was no Statute Law in India applicable, and held that, therefore, it must be guided by the Common Law in England. Having found that it was not proved that the plaintiff had in any way been negligent, and that under the Common Law of England it was unnecessary for the plaintiff to prove that there was any negligence on the part of the defendant and that if goods were lost in an inn, the inn-keeper was *prima facie* liable and that the *onus* lay on him to prove otherwise, it decreed the suit. On appeal, this decree and the reasons for it were maintained by the learned District Judge. On appeal to this Court objection was taken to the finding on the point of law arrived at by the Court below. That decision was based largely on the case of

Whateley v. *Palanji Pestonji* (1). That was a case referred by the Court of Small Causes in Bombay to the High Court, and from the opening words of the judgment of the High Court it would seem that the case was one concerning a hotel situated in the Island of Bombay, for the opening words are: "There is no law but the Common Law of England to regulate the relation of inn-keeper and guest in Bombay, in a case between an European and a Parsi." It is argued for the respondent that, in the absence of any Statute Law dealing with the subject in this country, the Common Law of England should be applied. It was, however, pointed out by their Lordships of the Privy Council in the case of *Waghela Rajsanji* v. *Shekh Masludin* (2), that that is so, but only if the rules of English Law are found applicable to Indian society and the circumstances. There can be no doubt that hotels are built and managed very differently in England and in India, more certainly so in the *Mofussil* parts of India at the present time. Owing to the climate and for other reasons the quarters in which the residents live in Indian hotels are much more open and unconfined than in England. Unlike an English hotel an Indian hotel is more or less a thoroughfare to which the public have free access—pedlers with their wares, unemployed servants seeking employment, and so on—including snake-charmers, jugglers and such. It is also the custom in India for guests to take private servants with them, who have access not only to their master's rooms but also have opportunities of access to the rooms occupied by other persons, and menial servants must be employed and have of necessity frequent access at least to the bath rooms. We may point out that even in England the Common Law was greatly modified in favour of the inn-keeper by the Inn-keepers' Liability Act of 1863 and other Acts. Under these circumstances it would be quite impossible to apply the Common Law of England in force against inn-keepers in the *Mofussil* in India.

There is nothing to show that the Bombay decision was meant to, or has any application to the *Mofussil* of India. That case also was decided in 1866 before the Indian Contract Act was passed. It seems to us that the liabilities of a hotel-keeper to his guests are now regulated by the Indian Contract Act, and in the absence of any specific agreement in a given case, we think that the rules in Chapter IX of the Indian Contract Act would apply. The case of *Rampal Singh* v. *Murray & Co.* (3) would seem to confirm this view, although it is not fully applicable to the facts of this particular case.

It is remarkable that (so far as we know) there is no reported decision in any of the Indian Courts on the subject. Having come to the conclusion, when the appeal was first heard by us that while the decree of the Courts below could not be maintained on the ground taken by those Courts, we thought it necessary before deciding the case, to send down an issue as to whether the defendant had taken such care of the goods of the plaintiff as were required by section 151 of the Indian Contract Act. In other words, we thought the Indian Contract Act was applicable. The parties were allowed to give such further evidence on this issue as they desired, and the learned District Judge has found as a fact as follows:—The hotel building is divided into two main blocks, the public and dining rooms and some residential rooms are in one block, and other dwelling rooms are in a separate block at some distance from the main block. The detached block of dwelling rooms consists of a verandah, extending the whole length of the building, six sleeping rooms leading into two bath-rooms, each at the rear, and each bath-room has a door leading out to the back. It is found that at the back of this block there is an open unfenced Maidan so that any one who pleased could have access to the back of these quarters. It was also found that the bath-room connected with the sleeping room which the plaintiff occupied, was unsafe and could easily be entered from the back. It was admitted that the plaintiff had a servant with him and that on the evening of the 27th of September at about 8 o'clock when the plaintiff went to the main building to have his dinner, this servant was left in or about the room; that

(1) 3 B. H C. R. 137.

(2) 14 I. A. 89 at p. 96; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 11 B. 551; 6 Ind. Dec. (N. s.) 364 (P. C.).

(3) 22 A. 164; A. W. N. (1900) 3; 9 Ind. Dec. (N. s.) 1140.

shortly afterwards the suit case was stolen from the room. It is found that the plaintiff's servant followed the thief unsuccessfully. It is also found that there had been two other thefts within the year in the hotel to the knowledge of the manager, and it is not denied by him as asserted by the plaintiff that his notice had been brought to the unsafe condition of the bath-room. On the evidence the Court has come to the conclusion that the defendant had not taken such care to ensure the safety of the property of the guests as a man of ordinary prudence would, under the circumstances, take of his own goods, and that there was negligence on his part. In other words, the finding is against the defendant Objection is taken to the finding mainly on the ground that as the plaintiff actually had a servant in his own employ and had left his servant in or near the room at about the time the theft took place, the defendant was absolved from liability, and that, at any rate, so far as this plaintiff was concerned, there was no obligation for the defendant to take special care to ensure the safety of his goods. We are not prepared to accept this argument. It was the duty of the defendant to keep his premises in such a condition of safety as would reasonably prevent theft. The finding here is that the whole of the back of the detached premises was unsafe; that the fact that it was unsafe had been brought to the notice of the defendant and that, therefore, he should not only have had the doors repaired but that he should have had a watchman at the back of these premises as the only means of ensuring safety, and prevent anybody entering the premises if he had a mind to do so. In our opinion, on this finding, which is one of fact, binding on us in second appeal, the appeal fails and it is dismissed with costs.

W. C. A & M. H.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3118 OF 1917.

February 17, 1922.

Present :—Mr. Justice Le Rossignol and Mr. Justice Abdul Qadir.

KHUDA YAR—PLAINTIFF—APPELLANT

versus

AMIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Exclusion of half blood—Janjuhas of Shadia, Tahsil and District Mianwali.

Among *Janjuhas* of Shadia, Tahsil and District Mianwali, the whole blood excludes the half blood in cases of collateral succession.

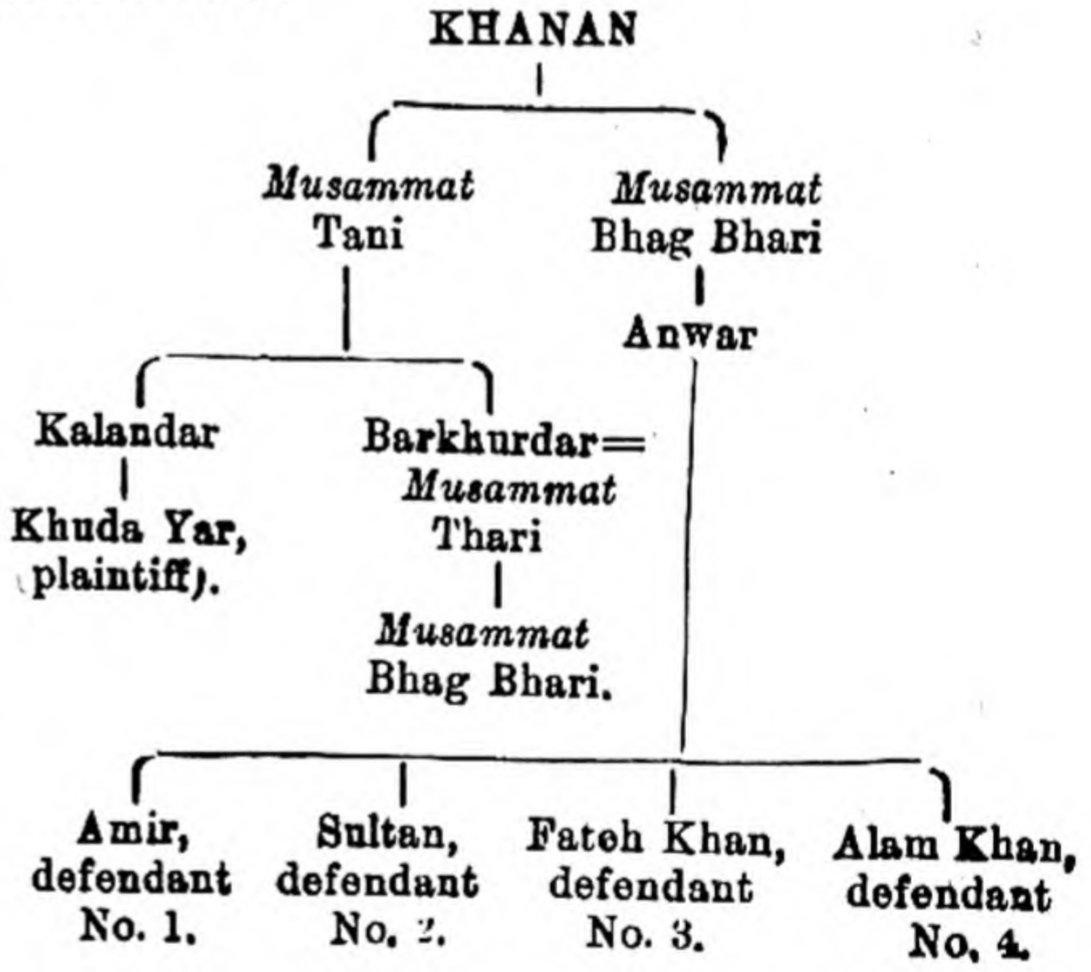
Khudayar v. *Ahmad*, 51 Ind. Cas. 298; 83 P. R 1919, referred to.

Second appeal from a decree of the District Judge, Mianwali, dated the 2nd August 1917, reversing that of the Senior Subordinate Judge, Mianwali, dated the 26th May 1917.

Mr. *Nanak Chand*, for the Appellant.

Pandit *Sheo Narain*, R. B., for the Respondent.

JUDGMENT.—The following pedigree exhibits the relationship between the parties to this case :



The property in dispute is that of Barkhurdar who was succeeded in the holding by his daughter, *Musammat* Bhag Bhari. On her marriage, about 1906, Barkhurdar's share in the joint estate was mutated in favour of the parties in equal shares. The present suit was brought by Khuda Yar for a declaration that he was the owner of a two-thirds share of the joint estate. The case propounded by him was that in accordance with custom, on the death of Khanan, who had families by two different wives, succes-

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sion was made in accordance with the *pagwand* rule *i.e.*, Kalandar, Barkhurdar and Anwar each succeeded to a one third share in the estate. His contention is that in such circumstances it is the custom for the two different families to be regarded as separate groups for the purpose of collateral succession and that on the death of Barkhurdar he should consequently have been recorded as owner of Barkhurdar's one-third share to the exclusion of the defendants. The Trial Court decreed for the plaintiff, holding that the *riwaj-i-am* of 1870, entirely supported the custom recited by the plaintiff and that in the subsequent *riwaj-i-am* of 1908 the Jats stated that no regard was paid among them to uterine descent but the compiling officer noted that this statement was not in accordance with facts, as several instances had been quoted in which full brothers had succeeded to the exclusion of half brothers. The learned District Judge on appeal by the defendants held that the plaintiff had failed to prove the custom alleged and dismissed the suit. The plaintiff has come up to this Court on second appeal and the question for decision appears to be as follows. In view of the fact that in 1870 the custom by which the whole blood excluded the half-blood was emphatically affirmed and that in 1908 the assertion that the custom had been reversed was found to be not in accordance with facts, have the defendants established that the old custom has become obsolete? The parties belong to village Shadia which is now a separate estate but was formerly at the time of the Settlement of 1878 a hamlet of the large village of Wan Bhachran. On behalf of the plaintiff two cases decided by the District Judge of Mianwali are cited. Those cases referred respectively to Bhatti Mians and Bhachar Jats of Wan Bhachran and in them the rule of uterine descent was followed. *Khuda Yar* v. *Ahmad* (1) is a case of Kaliar Jats of Mianwali Tahsil in which it was held that the half brothers, who were the defendants in the case had failed to establish a custom by which half brothers succeed with those of the full blood. Two other cases are cited in which the same rule of custom was followed by the Collector in 1909 but the parties to those cases appear to have been Pathans, and one other case, that of Said Khan, a Janjuha like the parties to this case, who excluded his half brothers. As against those, two Janjuha cases, that of Zaman and Muhammad Azam, are cited in favour of the custom set up by the defendants' and two other cases are referred to, but the facts of those cases and their dates are not satisfactorily proved, so that the only two clear cases in favour of the defendants' contention are those proved by the evidence of the Naib Sadr Kanungo.

Bearing in mind that no custom has the force of law unless it is ancient and certain and that the custom recited by the plaintiff was in full vogue in 1878 and has been observed since that date in several contested cases, we are unable to hold that the defendants have succeeded in establishing that the old custom is obsolete.

For the reasons set forth above we accept the appeal and decree for the plaintiff with costs throughout.

Z. K.

Appeal accepted.

(1) 51 Ind. Cas. 298 33 P. R. 1919.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 151 OF 1921.

August 9, 1922.

Present :—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump,

SHANTARAM BALKRISHNA—APPELLANT

versus

WAMAN GOPAL WADEKAR AND ANOTHER —RESPONDENTS.

Hindu Law—Mitakshara—Vyavahara Mayukha—*Common passage—Partition—Indivisibility.*

On the authority of the *Mitakshara* and the *Vyavahara Mayukha*, land which is reserved as common passage is not divisible. The rule applies equally to a common passage reserved at the time of a partition. [p. 685, col. 1.]

Messrs. *O'Gorman* and *Jinnah*, for the Appellant.

Mr. *Taraporevala* (with him Mr. *Kanga*, Advocate-General, and Mr. *K. J. Desai*), for Respondents Nos. 1 and 2.

SHANTARAM BALKRISHNA v. WAMAN GOPAL.

JUDGMENT.

SHAH, Actg. C. J.—The facts which have given rise to this appeal are briefly these. A plot of ground, which is shown in the plan, was originally owned by one Balkrishna. He left four sons, Shantaram, Vasantrao, Janardan and Shivshankar, and at a partition which was effected among the four brothers in the year 1916, this plot was divided into four parts. The plot marked A in the plan fell to the share of Shantaram, the plot marked B was assigned to Vasantrao, the plot marked C was assigned to Janardan and the plot marked D was assigned to Shivshankar. There was a common passage left which is shown in the plan and which is marked E F H G. There is no special provision in the decree based upon the award relating to the partition, but it appears from the descriptions of the various plots given in the Schedules that the said land was reserved for the common passage. On September 9, 1916, Janardan conveyed his interest in the plot C to the present plaintiffs, and on September 28, 1916, Shivshankar conveyed his interest in the plot D to the 1st plaintiff on behalf of both the plaintiffs. On June 18, 1919, Vasantrao conveyed the plot B including his right, title and interest in the strip of land called the common passage to Bhagvandas Tapidas, the original defendant No. 2.

It appears that before the date of this last conveyance, the present plaintiffs, who had become owners of plots C and D, built in such a manner as to make some encroachments upon the common passage which are shown in the plan, and a suit was filed by Shantaram and Vasantrao for the removal of those encroachments. In that suit a decree was passed on August 6, 1918, against the present plaintiffs. A copy of that decree was annexed to the plaint but has not been formally put in as an exhibit. In the course of the argument the decree has been referred to, subject to the appellant putting in a certified copy of the decree as an exhibit. The result of this decree was that the plaintiffs were required to remove the encroachments which they had made on this common passage.

Then on August 22, 1919, the said Bhagvandas conveyed in favour of the plaintiffs his interest in the small strip of land forming part of the plot B in the south marked OPJL, and his right, title and interest in the portion of the common passage between the plots C and D and marked EFML. In virtue of these conveyances at the date of the present suit, which was filed in September 1919, the plaintiffs had become owners of the plots C and D, and it may be taken for the purpose of this appeal that they had become owners of three-fourths of the interest in that portion of the common passage which is marked EFML, and were interested along with the owners of plots A and B, as co-owners in the remaining portion of the land described as common passage, namely, LMHG. I may add that the common passage joins the main road at its northern end and is closed by a wall of the adjoining premises at its southern end. As a passage it ends at the line EF. The present suit was filed with a view to seek partition of the land which has been described as common passage, and the prayer was to secure the result that the partition should be so effected as to make the owners of plots C and D absolute owners of the portion of the passage EFML; to assign the absolute interest in the soil of that part of LMHG towards the line MH so far as the owner of the plot A was concerned, which would represent $\frac{1}{4}$th of the whole area of this passage, to the 1st defendant; and to allow to the owner of plot B the absolute interest in the soil of that portion of LMHG towards the line LG to the extent of $\frac{1}{4}$th interest in that part of the passage which is marked LMHG. The intermediate narrow strip which would be very small was to remain the absoulte property of the owners of the plots C and D with the right of passage in favour of the plaintiffs over the whole of the land marked LMHG subject to such compensation being paid to the owners of plots A and B as the Court might think proper. This would make the plaintiffs the absolute owners of the southern half of the passage, while the remaining half would remain exactly as it was at the date of the suit for the benefit of all the four owners.

During the course of the suit there were various amendments made from time to time which it is not necessary to detail for the purposes of this appeal. The objection taken by defendant No. 1 who is the owner

of Plot A was that this was really an attempt to get rid of the clear effect of the decree against the plaintiffs for the removal of the encroachments and to secure a partition, which in effect would deprive the 1st defendant compulsorily of such right of ownership as he had in the whole of this common passage as a co owner. Defandant No. 2 Dwarkadas, who purchased the interest of the original defendant No. 2, Bhagvandas, in the plot B, as also defendant No. 3, the original owner of the plot D, resisted the plaintiffs' claim. I need not detail the various defences; but five issues were raised on the pleadings. The first issue is, whether the portion of the passage marked EFLM is of no use to the defendants as alleged in the plaint, and the other material issue which I need note is the third issue whether the plaintiff is entitled to partition as claimed. The learned Trial Judge found in favour of the plaintiffs, and made the following observations :—

"Having regard to all the considerations in the case and having seen the passage this afternoon I am fully convinced that the passage between LM and EF is absolutely useles to the proprietors of plots A and B, and this passage was kept open only for the purpose of giving access to the owners of plots C and D as they had no other access except through this passage. I think it is fit that this partition should be ordered and special directions should be given to the Commissioner."

The learned Judge gave directions as to partition practically as prayed for.

In the appeal the principal point argued is whether the partition of this narrow strip of land, which was reserved at the time of the partition in 1916 as common passage can be allowed. In the course of the argument a further point that arose in connection with this question was whether, as a matter of law, such a claim for partition of the common passage was maintainable in view of the rule of Hindu Law, by which the parties are governed, that common passages are indivisible.

I shall first deal with the question as to whether, in view of the special rule of Hindu Law, which undoubtedly is applicable to the parties to this suit, the claim for partition is maintainable. I am of opinion that it is not. The rule to which I refer is to be found in the Mitakshara, Chapter I, section iv, (Stokes' Hindu Law Books, pages 384, 387 and 389). That section relates to "Effects not liable to partition" and the relevant passages in that section are to be found in paragraphs 16 and 25 which are as follows :—

"16 Other things exempt from partition, have been enumerated by Manu; 'Clothes, vehicles, ornaments, prepared food, women, sacrifices and pious acts, as well as the common way, are declared not liable to distribution.'"

Then the commentator proceeds to deal with each of these items, and the opinion expressed by Vijnaneshwara as to 'common way' is to be found in paragraph 25 which is as follows :—

"The common way, or road of ingress and egress to and from the house, garden, or the like, is also indivisible."

The same rule is referred to by Nilkantha in the Vyavahara Mayukha The same verse from Manusmriti is quoted in Chapter IV, section vii, and the word '*prachara*' which has been used for the expression "common way" is thus explained in the same section: "*Prachara* is way to the house, or the like, as also a pasture ground for cattle, etc." (See Mandlik's Hindu Law, pages 70 and 71.)

These passages make it quite clear that if this is to be treated as "common way, or road of ingress and egress", it is indivisible. I may add here that the word "*prachara*" which is used in the verse quoted from Manusmriti, and which has been rendered in these translations as "common way" is translated in the Sacred Books of the East Series, Volume XXV, as "pasture ground", and I have not overlooked the interpretation which has been put by some commentators upon the word "*prachara*" as indicating "pasture ground." In the foot-note on this verse (Manu IX, 219) in the said volume at page 379 it is also indicated that the word "*prachara*" is understood by some of the commentators on Manusmriti in the sense of "common way". But what is important is that this word has been interpreted in the Mitakshara in the sense of 'common way'; and that is how it is interpreted in the Vyavahara Mayukha. The author of the Vyavahara Mayukha gets over the apparent difficulty by accepting

both the meanings of the word "*prachara*". There is no doubt, therefore, that on the authority of the Mitakshara and the Vyavahara Mayukha, by which we are bound, that the land which was reserved as common passage at the time of partition between the parties in 1916 is not divisible.

It is urged, however, that this rule ought not to be strictly applied, under the modern conditions obtaining in a large city like Bombay. The rule to my mind is so plain that I do not see how it could be said to make any difference whether it is to be applied to any land in the city of Bombay or outside. Further, it is urged that the 'common way' referred to in the texts would refer to the "common ways" existing prior to partition, but not to such "common passages" as are created for the first time and reserved by agreement between the parties at the time of the partition. I am unable to discover in this contention any real answer to the application of the plain and simple rule to the facts of this case. This point was not raised in the Trial Court, and as I have already stated, it was only referred to in the course of the argument before us. But the rule is clear, and I do not see how the plaintiffs can escape the application of that rule. This rule is referred to in *Nathubhai Dhirajram* v. *Bai Hansgavri* (1). No doubt there the facts were different and the rule was referred to under somewhat different circumstances. I refer to that judgment for the purpose of showing that the rule is not an obsolete rule of Hindu Law but a rule which is capable of application, and which ought to be applied, wherever it can properly apply.

In the present case it is clear to my mind that when in 1916 the brothers divided the property and kept this passage common, they really kept it as a common way for the use of all the four brothers; and the attempt which has been made in the course of the argument to show that the owners of the southern plots C and D have greater interest than the owners of plots A and B in the north does not appear to me to derive any support from the words used with reference to this passage in the decree relating to partition. The land which is shown in the plan as passage has been described throughout as "common passage" and the plaintiffs' claim for partition is based on the footing that all the owners of the four plots are co-owners of this land. It may be that the plaintiffs have some greater use of the passage in virtue of the position of the plots C and D than the owners of plots A and B. But I do not see how the accident of the southern end of the passage being closed by a wall could make any difference in law to the rights of the parties, nor can I see how in law they can be said to have any more interest in the passage than the owners of plots A and B. Really the land which is now sought to be partitioned is 'common way' and it ought not to be divided according to the rule of Hindu Law to which I have referred. That seems to afford a complete answer to the plaintiffs' claim.

But, apart from this rule of Hindu Law, the point has been raised on behalf of the appellant that such a partition which has practically the effect of depriving one co-owner of his interest in the property ought not to be allowed. On the other hand, on behalf of the plaintiffs reliance is placed upon the rule about which there can be no doubt that a co-owner of any land is entitled to seek partition of the land at his will. But in the present case it is not a simple partition by metes and bounds that the plaintiffs seek, but a partition on certain lines without which the partition would obviously be of no use to the plaintiffs. The strip of land which is marked as common passage varies in width from eight to ten feet throughout the whole length, and as a strip of land it is absolutely inconvenient to divide it by metes and bounds.

But the way in which the plaintiffs seek to get over the difficulty is by drawing a distinction between the right of passage as an easement and the right of ownership over the land as distinguished from the right of passage. The argument is somewhat ingenious and I shall not attempt to state it in detail. In the case of land which is owned by certain persons, it ought to be divided in the ordinary way if it is capable of division. If it is incapable of division it must be kept as the common property of the co-owners. It is not suggested that the

(1) 15 Ind. Cas. 818; 36 B. 379 at p. 382; 14 Bom. L. R. 418.

alternative remedy of sale under certain circumstances as provided by the Partition Act is applicable to this case nor is it suggested that such a remedy is suited to the present case. The very nature of the prayer shows that the plaintiffs do not desire a simple partition, which obviously is not possible under the circumstances of the case, but a peculiar partition to serve their own interests without due regard to the interests of the co-owners. In view of the rule of Hindu Law upon which I base my decision, it is not necessary for me to arrive at any final conclusion on the general question whether, apart from that rule, such a partition as is claimed by the plaintiffs is permissible in law, and even if it be permissible in law, whether under the circumstances of the case it would be right to direct such a partition.

It is difficult to escape the inference that soon after the decree was passed for the removal of the encroachments, in 1918, against the plaintiffs, they filed this suit with a view to circumvent, if possible, that decree. If it be open to them in law to do so they are entitled to that remedy. But, in my opinion, it is not open to them to do so.

I would, therefore, allow the appeal, discharge the decree of the Trial Court and dismiss the plaintiffs' suit with costs throughout.

CRUMP, J.—As I agree that the decree of the Trial Court cannot stand, I wish to indicate briefly my reasons for that conclusion. The parties to this case stand in the shoes of the four sons of Balkrishna who were parties to the original division of this property. That partition by virtue of the decree in Suit No. 337 of 1910 was a complete partition, and I cannot see any ground on which it can now be re-opened. It is not suggested that there was any *bona fide* error there, or that the partition was of a partial nature. The effect of the decree clearly was to decide that the property of which partition is now sought should be reserved as a common passage to the houses of the four parties. That being so, it would follow from the decree itself that that passage is not property such as can be the subject of a further partition. Therefore, even apart from the rule of Hindu Law, as to which it is unnecessary for me to add anything in view of the judgment of the learned Chief Justice, it does appear to me that the suit is not maintainable, and that the jurisdiction which the Judge of the Trial Court has exercised is a jurisdiction which he did not possess. The ingenuity of Counsel has failed to discover any precedent for such a suit as this, the reason obviously being that it is probably the first suit of its nature. If I felt any doubt as to the correctness of our view of the law, that doubt would be removed by a consideration of the motive which has impelled the plaintiffs to file the present suit. They do not in reality desire partition of this common way. What they really desire to do is to get rid of the effect of the decree against them whereby they were ordered by this Court to remove a certain encroachment on that way. It is an ingenious course, but one which I do not think could possibly be permitted to succeed. The grounds on which the Trial Judge has proceeded are those of convenience rather than law. It may be true that the portion of the passage which has been assigned to the plaintiffs is of no value to the other parties, but then they are the best judges, and they cannot be compelled to surrender the rights which were awarded to them by the partition decree in the previous suit without their own consent. Therefore, it seems to me that the suit must of necessity fail, whether it be approached on the basis of the rule of Hindu Law or on the basis of any other system of law which could conceivably be applicable to the present case. I agree, therefore, that the appeal should be allowed and the suit dismissed with costs.

W. C. A. *Appeal allowed.*

MADAM PILLAI v. BADRAKALI AMMAL.

MADRAS HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL NO. 522 OF 1920.
January 6, 1922.

Present :—Sir Walter Schwabe, KT., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Kumaraswami Sastri.

MADAM PILLAI—DEFENDANT No 2—APPELLANT

versus

BADRAKALI AMMAL AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1, RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 9, 54, 118 —Transfer of property by husband to wife for life in lieu of future maintenance—Sale—Exchange—'Price' in s. 54, meaning of.

A transfer of land of the value of more than Rs 100 by a husband to his wife to be enjoyed by the latter during her lifetime in discharge of her claim to future maintenance can be made without writing. Such a transfer is neither a sale nor an exchange but is a transaction not expressly required to be in writing under section 9 of the Transfer of Property Act. [p. 689, col. 1; p. 690, col. 1.]

Narbadabai v. *Mahadeo Narayan*, 5 B. 99; 3 Ind. Dec. (N. S.) 68, disapproved.

Per *Schwabe, C. J.*—The word 'price' in section 54 of the Transfer of Property Act means money, but not necessarily money handed over in current coin at the time but includes money which might be already due or might be payable in the future. [p. 689, cols. 1 & 2.]

Per *Coutts-Trotter, J.*—The word 'price' in section 54 of the Transfer of Property Act connotes something different and something more limited than the familiar term 'valuable consideration.' It means money. [p. 690, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 33 of 1919, preferred against the decree of the Court of the District Munsif, Tuticorin, in Original Suit No. 114 of 1918.

This second appeal coming on for hearing on the 14th and 15th of April 1921 upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the case and upon hearing the arguments of Mr. *K. V. Krishnaswami Aiyar* for Mr. *T. R. Venkatarama Sastri*, for the Appellant, and of Mr. *A. Swaminatha Aiyar*, for the 1st Respondent, and the 2nd Respondent not appearing in person or by Pleader, and the case having been posted to be spoken to on the 20th and 22nd of April 1921, and upon hearing the arguments of Mr. *T. R. Venkatarama Sastri*, for the Appellant and of Mr. *A. Swaminatha Aiyar*, for the 1st Respondent and the case having stood over for consideration till the 27th of April 1921, the Court (Oldfield, J. and Ramesam, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The second defendant, here appellant, relies on a sale-deed of the suit land from 1st defendant. Plaintiff, the first wife of 1st defendant, has obtained a declaration that the sale to 2nd defendant is invalid, so far as it affects her right to enjoy the land during her life, on a finding by the lower Courts that she is doing so under an oral transfer of that right by 1st defendant with a condition against alienation by him during her enjoyment. The finding that this transfer was made is one of fact and we must accept it. The second appeal has been argued on the ground that under the Transfer of Property Act an oral transfer of this kind is ineffective. The decision of the lower Appellate Court has been supported on the grounds that, even if the oral transfer is ineffective, plaintiff has prescribed for a right to possession by her adverse holding for about seventeen years, and that 2nd defendant's sale having to his knowledge been intended to defeat plaintiff's maintenance right that right must under section 39 of the Transfer of Property Act be enforced against him by keeping her in possession.

Neither of the considerations relied on by plaintiff affords an immediate ground of decision. For the lower Appellate Court has found only that she had possession on the date of her plaint, not that she had had it for the previous period necessary for prescription; and a remand for proper consideration of the plea of prescription would be necessary. The argument from section 39 assumes that her right to maintenance can be identified with her right to the enjoyment of the suit land, whereas the validity of the transfer to her of that land in lieu of maintenance is the point in dispute.

MADAM PILLAI v. BADRAKALI AMMAL.

We have, therefore, to decide whether this oral transfer of land, admittedly of over Rs. 100 in value is valid. The question raised are of general importance and as we are referring the matter we attempt no further discussion or citation of authorities than is sufficient to indicate its difficulty. In argument before us neither party has contended that the transfer to plaintiff is a lease; and the suggestions that it is a gift or a family settlement or compromise can be dismissed shortly, the former because her abandonment of her right to claim maintenance is a consideration within the meaning of section 2 (*d*) of the Indian Contract Act, the latter because the arrangement is not put forward as an acknowledgment of existing rights or otherwise than as a creation of new ones. Second defendant argues that the transfer is a sale or exchange which under sections 54 and 118 of the Transfer of Property Act can be made only in writing, plaintiff, that it can be made without writing under section 9, because the case is not one in which a writing is expressly required.

One obstacle to the application of either section 54 or 118 is that in the present case the transfer is on the one side of the right to enjoy only for the transferee's life and this may be inconsistent with the references to transfer of ownership in the former and of ownership of a thing in the latter. For in the absence of definitions of "ownership" and of "a thing" it is a question whether the transfer of less than an absolute and permanent right is contemplated by either section. We have been shown no authority on this point or on the kindred objection to the application of section 118 to the consideration proceeding in the present case from the transferee, that the abandonment of a right to maintenance is not the ownership of a thing. For it can hardly be said that the abandonment of a right against a person is a transfer to him of that right; and, if it could be, a right to future maintenance is, it has been held, not a thing which can be the subject of transfer or assignment. [*Narbadabai* v. *Mahadeo Narayan* (1) and *Palikandy Mammad* v. *Chingoran Keloth Valia Appa* (2).] The difficulty in connection with section 54 is that a price or promise of a price is essential and that plaintiff's abandonment of her right to future maintenance, which has never been assessed or valued, is not a price or the promise of one because a price must according to authority [*Queen Empress* v. *Appavu* (3) and *Volkart Brothers* v. *Vettivelu Nadan* (4)] be money. We have been asked to disregard this with reference to the judgment of Sadasiva Aiyer, J., in *Ariyaputhira Padayachi* v. *Muthukumaraswamy Padayachi* (5) and his dictum that "If two persons mentally fix the values of the exchanged things in current coin and then exchange them as of equal value, ... they might be held to effect 'sales' and not to pay 'prices' (the word 'not' being apparently interpolated in the report) and not merely to effect an exchange." It is possible that this was not enunciated as a general principle, but only with reference to cases such as that before the learned Judge, in which the data for the mental process he assumed, in the shape of information as to completed transactions, were available. But the supposition of such a process can hardly be made in cases of the kind now in question, in which the calculation of the amount depends on an estimate of an unascertained periodical liability for an uncertain time, and we have to assume not only a mental fixing of the total due by each party, but some sort of sympathetic agreement between them on the same figure, in the absence of which there could be no contract.

In these circumstances we refer for the opinion of a Full Bench the question whether a transfer of land of the value of more than Rs. 100 by a husband to his wife to be enjoyed by the latter during her lifetime in discharge of her claim to future maintenance can be made without writing.

This second appeal came on for hearing before a Full Bench.

Mr. *K. V. Krishnaswamy Aiyar* for Mr. *T. R. Venkatarama Sastri*, for the Appellant.—

(1) 5 B. 99, 3 Ind. Dec. (N. S.) 68.

(2) 34 Ind. Cas. 381; 40 M. 302. 30 M. L. J. 261.

(3) 9 M. 141; 1 Weir 645; 3 Ind Dec. N. S.) 495.

(4) 11 M. 459; 12 Ind. Jur. 335; 4 Ind Dec. (N. S.) 32.

(5) 15 Ind. Cas. 843; 37 M. 423, 12 M. L T. 425; 23 M. L. J. 339; (1912) M. W. N. 854.

The transaction in question is invalid for want of a writing to evidence it.

It must be treated as a gift as there was no valid consideration for the transfer. An agreement to provide for the future maintenance of one's wife is an illegal bargain. If it is viewed as a settlement even then it should be in writing.

Messrs. *A Swaminatha Aiyar*, for Respondent No. 1.—The transaction falls under section 9 of the Transfer of Property Act in the category of cases in which no writing is expressly required by law. It is not a sale as there was no 'price', that is, money paid or promised. It is not a gift. There is nothing illegal in husband and wife agreeing as to the wife's future maintenance. It is not an exchange as neither party transfers the ownership of one thing for the ownership of another.

OPINION.

SCHWABE, C. J.—The question referred to us in this case is "whether a transfer of land of the value of more than Rs. 100-0 0 by husband to his wife to be enjoyed by the latter during her lifetime in discharge of her claim to future maintenance can be made without writing."

It was argued first that such an agreement was a gift, because it was said that such a bargain was illegal and, therefore, without consideration: but it had to be admitted that, if the bargain was to receive the land in discharge of the claim to future maintenance, there was nothing illegal at all; and it is not necessary to say anything further on the subject of gift. By the Transfer of Property Act, section 9 "A transfer of property may be made without writing in every case in which a writing is not expressly required by law" and, therefore, one has to look at the rest of the Act to see whether writing has been expressly required by law for such a transaction as this. Apart from the question of gift, the only sections, which it is claimed, could apply are sections 54 and 118. Section 54 relates to sales, a sale being defined "as a transfer of ownership in exchange for price paid or promised". In this case one has to consider whether there was a price paid or promised by the transferee. Now, "price" has a well defined meaning. It means money, but not necessarily money handed over in current coin at the time but includes money which might be already due, or might be payable in the future. I think the law is well expressed in the commentaries on the Transfer of Property Act by Shephard and Brown, page 175. "'Price' includes money only, for, if the thing given and exchanged for land consists of goods and not money, there is no sale but an exchange. A transfer not made in exchange for a money consideration, *e. g.*, a transfer made in pursuance of a compromise of a family dispute, would not be a sale, and might be altogether outside the provisions of the Act." There being, in my view, no price paid or promised in this case, the transaction was not a sale. We were referred on this point to a decision in *Ariyaputhira Padayachi* v. *Muthukumaraswamy Padayachi* (5) and to certain observations of Sadasiva Aiyar, J., therein in which apparently he would extend "price" so as to cover all cases where articles are exchanged, one against the other, provided that the parties went through the mental process of fixing in their own minds the value of the articles to be exchanged. I must say that I think that that was going beyond anything that one can find in the Act. It seems to me that those observations were quite unnecessary for the decision which was arrived at in that case, and I confess that I cannot agree that the mental process gone through of valuing in one's mind the different articles to be exchanged can possibly turn an exchange transaction into a sale.

The remaining section is section 118 which deals with 'exchanges'. By that section "exchange" is defined as follows: "where two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an exchange." In this transaction the husband transfers the land or the right to use the land during the lifetime of the wife and the wife gives up her right to future maintenance. It seems to me that there are two reasons why this transaction cannot be an exchange within that definition. First of all, the husband does not transfer the ownership of the land, and, secondly, the wife does not transfer the ownership of anything. She does not purport to transfer anything to her husband,

nor had she anything, within the meaning of that section, which she could transfer.

On these grounds the answer to the question referred to us is in the affirmative.

COUTTS-TROTTER, J.—I agree. When we are construing a word like "price," we are dealing with a word which is by its inherent nature a likely subject of controversy, and I turned out of curiosity to the Oxford English Dictionary and found the quotation from Adam Smith's Wealth of Nations—1776: "The real price of everything, what every thing really costs to the man who wants to acquire it, is the toil and trouble of acquiring it. Labour was the first price, the original purchase money that was paid for all things." But it seems to me that the answer is to be found in what I said during the course of the argument, that a trained English lawyer would never use the word "price," unless it be to connote something other than the perfectly familiar phrase "valuable consideration," which would naturally occur to his mind; and it seems to me that the whole of Mr. Krishnaswami Iyer's ingenious argument comes to this that we are to construe price as meaning the familiar term "valuable consideration." I think that the word "price" was put into the section to connote something different and something more limited, that is, money.

KUMARASWAMI SASTRI, J.—I agree with my Lord and would only add that even if the transaction is treated as a settlement of family disputes, there is nothing in Hindu Law requiring it to be in writing. Partition can under Hindu Law be made without any document and a settlement cannot be in a worse position.

It is argued that the transaction must be viewed as a gift of immoveable property, as under Hindu Law an agreement by a husband to provide for the future maintenance of his wife is invalid, and there being no legal and valid consideration for the transfer, it is in effect a gift. I see nothing illegal in Hindu Law for a husband to make provision for the future maintenance of his wife. It is very often a very proper thing to do. Even assuming that the agreement to provide for future maintenance is invalid under Hindu Law the transaction will not amount to a gift. It will be invalid not for want of writing and registration but because it is incompetent for the parties to enter into the transaction because of the personal law by which they are governed.

M. C. P.

Answered in the affirmative.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 65 OF 1921.

February 20, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr Justice Macgregor.

MAUNG THWE—APPLICANT

versus

A. L. A. R. CHETTY FIRM AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110, interpretation of—Appeal to H. M. in Council—Amount of subject-matter of suit, what is—Special leave to appeal, when to be granted.

Section 110 of the Civil Procedure Code should be so interpreted that effect may be given to all its provisions, if this can reasonably be done, and the second paragraph of the section ought not to be read alone and as not being subject to the requirements of the first paragraph. It was not intended to make the second paragraph a separate provision. [p. 692, col. 1.]

Subramania Aiyar v. *Sellammal*, 31 Ind Cas. 296; 36 M. 843 at p. 845; 2 L. W. 1077; 18 M L. T. 450; (1915) M. W. N. 941; 30 M. L. J. 317, relied on.

For the purposes of an appeal to H. M. in Council the amount of the subject-matter of a suit in the Court of first instance is the amount for which a decree is recovered, including at most interest up to the date of the decree and the value of the subject-matter of a suit is the value at the time of the institution of the suit. [p. 691, col. 2.]

Moti Chand v. *Ganga Prasad Singh*, 24 A. 174; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 156; 8 Sar P. C. J. 247 (P. C.) and *DeSilva* v. *DeSilva*, 6 Bom L. R. 403 at p. 409, referred to

Where a case is otherwise unappealable to H. M. in Council, special leave can only be granted if the questions involved are not only substantial, but are of great public or private importance. [p. 693, col. 1.]

Moti Chand v. *Ganga Prasad Singh*, 24 A. 174; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 156; 8 Sar. P. C. J. 247 (P. C.), relied on.

Application for leave to appeal to His Majesty in Council.

Mr. *Das*, for the Applicant.

Mr. *Leach*, for Respondent No. 1.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council from a decree of this Court confirming the decree of the Court of first instance

The facts involved are as follows:—

Two persons, Maung Thwe and Tun Pe, each claimed to be the sole adopted son of

a Burmese couple who died leaving a fairly large estate. Cross-applications for Letters of Administration were filed and Letters were granted to Tun Pe. Thereupon, Maung Thwe brought a suit to have it declared that he was the sole adopted son and for possession of the estate. The first Court held that he was the sole adopted son. On appeal to this Court it was held that Tun Pe was the sole adopted son. An appeal was filed to His Majesty in Council when their Lordships held that both were adopted sons. In the meantime, subsequent to the decree of this Court declaring him to be the sole adopted son, and after notice had been served of the application for leave to appeal to His Majesty in Council, Tun Pe alienated the land in suit to Ma Shwe Pon for Rs. 6,000 by a registered deed. Subsequently, Ma Shwe Pon mortgaged this land to A. L. A. R. Chetty. The present suit was brought by the Chetty to enforce his mortgage. The amount he claimed was under Rs. 10,000, as was also the amount decreed in his favour. Maung Thwe was made a party and contested the mortgage on the ground that the original sale by Tun Pe to Ma Shwe Pon was void and of no effect, as he was merely a co heir and had no separate rights in this property that he could convey away. He pleaded that the principle of *lis pendens* applied to the alienation and that Ma Shwe Pon acquired no rights in the land which she could mortgage to the Chetty.

On appeal this Court at first accepted these arguments and set aside the decree of the Court below. An application for review was, however, admitted on the ground that the effect on the claim of the fact that Tun Pe was the administrator of the estate and must be deemed to have acted as such had not been considered, and the final decision was that the sale was good and that the doctrine of *lis pendens* would not apply in the circumstances of the case and this Court accordingly confirmed the decree of the Court below. From this decision Maung Thwe desires to appeal to His Majesty in Council.

He claims, in the first instance, that the subject-matter of the suit in the Court of first instance and in dispute on appeal to His Majesty is over Rs 10,000. It may be admitted that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is over Rs. 10,000 if the interest accrued due up to the date of the decree of this Court be taken into consideration. But it is argued by the respondent that the amount or value of the subject-matter of the suit in the Court of first instance is not Rs. 10,000.

As to this we have to consider the value at the time of the institution of the suit. The sale by Tun Pe to Ma Shwe Pon was for Rs. 6,000. When the property was brought to sale in execution of the Chetty's mortgage-decree we are told it realized less than Rs. 10,000, and we can find no proof on the record to show that the land was worth Rs. 10,000, or upwards at the time of the institution of the suit.

The amount or value of the subject-matter of the suit to the Chetty was clearly the amount he claimed, together with, at most, interest that had accrued due up to the date of the decree.

In *Koti Chand* v. *Ginga Prasad Singh* (1), their Lordships held that the amount of the subject-matter of a suit in the Court of first instance for the purpose of an appeal to His Majesty in Council is the amount for which a decree is recovered, including interest up to the date of the decree, and in the case of *DeSilva* v. *DeSilva* (2) Jenkins, C. J., held that for the purpose of considering whether the conditions as to value are satisfied "the decree is to be looked at as it affects the interest of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal."

So far as Maung Thwe is concerned, the effect on his interest of the adverse decree is that he is deprived of this parcel of land and that, as we have said, has not been shown to amount to Rs. 10,000. We must, therefore, hold that the conditions laid down in the first paragraph of section 110 are not satisfied.

It is next urged that, even if that be so, petitioner is entitled to come under the second paragraph of section 110. It is urged that the decree involves, directly or indirectly, some claim or question to or respecting property of like amount or value.

(1) 24 A. 174; 6 C. W. N. 363; 29 I. A. 40, 4 Bom. L. R. 156, 8 Sar. P. C. J. 247 (P. C.).
(2) 6 Bom. L. R. 403 at p. 406.

MAUNG THWE v. A. L. A. R. CHETTY FIRM.

In the first place, it is claimed that this provision is to be read alone and not subject in any way to the requirements of the first paragraph of the section. We are quite unable to accept this view. It is based apparently on the spacing and *quasi* separation into a separate paragraph. We do not consider that it was intended to make it a separate provision. What the section requires is that the subject matter in the Court of first instance must be Rs. 10,000, or upwards, and in addition that the amount or value of the subject-matter on appeal must be the same, or the decree must involve, directly, or indirectly, some claim or question to or respecting property of like amount or value. This latter provision is to be read as an alternative to the 2nd restriction in the earlier part of the section. To read it otherwise would render the provision as to the value of the subject-matter in the Court of first instance a dead letter. It is not open to us so to interpret the section. We are bound so to interpret it that effect may be given to all its provisions if we can reasonably do so.

There is authority for this view in the case of *Subramania Aiyar* v. *Pellammal* (3). Speaking of this argument Wallis, C. J., said: "If this contention be accepted, a certificate must be granted in any case in which the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is not less than Rs. 10,000, whether or not the amount or value of the subject-matter of the suit in the Court of first instance fell below Rs. 10,000, and this provision becomes wholly nugatory."

Mr. Justice Srinivasa Aiyangar said "..... it is impossible to construe the second clause of section 110 of the Code of Civil Procedure so as to render the first [perfectly useless.....In my judgment, the first clause applies to cases where the decree awards a particular sum, or property of a particular value or refuses that relief (*i. e.*,) to cases where the subject-matter in dispute is of a particular value .....If the operation of the decision is confined only to the particular object-matter, clause (2) does not apply, and unless the case satisfies the conditions in clause (1) there is no right of appeal. If the decision beyond awarding relief in respect of the particular object-matter of the suit affects rights in other properties, clause (2) would apply: also if the matter in dispute is one which is incapable of valuation as in the case of easements, clause (2) may apply."

It is argued that the decision in respect of this particular alienation by Tun Pe will decide other alienations made by him, one of which is pending in appeal before this Court. It is a case in which a mortgage was made by Tun Pe of another portion of the estate. The decision of this case cannot be said to decide some other case relating to another portion of the estate The parties will be different and this will in no way be binding on them. Moreover, the decision will be on a point of law and the correct decision on a point of law cannot be said to decide questions relating to other portions of the estate. Even if the decision on the point of law in this case holds good in some subsequent case, it will mean nothing more than that the right law has been applied, but, however this may be, as the value of the subject-matter of the suit in the Court of first instance is not Rs. 10,000 this provision cannot be brought into play.

Lastly, it is urged that the case should be certified to be otherwise a fit one for appeal to His Majesty in Council. Where a case is otherwise unappealable, their Lordships of the Privy Council have laid down in *Moti Chand's case* (1) that leave should not be granted unless there is some substantial question of law of general interest involved.

We are unable to hold that there is any such substantial question involved in the present case.

The powers of co-heirs in respect of alienation of joint and undivided property are well-settled. The decision as to the doctrine of *lis pendens* cannot be described as of general interest and there is no substantial question of law to justify the grant of a certificate.

Had the case been one satisfying the restrictions as to value, as our decree confirmed that of the Court of first instance it would have been necessary to

(3) 31 Ind. Cas. 296; 39 M. 843 at p. 845; 2 L. W. 1057; 18 M. L T. 450; (1915) M. W. N. 941; 30 M. L. J. 317.

hold that the appeal involves some substantial question of law. It may be that for purposes of that provision the questions arising in this case might have been held to justify the grant of a certificate; but for the grant of a special certificate, the questions involved must be not merely substantial but must be of great public or private importance and we are unable to hold that they are such in the present case.

For these reasons the application for leave to appeal must stand dismissed with costs. Advocate's fees five gold *mohurs*.

W. C. A.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 86 OF 1921.

July 12, 1922.

Present—Mr. Kotval, A. J. C.

BRIJMOHANSINGH AND ANOTHER PLAINTIFFS—APPELLANTS

versus

KASTURCHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 38, 47—Court not competent to execute decree—Power to treat suit as execution application.

Under section 47, clause (2), of the Civil Procedure Code a suit cannot be treated as an execution application unless the Court before which the suit is pending is either the Court which passed the decree or the Court to which the decree is sent for execution, as, under section 38 of the Code, no other Court except either of these two has power to execute a decree [p. 694, col. 2]

Appeal from a decree of the District Judge, Jubbulpore, dated the 18th October 1920 in Civil, Appeal No. 17 of 1920.

Dr. *H. S. Gour*, for the Appellants.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—In Civil Suit No. 59 of 1912 in the Court of the Subordinate Judge brought by one Rahimkhan against Hedayat Khan and Mahebub Khan for dissolution of partnership, the property in suit which belonged to Hedayat Khan and Mahebub Khan and had vested in the Receiver was sold by the latter on the 29th January 1916 to one Kunjilal. Kunjilal afterwards sold the property to the plaintiffs.

The defendants got the same property attached and sold in execution of a money decree against Hedayat Khan and Mahebub Khan in Small Cause Court Suit No. 1340 of 1911 and purchased it themselves. The sale was confirmed on the 17th August 1918. The plaintiffs sue for possession on the ground that the sale to the defendants is not binding on them. The claim is made under the following circumstances. In Suit No. 1340 of 1911 the property was first sold in execution in the Court of the Munsif in April 1912. Before the sale was confirmed an injunction was issued to the Munsif on the 24th June 1912 by the Subordinate Judge trying Suit No. 59 of 1912 to stay the execution proceedings. The proceedings were thereupon dismissed by the Munsif on the 28th June 1912. In February 1914 the defendants again obtained an order for sale of the property from the Munsif's Court. The property was again sold on the 5th January 1918 and purchased by the defendants. A second injunction to stay proceedings was issued by the Subordinate Judge to the Munsif who stayed the proceedings until further orders from the Subordinate Judge; *vide* order dated the 12th February 1918 in order-sheet (Exhibit D. 4). On the 17th August 1918 the Munsif confirmed the sale.

The grounds on which he did so appear in his order (Exhibit P-10), which is as follows:—

"Decree-holder by Mr. P. C. Bose, judgment-debtor by Mr. Banerji. Decree-holder applied for confirmation of sale held on 5th January 1918. After the sale an injunction was brought from the Court of Sub-Judge to stay further proceedings and the proceedings were then stayed. The case in connection with which the injunction was issued has been decided. But no order for cancellation of the injunction is received. Applicant's Pleader contends that as the suit is decided and no order is passed in reference to the injunction the injunction must be taken as having lost its force as the Court of the Sub Judge has no longer jurisdiction in the matter. I agree with this contention. I now confirm the sale as prayed for. Sale confirmed. Case struck off as partly satisfied. Costs on judgment-debtors."

On the 8th October 1918 the plaintiff

applied for review of the above order (Exhibit P-6). The application was rejected by the Munsif on the 24th January 1919 (Exhibit P-3). The Munsif held that the objection was too late and that the matter was one which required a regular suit for its decision. The present suit was then filed on the 13th August 1919.

The Trial Court decreed the plaintiffs' suit on the ground that the sale to the defendants was bad on the ground of *lis pendens*. The defendants' plea that the suit was barred by section 47, Civil Procedure Code, was decided against them. The defendants appealed to the lower Appellate Court and confined themselves to the plea of bar under section 47, Civil Procedure Code. The lower Appellate Court has held that the suit is barred under that section and has dismissed it. In this Court it is first contended that the question whether a suit or an application for execution lies is *res judicata* by reason of the Munsif's order (Exhibit P-3). This contention cannot prevail. The defendants were not parties to or heard in the proceedings in which the order was passed. Again, the Munsif was not called upon in the proceeding before him to decide whether a suit or an application for execution lay. If the Civil Court had not the power to try a suit in the matter, the Munsif's opinion could not confer it.

It is next argued that section 47 has no application as the matter does not relate to execution, satisfaction or discharge of a decree, and the plaintiffs are not the representatives of the judgment-debtor. This point has been fully discussed by the lower Appellate Court in paragraphs 4 and 5 of its judgment and I agree with its conclusions. It is said that in *Veyindramuthu Pillai* v. *Maya Nadan* (1) the point was whether an appeal lay or not. This is true, but this point depended on the question whether an auction-purchaser was the representative of the judgment-debtor or not, and the latter was the point really to be decided. That the matter is one in execution proceedings can scarcely be disputed. The Executing Court sold property which the plaintiffs contend had ceased to be the judgment-debtor's. They desired the sale to be cancelled and not confirmed. An application for this purpose had to be made to the Executing Court as in fact it was made. I agree with the lower Appellate Court that section 47 applied to the case, the plaintiffs being the representatives of the judgment debtor and the matter being one relating to execution of the Small Cause Court decree and arising between the defendants who were the decree holders in that suit and the plaintiffs who were the representatives of the judgment-debtors.

It is lastly contended that under clause (2) of section 47 the suit should have been treated as an application in execution and dealt with as such. Under section 38, Civil Procedure Code, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. The Trial Court not being the Court to which the decree was sent by the Small Cause Court for execution, this section prevents it from proceeding with the suit as a matter in execution and executing the decree.

The appeal fails and is dismissed with costs.

The lower Appellate Court has ordered costs in the lower Courts to be borne as incurred and in the particular circumstances of this case I am not inclined to interfere with the exercise of its discretion. The cross-objection is, therefore, dismissed. I make no order as to costs.

G. R. D.

Appeal and cross-objection dismissed.

(1) 54 Ind. Cas. 203; 43 M. 107; (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32 (F. B.).

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 72 OF 1920.

March 13, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Macgregor.

THE CHETTY FIRM OF S. R. M. S. ARUNACHELLAM CHETTY—APPELLANTS

versus

KO PO YAN AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 178—Documents of title—Railway Receipts, negotiability of Transfer of Property Act (IV of 1882), s. 137, scope of.

ARUNACHALAM CHETTY v. PO. KO. YAN.

Railway Receipts are "Mercantile Documents of Title to Goods" within the meaning of section 178 of the Contract Act, but they are not by law negotiable; in order to give them the attribute of negotiability, it must be established by the custom of merchants that they are treated as negotiable in the particular trade and at the particular place where the claim to negotiability is advanced. From the mere fact that they have acquired the attribute of negotiability in one City in a particular trade, it does not follow that they are invested with that attribute in another City in an altogether different trade. [p. 697, cols. 1 & 2.]

Section 137 of the Transfer of Property Act merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made. In order that such a transfer should, in the case of Railway Receipts, have the effect of transferring the ownership of the goods, it must be established that they are negotiable. They are not negotiable by law, nor are they rendered negotiable by section 137 of the Transfer of Property Act. [p. 698, col. 1.]

Ramdas Vithaldas Durbar v. *Amerchand & Co.*, 35 Ind. Cas. 954; 40 B. 630; 20 C. W. N. 1182; (1916) 2 M. W. N. 110; 18 Bom L. R. 670; 20 M. L. T. 194; 31 M. L. J. 541; 4 L. W. 342; 14 A. L. J. 1045; 24 C. L. J. 320; 85 L. J. P. C. 214; 32 T. L. R. 594; 43 I. A. 164 (P. C.), referred to.

Natcheappa Chetty v. *Irrawaddy Flottila Co. Ltd.*, 22 Ind. Cas. 3 1; 41 C. 670; (1914) M. W. N. 162; 18 C. W. N. 457; 12 A. L. J. 21 : 15 M. L. T. 193; 7 Bur. L. T. 40; 19 C. L. J. 265; 16 Bom. L. R. 298 (P. C.), relied on.

Appeal against the judgment of Mr. Justice Maung Kin, on the Original Side.

Mr. *N. M Oowasjee*, for the Appellants.

Messrs. *Young* and *Leach*, for Respondents Nos. 3 and 4.

JUDGMENT.—The facts of this case are practically undisputed. The 2nd defendant, Kyaung Taik, had received from time to time large sums of money from the 3rd defendants, the London-Rangoon Trading Company, Limited, for the purpose of buying paddy for them. He was still owing them over Rs. 13,000 which he had to make good by the supply of paddy. They agreed to take paddy from him at the rate of Rs. 160 per 100 baskets. He went to Mandalay and there made arrangements with the 1st defendant, Po Yan, telling him that if he would buy paddy for him he would sell it to the London-Rangoon Trading Company, Limited, who were paying Rs. 160. Po Yan had no capital and he arranged with the plaintiffs, the Chetty firm, that they should finance his purchases, assigning to them the Railway Receipts for all paddy dispatched, as collateral security for *hundis* that were to be executed.

It is perfectly clear that the plaintiffs were fully aware of the arrangements come to. Po Yan bought paddy and consigned it to the London-Rangoon Trading Company, Limited, to be delivered at their Patheinnyun Mill siding. For each dispatch a *hundi* was drawn by Po Yan on Kyaung Taik and the *hundi* was sent by the plaintiffs to their Rangoon branch for acceptance and collection, together with the Railway Receipt relating to that consignment assigned by Po Yan, the consignor, to them. When each consignment was loaded in trucks and the Railway Receipt issued, Po Yan, taking with him his vendors or their brokers, went to the Chetty who advanced the price and then took the *hundis* and the Railway Receipts. The paddy was carried by the Railway Company, the 4th defendants, and delivered at the 3rd defendants' mill siding where it was immediately unloaded by Kyaung Taik's men. After the paddy had been inspected and passed, it was taken over by the 3rd defendants. Delivery was given by the Railway Company without production of the Railway Receipt. This was in accordance with the standing arrangement between the Railway Company and the 3rd defendants, the Railway Receipts being collected weekly and submitted together with the freight due.

It is not denied that the plaintiff Chetty gave no notice either to the 3rd defendants or to the Railway Company that the Railway Receipts had been assigned to him for value specifically applied to the purchase of the paddy. All the paddy was delivered between the 20th and 23rd of November 1918.

The plaintiff Chetty on learning that his Rangoon branch could not find Kyaung Taik, came down to Rangoon on the 25th, that is, after delivery had been given and taken, Kyaung Taik then accepted the *hundis* but he did not meet them. Subsequently, as he could not obtain payment from either Po Yan or Kyaung Taik, the Chetty brought the present suit in which he claims a decree against the 1st and 2nd defendants for the amount due to him on the *hundis*: he asks for a declaration that he had a valid charge

and lien for the amount so found due on the paddy covered by the Railway Receipts, and further for a decree that the 4th defendants, or in the alternative the 3rd defendants, should hand over the paddy to him or pay its value to the extent of the amount found due from the 1st and 2nd defendants.

The 1st defendant confessed judgment. The 2nd defendant did not defend the suit though he appeared as a witness for the 3rd defendants. The 3rd defendant Company pleaded that they had a contract with the 2nd defendant to supply them 12,000 baskets of paddy at Rs. 160 per 100 baskets, and as the 2nd defendant owed them Rs. 13,500, it was agreed that the price of paddy delivered under this contract should be set off against the previous amount due. They admit receipt of the paddy; they allege that they paid for it by writing off Rs. 5,600 against the previous debt and paying Rs. 774 1-0 in cash; they allege they received the paddy from the 2nd defendant and that they had no knowledge that the paddy belonged to any other person, or that any third party had any interest whatever in the paddy or its value; they urge that it was the bounden duty of the plaintiff to have informed them immediately and plaintiffs' failure to do so absolves them from all liability.

The Railway Company deny that the plaintiff has any lien on the paddy; that they gave delivery in ignorance of the alleged claim and deny that plaintiff was entitled to any relief against them.

There can be no doubt, on the evidence in this case and on the documents that were executed, that Po Yan purchased the paddy for and on behalf of the 2nd defendant. He bought it under an arrangement by which it was agreed that the paddy should be consigned to the 3rd defendants at their mill siding. He purchased it with the knowledge and on the understanding that it should eventually be sold to the 3rd defendants. The plaintiff was also fully aware of these facts. He knew exactly when the paddy was dispatched, and he knew, or must be presumed to have known, that the paddy would not be kept lying about in waggons but that it would be unloaded without delay.

So far as the Railway Company was concerned, he knew that if they delivered the paddy to the consignee they would be merely carrying out completely the contract that they had entered into with the consignor.

The plaintiff must, therefore, have been aware that the 3rd defendants would take delivery of the paddy in due course without delay, that the paddy was consigned to them and that they would have no reason to suppose that there were any other claims against this paddy if he did not give them notice of the assignment of the Railway Receipts to him. Knowing all this he appears to have taken the most leisurely action and made no attempt to give any such notice to either the Railway Company or the 3rd defendants. Under ordinary circumstances, therefore, he could have no claim as against either the 3rd or the 4th defendants unless the Railway Receipts were documents that were negotiable and transfer property in the goods by assignment merely. It is on this point that the appellant mainly bases his appeal.

The argument is that Railway Receipts are documents of title to goods within the meaning of section 178 of the Indian Contract Act and that, therefore, a valid pledge of such documents might be made. Leaving aside the question whether the pawnee, in this instance, can be said to have acted with ordinary care in a manner that a careful man of business would act, the argument is based on the provisions of sections 4 and 137 of the Transfer of Property Act, but for the provisions of section 137 such a document would have required to be transferred by an assignment in writing, coupled with notice to the holder of goods.

Section 137 lays down that in respect of certain specific documents or instruments which are for the time being by law or custom negotiable, and also in respect to any mercantile document of title to goods, those provisions should not apply.

To the section is appended an explanation which is a definition of the expression "Mercantile Document of Title to Goods." It lays down that this expression includes, amongst other things, Railway Receipts and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize either by endorsement or by

delivery, the possessor of the document to transfer or receive goods thereby represented. The section does not purport to go beyond providing that documents that fall within the scope of its terms shall not be subject to the special requirements of Chapter 8 as regards transfers of actionable claims.

Now, it may be admitted that Railway Receipts are "Mercantile Documents of Title to Goods," but they are documents which are not by law negotiable, and in order that they should be given the attribute of negotiability, it must be established that by custom they are treated as negotiable in the particular trade and at the particular place where the claim to negotiability is advanced.

In paragraph 967 of Halsbury's "Laws of England," Volume II, page 565, it is said: "There remain, however, always the same prime requirements with which an instrument must comply before it can be accorded negotiability. One of these requirements is the form of the instrument itself, the other the custom of trade in regard to it....."

Great reliance was placed on the decision of their Lordships of the Privy Council in the case of *Ramdas Vithaldas Durbar* v. *Amerchand & Co.* (1). That was a case dealing with Railway Receipts as used in connection with the cotton trade in Bombay. The case dealt with the right of stoppage *in transitu*. The High Court of Bombay in dealing with section 137 of the Transfer of Property Act had called attention to the significance of the division into two classes of Mercantile Documents of Title mentioned in section 137; Bills of Lading stand apart in that "the purchaser who takes the Bill of Lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship in requiring him to attorn to his rights," and the learned author from whom the quotation is made goes on to say: "but when the goods are on land, there is no reason why the person who received a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the Bill of Lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."

They held that the enactment of section 137 put an end to the question, but on the case coming up on appeal before their Lordships of the Privy Council, they held that on the evidence that had been given in that case, the custom of merchants in the cotton trade at Bombay in respect of Railway Receipts had been established and that that custom accorded negotiability to these documents, and their Lordships go on to say: "It is, therefore, unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act No 2 of 1900 would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are 'documents showing title to goods' within sections 102 and 108 and 'documents of title to goods' within section 178 of the Indian Contract Act"

To my mind it is clear that their Lordships of the Privy Council did not regard the matter as so certain and clear as the Appellate Court in that case had considered; or, otherwise, they would have decided the case on that ground also. It is not necessary to go so far as to say that their judgment indicates grave doubt as to the result of section 137, but the authority does not help us to a decision in this case, for in the case before us no evidence has been led to show that by the ordinary course of business these documents have acquired the attribute of negotiability in Rangoon. They have in Bombay in the cotton trade, but it does not follow from that that they have in Rangoon in the paddy trade.

There are remarks, however, in their Lordships' judgment which are of great assistance. They say: "In the first place it is to be observed that 'title' in both expressions, (Instrument of title, Document of title) can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing

(1) 35 Ind. Cas. 354; 40 B 630; 20 C. W. N. 1182; (1916) 2 M W. N. 10. 18 Bom L. R. 670, 20 M. L. T. 194; 31 M. L. J. 541; 4 L. W. 34; 14 A. L. J. 1015; 24 C. L. J. 320; 85 L. J. P. C. 214; 32 T. L. R. 594; 43 I. A. 164 (P. C.).

to do with ownership. A Bill of Lading may in this sense be an instrument or document conferring title, but, if so, the same is true of all the other documents contained in the genus 'document of title.' The fact that a document confers title in this sense cannot, therefore, be used as the distinguishing mark of a particular species of the genus. The truth is that the only point in which a Bill of Lading differs from other 'documents of title' is that its assignment, whether upon a re-sale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The appellant's Counsel was unable to mention, and their Lordships are not aware of any other document with this peculiarity....."

A Bill of Lading transferred by endorsement and delivery transfers ownership of the goods; no other documents, though they may be "documents of title" to goods, can transfer by mere assignment and delivery, the ownership of the goods though they may transfer the right to receive the goods.

In my view, therefore, section 137 merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made. In order that such a transfer should have, in the case of Railway Receipts, the effect of transferring the ownership of the goods, it must be established that they are negotiable. They are not negotiable by law; they are not rendered negotiable by section 137 of the Transfer of Property Act, and there has been no attempt to prove in this case that they are negotiable by the custom of merchants in Rangoon.

There is, I think, authority for this view in the case of *Natchappa Chetty* v. *Irrawaddy Flotilla Co. Ltd.* (2). Their Lordships of the Privy Council were dealing with a very similar claim to the present one. That was based on a Mate's Receipt, which is practically the equivalent, in the Irrawaddy Flotilla Company's business, of the Railway Receipt in the Railway Company's business. Their Lordships said after quoting section 137: "Their Lordships are of opinion that this document was not a negotiable document in the sense of this section of the Statute. It was not a document of title. There was no authority by law to give to an assignee by transfer of that document any right as against the shipowner except upon the usual form of an assignment as between the shipper and his assignee. That usual form must be accompanied by notice to the shipowner which charges him with the fact of the assignment, and makes him responsible to the assignee instead of the original shipper. There is great difficulty in cases of this kind, in avoiding being misled by terminology. Each of the categories attempted has failed. The document is not a Bill of Lading, not a Mate's Receipt, and not a statutory negotiable instrument. The simple fact remains that this is a document which charges the respondents with receipt of certain goods from Chowdhry, under a bargain to convey them by ship to Rangoon for a stipulated freight and on certain conditions, and the duty arising from it was to deliver the goods to Chowdhry or to his nominee at Rangoon. In complete compliance with that duty the goods so placed in the possession of the shipowner for carriage were duly delivered.

"In these circumstances their Lordships see no reason to doubt that the judgment reached in the Court appealed from is correct. It is a simple ordinary receipt for goods. Why should these goods not be delivered to the person who is said to have handed them to the shipowner? Assuming the 'Mate's receipt,' as it is called, to have been lost, was the owner of the goods, who then handed them to the shipowner, not to be entitled because the receipt had disappeared, to possession of his own goods from the carrier whose freight he was willing to pay?

"Their Lordships are of opinion that that simple statement of the point shows that there is no legal foundation for the position that this was a document of title, and that the goods passed upon the transfer of it."

Their Lordships then dealt with the result of the clauses in the conditions which are very similar to the clauses in the Railway Receipts.

As regards the necessity for the production of the Mate's receipt before delivery, can be given; "In the opinion of their Lordships the sentences now quoted from the circular of the respondent Company merely set

(2) 22 Ind. Cas. 311; 41 C. 670; (1914) M.W.N. 163; 18 C. W. N. 457; 12 A. L. J. 211; 15 M L T. 193; 7 Bur. L.T. 40; 19 C. L. J. 265; 16 Bom. L. R. 238 (P.C.).

forth a mode in which in conducting their own business, the respondent Company would protect themselves in the course of their trade. But they cannot be founded upon by other parties as forming any part of any obligation to them restrictive of their freedom or methods of action in conducting their own affairs. As against customers they afford protection to the Irrawaddy Flotilla Company, and they give an intimation or warning that they shall not part with the goods unless Mate's Receipts are given up, or otherwise unless a guarantee be obtained. But this protection of themselves they could freely give up if satisfied of the identity and solvency of the owner or nominee of the owner who demanded the goods at the port of delivery. And it is wholly *jus tertii* for any person in the position of the appellants (who are money-lenders who had made certain trading advances to Chowdhry and make claims against him for the paddy) to plead that that clause of the shipowners' circular constitutes an obligation upon which they as outside parties are entitled to found."

Lastly, dealing with the case founded upon tort in respect of giving delivery without the production of the Mate's Receipt, their Lordships say: "It is difficult to figure it; but the thing upon which tort was founded was some failure of duty. The failure of duty apparently was this: that the Irrawaddy Flotilla Company had suspicions raised in their minds or might have had suspicions raised in their minds, as to the expediency of parting with these goods unless on production of the Mate's Receipt to Chowdhry, who himself handed them over to them, because some financiers like the appellants might have claims upon them....." They discard the argument.

It, therefore, seems to me that there is ample authority to support the opinion that I have expressed above, namely that these Railway Receipts, while they are "documents of the title" to goods within the meaning of section 178, are not also of necessity documents which *ipso facto* transfer the ownership of the goods; to do that they must be negotiable; they have not the attributes of negotiability in form and there is no proof that they have become negotiable by the custom of merchants.

As regards the Railway Company the appeal must fail, for the Railway Company entered into a contract and they have performed that contract in its entirety. The terms of their Railway Receipts do not impose on them any duty not to give delivery unless and until the Railway Receipt is produced. They have reserved to themselves in express terms the right to give delivery without the production of the Railway Receipt and they exercised that right in the present case, and it must have been known to any one who gave the matter a moment's thought not only that they would, but that they were bound to, exercise that right.

The Railway Company had the arrangement with the 3rd defendants that is mentioned earlier in this judgment, and if they were to insist on the production of Railway Receipts in every instance, the whole of the paddy trade of this Province would be dislocated. The shortage of waggons would be heavily accentuated, and there is every reason, therefore, why they should avail themselves of the right to dispense with the production of Railway Receipts, which they have reserved.

As regards the 3rd defendants, the appeal also fails. They had agreed to accept from the 2nd defendant paddy at a certain rate; paddy arrives at their mill siding consigned to them; it is taken delivery of by the 2nd defendant's servants and unloaded; they examine the paddy and accept it and pay for it; they had had no notice from anyone of any dealing with the Railway Receipts; they had no privity of contract with Po Yan; he was not their seller and no assignment by him could bind them, and certainly not without notice.

The sole ground, therefore, on which the appellant's claim could succeed as against defendants Nos. 3 and 4 would be that the Railway Receipts were documents of such a character that property in the goods had passed to the plaintiff by the assignment of the Railway Receipts. They are not negotiable instruments; they are not instruments which by transfer pass the ownership of the goods.

On every ground, therefore, in my opinion, the appeal fails as regards the 3rd and 4th defendants, and as regards the 3rd and 4th defendants it must be dismissed. We, therefore, confirm the decree of the Court below with costs throughout.

W. C. A.

Decree confirmed.

RAMASUMRAN PRASAD v. GOBIND DAS.

PATNA HIGH COURT.
SPECIAL BENCH.

FIRST CIVIL APPEAL No. 189 OF 1922.

August 1, 1922.

Present :—Sir Dawson Miller, KT., Chief Justice, Justice Sir B. K. Mullick, KT., Justice Sir Jwala Prasad, KT., Mr. Justice Coutts and Mr. Justice Das.

RAMSUMRAN PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOBIND DAS—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), *s.* 7 *cls.* (iv) *(c) and* (v) *—Alienation by widow—Gift—Reversioner's suit for possession after widow's death—Declaratory decree—Consequential relief—Unnecessary prayer for relief—Duty of Court—Interpretation of Statutes—Fiscal Act—Relief asked for necessary or unnecessary—Court-fee.*

Per *Special Bench*, (*Coutts, J.* dissenting) :—Where a plaintiff claims relief, to which he is not entitled until some decree or alienation of property which stands in his way has been avoided, or until his legal character or title, which has been called in question, has been declared by a decree of the Court, his suit is one for a declaratory decree with consequential relief and comes under clause (*iv*) *c*) of section 7 of the Court Fees Act, even though the declaration, which it is necessary for him to obtain before the further relief can be granted, has not been in terms asked for in the plaint. But where such a declaration is not necessary to enable the plaintiff to obtain possession of property or other relief for which the suit is really brought, the suit does not fall under clause (*iv*) (*c*) merely because a declaratory decree is sought. The prayer for such a decree should be treated by the Court as a mere surplusage. [p. 701, col. 2.]

Ugra Mohan Chaudhuri v. *Lachhmi Prasad Choudhuri*, 56 Ind Cas. 422; 5 P. L. J. 339; (1922) Pat. 6, relied upon.

Khetra Mohon Mohapatra v. *Ganesh Lal Pandit*, 61 Ind. Cas 565; 6 P. L. J. 101; 2 P. L. T. 607 and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*, 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C), referred to.

In a suit by a reversioner on the death of a widow to recover possession of immoveable property of her husband from her donee, it is unnecessary for the plaintiff to seek a declaration that the gift is not binding on him. And even if such an unnecessary declaration is asked for the suit comes under clause (*v*) and not under clause (*iv*) (*c*), section 7, Court Fees Act. [p. 702, col. 2; p. 703, col. 1.]

The Court is, in all cases, bound to adjudicate upon the matters in issue between the parties and it is unnecessary for the parties to pray that this should be done. [p. 701, col. 2.]

Per *Coutts, J.*—The Court Fees Act is a purely fiscal Act, and in deciding what Court-fee is payable on a plaint the question whether any relief asked for is necessary or not does not arise. [p. 703, col. 1.]

Court-fee matter in judgment delivered by the Subordinate Judge, Patna.

Mr. *S. M. Mullick*, *N. N. Sen*, *L. K. Jha*, *L. N. Singh* and *Nirsu Narain Singh*, for the Appellants.

Mr. *Sultan Ahmed*, Government Advocate, for the Respondent.

JUDGMENT.

MILLER, C. J.—This matter came before a Division Bench on a question of Court fees in an appeal preferred to this Court on behalf of the plaintiffs. The plaintiffs as the reversionary heirs of Benarsi Pershad instituted the suit to recover possession of a portion of his estate to which they were entitled as reversionary heirs on the death of his widow Jainti Kumari. The defendant claims to be in possession of the property in suit under a deed of gift executed by Jainti Kumari during her life time. She died in 1916 and the plaintiffs on endeavouring to obtain possession and to have their names entered in register D in the Land Registration Department were opposed by the defendants who set up the deed of gift executed by the widow. The plaint alleges that the plaintiffs are the next reversionary heirs of Benarsi Pershad and that the property in suit formed part of his estate, that his widow *Musammat* Jainti Kumari, after his death, came into possession by right of inheritance as a Hindu widow and that on her death the plaintiffs became entitled to possession, but that their possession was opposed by the defendants who set up a deed of gift executed by Jainti Kumari. They further plead that the deed of gift made by the widow is not legally binding on the plaintiffs and that the defendant is not entitled to retain possession. There are other allegations which it is unnecessary to refer to in detail. In the prayer portion of their plaint they claim the following reliefs :—

(1) That on consideration of the above facts the Court may be pleased to hold that the properties in dispute constitute the estate of Babu Benarsi Pershad, that the plaintiffs, as reversionary heirs of the said Babu, are entitled to get possession of the properties in dispute since the death of *Musammat* Jainti Kumari, that it is illegal on the part of the defendant not to give up possession of the properties, and that the defendant's possession is quite illegal and wrongful.

(2) That on adjudication of the above points a decree may be passed in favour of the plaintiffs in respect of the properties in dispute by dispossessing the defendant or such person as may be found in possession at the time of delivery of possession.

With their plaint the plaintiffs deposited a Court-fee upon a valuation of 10 times the Government revenue, treating it as a suit for possession of land under section 7 (*v*) of the Indian Court Fees Act. On appeal to this Court they again paid the fee calculated on the same basis with their memorandum of appeal, The Stamp Reporter, whose duty it is to see that the proper fee is attached to the memoradum of appeal, reported that the fee payable in such a case was that provided by section 7 (*iv*) (*c*) of the Court Fees Act, which provides for suits to obtain a declaratory decree or order where consequential relief is prayed, in which case the stamp-fee payable is an *ad valorem* fee according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If the fee is payable under clause (*iv*) and not under clause (*v*) of the section, the plaint and the memorandum of appeal were both insufficiently stamped by a sum of Rs. 1,025. The question came up before the Taxing Officer who referred it to the Taxing Judge, who held that the case fell within section 7 clause (*iv*) (*c*) of the Court Fees Act and that on the memorandum of appeal the deficit Court-fee should be paid. Upon this question his decision as to the fee payable on the memorandum of appeal is final and the deficit has been paid. The question whether the deficit payable on the plaint should be deposited before the appeal should proceed was placed before the Bench for determination. As there appeared to be some conflict of opinion between the decision in the case of *Khetra Mohon Mohapatra* v. *Ganesh Lal Pandit* (1) and the case of *Ram Sanehi Tewari* v. *Mahadeo Upadhya* decided by the Taxing Judge, Mr. Justice Roe in August 1917, First Appeal No. 242 of 1917 the Division Bench thought that the question should be heard by a Special Bench and it now comes before us for determination.

The question is, whether the present suit is one to obtain a declaratory decree where consequential relief is prayed under clause (*iv*) (*c*) of section 7, in which case the fee paid on the plaint is deficient by Rs. 1,025, or whether it is a suit for the possession of land under clause (*v*) of that section. A practice appears to have sprung up in the subordinate Courts of this Province, and possibly in other Provinces, of claiming declarations in cases where such relief is altogether unnecessary. This practise frequently gives rise to questions of some nicety as to what is the proper fee payable in such cases. In cases where such a declaration has been claimed, although it is not necessary in the particular case to enable the plaintiff to obtain possession of property or other relief for which the suit is really brought, it has sometimes been held that if he frames the suit in that way he must pay a Court fee upon a suit so framed. Further, where the plaintiff claims relief to which he is not entitled until some decree or alienation of property which stands in his way has been avoided, or until his legal character or title, which has been called in question, has been declared by a decree of the Court it has generally been held that such a suit comes under clause (*iv*) (*c*) of the section, even though the declaration which it is necessary for him to obtain before the further relief can be granted has not been in terms asked for in the plaint. In the present case the plaintiff asks for an adjudication upon certain points and for a decree in his favour for delivery of possession by dispossessing the defendant. He does not in terms ask the Court for any declaration either as to his legal character or title or as to the invalidity of the gift in favour of the defendant. The Court is in all cases bound to adjudicate upon the matters in issue between the parties and it is unnecessary for the plaintiff to pray that this should be done. The real relief which the plaintiff seeks is delivery of possession of the property by dispossession of the defendant, and if he asks for a decree in those terms when he is not bound first to ask for a declaration before such relief can be granted I do not think that, merely because he ask the Court to adjudicate upon the matters in issue, the suit should be treated as a suit to obtain a declaratory

(1) 61 Ind. Cas. 535; 3 P. L. J. 101; 2 P. L. T. 607.

decree with consequential relief. The real question for determination appears to me to be whether or not the plaintiff can obtain in the present suit a decree for possession without first seeking a declaration that the gift to the defendant by Jainti Kumari is not binding. If a gift in such circumstances is binding as against the reversioner until it is set aside by the decree of the Court then it is, in my opinion, essential that he should first ask for a declaration setting it aside. This question appears to me to be governed by the decision of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2) where it was decided in a suit by a reversioner on the death of a Hindu widow to recover immoveable property of her husband, of which the widow had granted a lease for a term extending beyond her own life, that the reversioner might at his option affirm the alienation or treat it as a nullity without the intervention of any Court, there being nothing to set aside or cancel as a condition precedent to the heir's right to recover the property. In that case the plaintiffs had in fact by their plaint prayed for a declaration that the lease was inoperative as against them and further asked for delivery of possession. It was held, however, that it was not necessary for them to claim a declaration and that they might merely have claimed possession leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on for showing that the lease or any derivative dealings with the property were not in fact voidable but were binding on the reversionary heirs. Their Lordships accordingly held that Art. 91 of the Limitation Act which limits to three years the period for bringing a suit to cancel or set aside an instrument was no bar to a suit for possession after the three years had expired.

It follows, therefore, that in the present case there was no necessity for the plaintiff to seek a declaration that the gift was not binding as a necessary preliminary to his right to recover possession nor did he in fact do so. I can see no reason why the wording of the prayer portion of the claim which asks the Court to consider and adjudicate upon the matters alleged in the plaint and then grant a decree for possession should be interpreted as asking for a declaratory decree. The Court was bound to determine the questions in issue and the plaintiff was not bound to seek a declaration in the form of a decree. The only decree asked for was one for possession after dispossessing the defendant and the rest of the prayer was merely unnecessary surplusage which I regret to say is so often a distinctive feature of the pleadings which come before us.

The cases of *Ugra Mohan Chaudhuri* v. *Lachhmi Prasad Chaudhuri* (3) and *Khetra Mohon Mohapatra* v. *Ganesh Lal Pandit* (1) were relied upon by the learned Government Advocate who appeared on behalf of the Board of Revenue. In the former case the plaintiffs' claim to recover a large estate depended upon the validity of his adoption which had been distinctly challenged and he brought the suit to establish his status as an adopted son as well as to recover the estate. It was, therefore, held that the suit was one for a declaratory decree with consequential relief. In the second case the plaintiff asked in terms for a declaration that she was the sole heir of her father and that the defendants who claimed under a transfer from her mother when in possession of the estate as a Hindu widow had no right to the properties in suit. Even if such a declaration was not necessary the plaintiff asked for it and it was competent to her to do so. The fee in both cases was held to fall under section 7 (*iv*) (*c*) of the Act. Those cases, however, do not afford any authority for the proposition that where a declaration is neither necessary nor in terms asked for the suit should be treated as one coming under clause (*iv*) (*c*) of the section.

It was further argued that as the Deputy Collector had refused to enter the plaintiff's name in the register he was bound to seek a declaration of his title. I am unable to follow this argument. The title of the plaintiff in no way depended upon the act of the Deputy Collector nor was anything done by that officer an obstacle which

(2) 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 828; 34 I. A. 87 (P. C.).

(3) 56 Ind. Cas. 422; 5 P. L. J. 339; (1922) Pat. 6.

required to be removed before the plaintiff could assert his title and claim possession. In my opinion the fee paid on the plaint was the proper fee and the case came within clause (*v*) and not clause (*iv*) (*c*) of the 7th section of the Court Fees Act. The plaint was properly stamped and the appeal should be allowed to proceed.

MULLICK, J.—I agree.

JWALA PRASAD, J.—I agree with the order proposed by my Lord the Chief Justice.

COUTTS, J.—I regret I am unable to agree with my Lord the Chief Justice and my learned brothers.

As I read the plaint, the suit is one for a declaratory decree with a consequential relief, and this being so, the Court-fee is payable under section 7 (*iv*) (*c*) of the Court Fees Act. The Court Fees Act is a purely fiscal Act, and in deciding what Court-fee is payable on a plaint, the question of whether any relief asked for is necessary or not does not, in my opinion, arise.

DAS, J.—I agree with the order proposed by my Lord the Chief Justice.

S. D. *Order accordingly.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 171 OF 1921.

October 14, 1921.

Present:—Mr. Justice Kumaraswami Sastri.

INAGANTI VENKATARAMA ROW—PETITIONER

versus

U. R. R. D. K. VENKATALINGAMA NAYANIM BAHADUR VARU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17, O. XXII, r. 3—Amendment of plaint by deceased plaintiff's legal representative—Limits of amendment—Conflict of interests—Proper course for legal representative.

It is not open to the legal representative of a deceased plaintiff to assert any individual and hostile rights which he may have against the deceased plaintiff and those claiming through or under him and to seek to enforce those individual and paramount rights under the guise of an application to amend the plaint. [p 705, col. 1.]

All that he can do is to take up the suit at the stage at which it was left by the deceased plaintiff and to continue the proceedings as legal representative. [p 705, col. .]

The limits to amendment should be determined by the consideration whether it would have been granted if the deceased had made the application [p 705, cols. 1 & 2.]

The power to grant amendment is subject to the rule that the subject-matter of a suit cannot be changed by means of amendment nor can one distinct cause of action be substituted for another. [p. 705, col. 1]

Therefore, the legal representative of a plaintiff who dies cannot be allowed to so amend the plaint as to convert a suit of one nature into one of another nature simply because he has in law the right to repudiate the transactions of the deceased as not binding on the estate to which he has succeeded. [p. 705, col. 2.]

In cases where there is a conflict of interests between the deceased plaintiff and his legal representative the proper course is for the latter to file a separate suit to enforce his rights. And it is not open to him in his capacity as legal representative to repudiate the transactions which have been admitted by the deceased to be valid and on the footing of the validity of which the deceased lodged his claim [p. 706, col. 1]

Subbaraya Mudali v. *Manika Mudali*, 19 M. 345, 6 Ind. Dec. N. S. 986, *Umrao Begum* v *Irshad Husain*, 21 C. 997, 21 I A. 163; 6 Sar P C J. 469; Rafique & Jackson's P. C. No. 135; 10 Ind Dec. (N. S.) 298 (P.C. , *Sarat Chandra Banerjee* v *Nani Mohan Banerjee*, 3 Ind Cas. 955; 36 C. 789, *Sham Chand* v. *Bhayaram Pandey*, 22 C. 92; 11 Ind. Dec. (N. S.) 64 and *Rustomji* v. *Sheth Purshotamdas*, 25 B. 606, 3 Bom. L. R. 327, referred to.

Bal Kishan Lal v *Topeswar Singh*, 14 Ind. Cas. 845; 17 C. W. N. 219; 15 C. L J. 446, *Skinner* v *Naunihal Singh*, 19 Ind. Cas. 267; 35 A. 211 at p. 214; (1913) M. W. N. 600; 13 M. L. T 488; 11 A. L. J. 494; 17 C. L J. 555; 15 Rom. L. R. 502; 17 C. W N. 853; 25 M. L J. 11 ; 40 I A. 105 (P C.), *Rai Charan Mandal* v. *Biswa Nath Mandal*, 26 Ind. Cas. 410; 20 C. L J. 10 , *Sangili* v *Mookan*, 16 M. 350; 3 M. L. J. 137; 5 Ind Dec (N. S.) 951, *Sakharam Mahadev* v. *Hari Krishna Dange*, 6 B 113; 3 Ind Dec. N S. 533 and *Ma Shwe Mya* v. *Maung Hnaung*, 63 Ind. Cas. 914; (1921) M. W. N. 396; 4 U B. R (1921) 30; 20 M. L. T. 28; 48 C. 832; 24 Bom. L. R. 682 (P. C.), distinguished.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 18th December 1920, of the Court of the Subordinate Judge, Chittoor, in Civil Miscellaneous Petition No. 267 of 1920, in Original Suit No. 5 of 1918.

FACTS appear from the judgment.

Messrs. *A. Krishnaswamy Iyer*, for the Appellant.—The lower Court should not have granted

the legal representative's application for amendment of plaint. The amendment asked for has practically the effect of converting the deceased plaintiff's suit into a suit of a different and inconsistent character. The plaintiff's representative disaffirms and repudiates the transactions entered into by the deceased. The test is, would the amendment have been allowed if the original plaintiff had asked for it? The only remedy for the representative lay in a separate suit. He cannot continue the suit on amendments contradictory to those alleged in the plaint. He can only continue the proceedings. That is the gist of O. XXII, r. 3, Civil Procedure Code. See *Subbaraya Mudali* v. *Manika Mudali* (1), *Umrao Begum* v. *Irshad Husain* (2), *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee* (3), *Sham Chand* v. *Bhayaram Panday* (4).

Messrs. *L. A. Govindaragava Iyer*, for the Respondent.—The amendment was well within the powers of the Court. If the legal representative is entitled to the reliefs claimed by him in his proposed application there is no use driving him to a regular suit. It is the declared policy of the Legislature to avoid multiplicity of suits. The Code of 1908 gives wider powers of amendment than the Code of 1882. See *Bal Kishan Lal* v. *Topeswar Singh* (5), *Skinner* v. *Naunihal Singh* (6), *Rai Charan Mandal* v. *Biswa Nath Mandal* (7), *Sangili* v. *Mookan* (8) and *Sakharam Mahadev* v. *Hari Krishna Dange* (9).

Mr. *A. Krishnaswami Iyer* in reply:—The cases cited by the other side can all be distinguished. In those cases the materials necessary for granting the reliefs were all found. They do not derogate from the salutory rule that new causes of action should not be introduced or hostile rights set up under the guise of amendment applications.

JUDGMENT.—This petition arises out of an application made by the legal representative of the deceased plaintiff to amend the plaint as originally filed. The suit was filed by the Rajah of Kalahasti against the defendants on a mortgage executed by him. As the Rajah of Kalahasti, before he succeeded to the Zemindari, had lent a lakh of rupees to the previous Rajah on the mortgage of certain villages, he filed a suit in two capacities. He described himself as the first plaintiff in his individual capacity and as the second plaintiff in his capacity as the Rajah of Kalahasti. As the transaction according to him took the form of an absolute sale-deed with a promise to re-convey and as only a sum of Rs. 84,000 out of the consideration was admitted by him, the reliefs he claimed were a decree for redemption after payment of Rs. 84,000 and for possession or in the alternative, if the transaction be held to be a sale and not a mortgage, for the recovery of Rs. 2,79,045 or such other sum as may be found by the Court to be due as unpaid purchase-money. Various defences were put in which it is unnecessary to consider for the purpose of this petition.

The plaintiff died pending the suit and his successor to the Zemindari applied to be brought on record as legal representative and was brought on record, as the third plaintiff. He also applied to amend the plaint by making allegations (1) to the effect that there was only a consideration of Rs. 23,400; (2) that, in any event, the transaction set out in the plaint, even if true, would not bind him as successor to the estate, as the moneys raised thereunder were not utilised for purposes binding on the estates; (3) that the sale alleged in the plaint for Rs. 3,00,000 odd was an improvident transaction, which caused serious loss to the estate and is not binding on him, and (4) that as the original vendee did not perform his undertaking, he is not entitled to remain in possession. The Subordinate Judge allowed the amendment and paragraphs 10 (*a*), 10(*b*), 10(*c*) and 12(*a*) are the amended paragraphs setting forth the contentions of the present Zemindar.

(1) 19 M. 345; 6 Ind. Dec. (N. S.) 946.

(2) 21 C. 997; 21 I. A. 163; 6 Sar. P. C. J. 469; Rafique & Jackson's P. C. No. 135; 10 Ind. Dec. (N. S.) 1298 (P. C.).

(3) 3 Ind. Cas. 995; 36 C. 799.

(4) 22 C. 92; 11 Ind. Dec. (N. S.) 64.

(5) 14 Ind. Cas. 845; 17 C. W. N. 219; 15 C. L. J. 446.

(6) 19 Ind Cas. 267; 35 A. 211 at p. 214; (1913) M. W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494. 17 C. L. J. 555 15 Bom L. R. 502; 17 C. W. N. 853; 25 M. L. J. 111; 40 I. A. 105 (P. C.).

(7) 26 Ind. Cas. 410; 20 C. L. J. 107.

(8) 16 M. 350; 3 M. L. J. 137; 5 Ind. Dec. (N. S.) 951.

(9) 6 B. 113; 3 Ind. Dec. (N. S.) 538.

There can be little doubt that under section 4 of the Madras Impartible Estates Act, II of 1904, the present Zamindar is entitled to question the alienations made, or debts contracted, by the deceased plaintiff if the alienations or debts were made or incurred under circumstances which would not entitle the managing member of a Hindu joint family, not being the father or grandfather of the other co-parceners, to make an alienation or incur a debt binding on the shares of the other co-parceners independently of their consent. The only question is whether he can do so in his capacity as the legal representative of the deceased plaintiff. I am of opinion that the Subordinate Judge was wrong in allowing the amendment which virtually amounts to the assertion of a title by the legal representative hostile to that person whom he purports to represent, and denying that the transaction entered into by the deceased plaintiff and on the footing of which he sued is binding on him. In cases where there is a conflict of interests between the deceased plaintiff and his legal representative and where the latter claims that he is not bound by the transaction of the deceased plaintiff, I think the proper course is for the legal representative to file a separate suit to enforce his rights, and that it is not open to the legal representative in his capacity as such to repudiate the transactions which have been admitted by the deceased to be valid and on the footing of the validity of which the deceased claimed certain reliefs in the plaint. Order XXII, r. 3, Civil Procedure Code, enacts that where the right to sue survives, the Court shall, on the application made in that behalf, cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. So that, it is clear from the above rule that all that the legal representative can do is to take up the suit at the stage at which it was left by the deceased plaintiff and to continue the proceedings as legal representative. It is not open to him to assert any individual and hostile rights which he may have against the deceased plaintiff and those claiming through or under him and to seek to enforce those individual and paramount rights under the guise of an application to amend the plaint. So far as the amendment of the plaint is concerned, it seems to me that the limits to the amendment should be determined by the consideration, whether it would have been granted, if the deceased had made the application. Within those limits, it is of course open to the legal representative to ask for amendment and the Court would, in my opinion, be justified in granting it. But where the amendment sought is one which the deceased himself could not have asked, it seems to me difficult to see how his legal representative could ask for it. It is clear that in the present case it was not open to the deceased Zemindar to question the propriety of his own alienation or to seek a declaration that the alienations made by him and which in terms are not limited to his own life-interest in the Zemindari are not binding on his successors. It is of course open to the successor of a Zemindar either to affirm an alienation made by him or to treat it as inoperative as being in excess of the powers of disposition vested in him by law. Where the legal representative disaffirms the transaction as in derogation of his individual right, it is difficult to see how the suit to redeem can be converted to a suit to question the propriety of the alienation, as against the reversioner.

In the latter case, the issues raised and the considerations involved would be wholly foreign to the issues in the suit to redeem. I can find no authority for the proposition that a suit of one nature can be converted into one of another nature simply because the legal representative has in law the right to repudiate the transactions of the deceased, as not binding on the estate to which he has succeeded.

Turning to the authorities, they seem to be clearly against the contention of the respondent. In *Subbaraya Mudali* v. *Manika Mudali* (1) it was held that the representative of a deceased plaintiff can only prosecute the cause of action as originally framed and that the defendant can raise no other defence against him, than he could have raised against the deceased plaintiff. In *Umrao Begum* v. *Irshad Husain* (2) the widow of a deceased *taluqdar* in Oudh claimed the *taluq* as against the daughter's son of the deceased. Her claim was disallowed as the grandson was held entitled to succeed under the Oudh Estates Act. The widow preferred an appeal to the Privy Council and died pending the appeal

Her daughter was brought on record as her legal representative. Though the suit was confined to the *taluq*, she claimed to bring into the controversy other property left by the last male-holder. Their Lordships of the Privy Council were of opinion that she could not do so, and that the revived appeal should be confined to the questions raised between the original parties as to the *taluq*. Their Lordships observe: "The reasons for the revivor apply only to the *taluq*, and it would obviously be improper and dangerous to allow Umrao to use the position she has obtained as the substitute of Ahmadi for the purpose of advancing her personal claims. Whatever claims Umrao has against any part of the estate she must enforce by a suit on her own behalf." In *Sham Chand* v. *Bhayaram Panday* (4) it was held that a person who is in the position of a rival claimant, who is desirous of setting up a claim of his own, which is not only not dependent upon the claim of the original plaintiff, but is in conflict therewith, cannot do so as the legal representative of the deceased. In *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee* (3) Harrington, J, held that "the right to sue in O. XXII means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death."

It is argued by Mr. Govindaraghava Iyer that the powers of amendment under the Code of 1908 are much wider, than those under the Code of 1882 and that the Court should allow an amendment which would prevent a multiplicity of suits. So far as the power to grant amendments is concerned, it is subject to the rule that you cannot substitute one distinct cause of action for another or change by means of amendment the subject-matter of the suit. In *Ma Shwe Mya* v. *Maung Mo Hnaung* (10) their Lordships of the Privy Council observe: "All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit." After referring to section 153 of the Code and r. 17 of O. VI, their Lordships state that to allow an amendment, whereby another and independent contract was set up when the original contract was negatived would be going outside the provisions of the Code.

Reliance was placed by Mr. Govindaraghava Iyer on *Bal Kishan Lal* v. *Toreswar Singh* (5) where an infant plaintiff sued to set aside a mortgage-decree as not binding on him and it was found that the mortgage was executed for necessity, the Court allowed him to redeem. The learned Judges were of opinion that as all the materials necessary to grant a prayer for redemption were found and as the plaintiff can obtain the relief in a separate suit, "it would manifestly not be in the interest of either party to the litigation to allow the possibility of a fresh suit". In the present case, the materials necessary to support the claim of the legal representative, to disaffirm the mortgage and sale sued on, would not ordinarily be necessary to be proved on the claim as originally made by the deceased plaintiff and it will be introducing contentions entirely foreign to the original claim to allow the amendment. *Skinner* v. *Naunihal Singh* (6) was a case where the plaintiff claimed full proprietary possession free from all mortgages or other burdens granted by his predecessor. The suit was dismissed by the High Court which reversed the decision of the Sub Judge. Before the Privy Council a point was taken for the first time that the dismissal was wrong and that in any event a decree for possession ought to have been passed, conditional on payment of mortgages and charges created by the predecessor in-title. Their Lordships of the Privy Council stated that they experienced considerable difficulty in permitting the alternative case raised to be the ground of judgment but observed: "It is only because, in this view, it may be possible, out of a large wreckage of procedure, to construct the material for a just decision of the true rights of the parties, and because upon the whole this may be in the parties' own best interests, that their Lordships refrain simpliciter sustaining the appeals and

(10) 63 Ind. Cas. 914; (1921) M. W. N. 396; 4 U. B. R. (1921) 20; 30 M. L. T. 28; 48 C. 832; 24 Bom. L. R. 682 (P. C.).

dismissing the suits". This is no authority for the proposition that as a general rule a legal representative can be allowed in that capacity to set up his individual rights and disaffirm transactions on which the deceased based his right to claim the reliefs sought.

The principle that Courts may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions referred to by Mookerjee, J., in *Rai Charan Mandal* v. *Biswa Nath Mandal* (7) has no application to cases like the present, where the death of a party creates rights on his legal representatives to question the validity of transaction entered into by the deceased. *Sangili* v. *Mookan* (8) and *Sakharam Mahadeo* v. *Hari Krishna Dange* (9) were cases where a co-parcener died pending appeal in a suit for partition and all that was held was that the plaintiff was entitled to a decree for a larger share as it had increased by the death of a co-parcener. In *Rustomji* v. *Sheth Purshotamdas* (11) the father was the plaintiff and the son one of the defendants. The plaintiff died pending the appeal and the son was as his representative, the sole plaintiff. It was held under the peculiar circumstances of the case he can only get such relief as would have been possible, had he occupied that position at the institution of the suit.

I set aside the order allowing the amendment of the plaint with costs in this and the lower Court.

M. C. P. *Petition allowed.*

(11) 25 B. 606; 3 Bom. L. R. 227.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 542 OF 1921.

July 7, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

SIBANAND MISRA AND OTHERS—DEFENDANTS—APPELLANTS,

versus

Babu JAGMOHAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Subrogation—Purchaser of equity of redemption paying off incumbrances—Subrogation, right to, on sale being set aside—Suit to enforce security—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 132, applicability of—Subrogation—Reimbursement, right of—Distinction.

The right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound. It cannot be claimed by a mortgagor or any other person who has assumed the payment of the mortgage-debt without having any interest to protect. [p. 708, col. 2]

However, a purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property becomes entitled to the benefit of the securities when the purchase is afterwards set aside. [p. 708, col. 2.]

Moulvie Mahomed Shumsool Hooda v. *Shewukram*, 22 W. R. 409; 14 B. L. R. 226; 2 I. A. 7; 3 Sar. P. C. J. 405 (P. C.) and *Syamalarayudu* v. *Subbarayudu*, 21 M. 143; 7 Ind. Dec. (N. S.) 457, followed.

A suit seeking to enforce such securities is governed by Art. 132, Schedule I, to the Limitation Act and must be brought within 12 years from the date of the mortgage. [p. 711, col. 1.]

Subrogation is, in most cases, rather an additional remedy than an additional right and may exist concurrently with and as a further security to the right to a simple action for reimbursement. [p. 710, col. 1.]

Pomeroy's Equity Jurisprudence, Vol. V, p. 5183, referred to.

Mahomed Ibrahim Hossein Khan v. *Ambika Pershad Singh*, 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.), followed.

The right to reimburse arises on a contract, express or implied, to reimburse and the party who claims the right enforces it in his own right and not in the right of another. Consequently, the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person who, not being primarily liable to discharge an obligation, does discharge it and it is a right to demand the performance of the original obligation and the application thereto of all the securities held by the creditor. [p. 709, col. 2; p. 710, col. 1.]

The right to reimbursement accrues to the person paying off a debt on the date on which he pays it off, while the right to enforce a security arises from the date of mortgage. [p. 702, col. 2.]

A second mortgagee paying off a prior mortgagee neither "acquires" a charge on the property nor does he acquire it on the date on which he pays off the prior mortgagee. The charge is already there; all that he acquires is a right to enforce the charge and to a cession in his favour of the securities held by the prior mortgagee. [p. 709, col. 2.]

Appeal from a decision of the Subordinate Judge, Gaya.

Messrs. *L. N. Singh*, *B. Saran*, R. B., and *Bhagwan Prasad*, for the Appellants.

Messrs. *Shivesar Dayal*, for the Respondents.

SIBANAND MISRA *v.* JAGMOHAN LAL.

JUDGMENT.

DAS, J.—The material facts are these: On the 13th December 1904 the defendants Nos. 1 to 5 (who will be referred to as the defendants throughout this judgment) borrowed a sum of money from *Musammat* Chandra Badan Koer and executed a mortgage bond in her favour, the due date of the payment fixed in the mortgage bond being the 29th May 1905. Thereafter the defendants executed three successive mortgages in favour of the plaintiffs to cover the properties mortgaged to *Musammat* Chandra Badan Koer. The plaintiffs sued upon their mortgages and got a preliminary decree on the 28th August 1916, and a final decree on the 11th May 1917. *Musammat* Chandra Badan Koer also sued on her mortgage, and got a preliminary decree on the 2nd September 1916 and a final decree on the 2nd March 1917. In execution of the plaintiffs' decrees the mortgaged properties were put up for sale and were purchased by the plaintiffs on the 3rd January 1918. The defendants then presented an application under O. XXI, r. 90 for setting aside the sale. *Musammat* Chandra Badan Koer commenced her execution proceedings on the 16th November 1917, and the plaintiffs on the 17th April 1918 as puisne mortgagees and for their own protection paid off *Musammat* Chandra Badan Koer whose execution proceedings thereupon came to an end. It is important to remember that the discharge of the prior security by the plaintiffs took place at a time when the equity of redemption was in them, though an application for setting aside the sale was pending at the instance of the mortgagor. The application of the mortgagors for setting aside the sale in favour of the plaintiffs ended in a compromise, the mortgagors paying off the plaintiffs and the sale being set aside. On the 4th January 1919 the plaintiffs commenced this action to enforce *Musammat* Chandra Badan's security as against the defendants or in the alternative, for a personal decree as against the defendants. Their case in the plaint is a simple one. They say that on paying off *Musammat* Chandra Badan which they were obliged to do for their own protection, they were subrogated to the securities held by *Musammat* Chandra Badan and were entitled to enforce these securities as against the defendants. The Courts below have allowed the plaintiffs' claim and the defendants appeal to this Court.

Two questions have been argued before us by Mr. Lachmi Narain Singh on behalf of the appellants: First, that in the circumstances of the case, the plaintiffs are not entitled to the benefit of the security held by *Musammat* Chandra Badan; and, secondly, that in any event, the right to enforce the security is barred by limitation. The argument as to the extinction of the security rests on the settled view of equity that a person who is primarily liable to discharge the debt and does discharge it is not entitled to claim a cession or assignment of the security. It was argued that, at the time when the plaintiffs discharged the debt of Chandra Badan, the equity of redemption was in them and that they were in fact in the position of the mortgagors primarily liable to discharge the debt due to Chandra Badan. In my opinion, the argument is not entitled to succeed. I accede to the argument that the right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound, and that the right cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage debt without having any interest to protect, but I am not prepared to agree with the view that the plaintiffs, after their purchase of the equity of redemption, were in the position of the mortgagor. It must be remembered that their purchase was not left unchallenged by the defendants and that an application for setting aside the sale was actually pending. That sale was ultimately set aside, and the moment it was set aside, equity will place the plaintiffs in the same position as that which they would have occupied but for the transaction which for the time being vested the equity of redemption in them. "A purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside." [See Ghose on Mortgage, 4th Edition, Volume 1, page 349. See also *Moulvie Mahomed v. Shumsool Hooda* (V.

Shewukram (1), *Syamalarayudu* v. *Subbarayudu* (2) and the cases cited at page 34) of Ghose on Mortgage]. I am of opinion that, on paying off *Musammat* Chandar Badan and on their own purchase being set aside, the plaintiffs became entitled to the securities held by *Musammat* Chandra Badan.

On the question of limitation, however, I am of opinion that Mr. Lachmi Narain Singh's arguments ought to prevail. In order to understand the argument it is necessary to remember three important dates in the history of these transaction. *Musammat* Chandra Badan was entitled to receive the mortgage money from the defendants on the 29th May 1905, so that her cause of action to enforce the mortgage of the 13th December 1904 accrued to her on the 29th May 1905. The plaintiffs discharged the mortgage debts due to Chandra Badan on the 17th April 1918, and commenced the present action on the 4th January 1919. The argument of Mr. Lachmi Narain Singh is this: That, in so far as the plaintiffs are seeking to enforce the security of Chandra Badan, the suit is barred by limitation under Art. 132 of the Limitation Act inasmuch as they can only do so, not in their own right, but in the right of Chandra Badan. The plaintiffs, on the other hand, maintain that on paying off Chandra Badan, they acquired a right as against the defendants to be re-imbursed the money which they had paid for the benefit of the mortgagors, and, as a consequence, to a cession of the securities held by Chandra Badan, and that they acquired this right on the 17th April 1918 when they discharged the debt due to Chandra Badan. This argument receives considerable support from the decision of Banerji, J., in the case of *Bora Shib Lal* v. *Munni Lal* (3) but, with all respect, I am unable to agree with the view expressed by that learned Judge in the case cited. The argument of Banerji, J., is this: That a puisne mortgagee in paying off the prior mortgage is entitled under section 69 of the Indian Contract Act, to be reimbursed by the mortgagor the money, which he pays to the prior mortgagee. He also acquires a charge on the property which he relieves of liability on general principles and under section 74 of the Transfer of Property Act. And the conclusion at which that learned Judge arrives may be stated in his own words. "This charge he acquires not when the prior mortgage was made nor when that prior mortgage could be enforced but on the date on which he pays off the amount of the prior mortgage. The right also to be re-imbursed accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which under the decree exists on them."

Speaking with all respect, I quite agree with the view that the right to be reimbursed accrues to the person paying off the debt on the date on which he pays it off; but I wholly deny that a second mortgagee paying off a prior mortgagee "acquires" a charge on the property or that he acquires it on the date on which he pays off the prior mortgagee. The charge, in my view, was already there, all that he acquires is a right to enforce the charge and to a cession in his favour of the securities held by the prior mortgagee. Section 74 of the Transfer of Property Act, to which Mr. Justice Banerji refers, does not provide that, on paying off a prior mortgagee the subsequent mortgagee acquires a charge on the property; but it does provide that he acquires "all the rights and powers of the prior mortgagee as such". It is one thing to say that a person acquires a charge on the property; it is quite another thing to say that he acquires the rights and powers of the prior mortgagee, one of which is to enforce the charge already existing subject to the law of limitation.

In my opinion the right to re-imbursement stands on one footing; right to enforce a security by virtue of subrogation stands on another footing. The right to re-imbursement arises on a contract, express or implied, to reimburse; and the party who claims the right enforces it in his own right, and not in the right of another. Consequently, the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subroge-

(1) 22 W. R. 409; 14 B. L. R. 226; 2 I. A. 7; 3 Sar. P. C. J. 405 (P. C).
(2) 21 M. 14; 7 Ind. Dec. (N. S.) 457.
(3) 63 Ind. Cas. 604; 3 U. P. L. R. (A.) 193; 19 A. L. J. 840; 44 A. 67.

tion is a right which equity concedes to a person who, not being primarily liable to discharge an obligation, does discharge it, and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor and only because the person discharging the obligation becomes clothed with the rights and powers of the original creditor. The subrogee is an assignee in equity, and it is difficult to understand how an assignee in equity stands on a better footing than an assignee at law. If, for instance, a creditor assigns his security for valuable consideration to a person who thereupon sues upon the security, it cannot be argued that, though the right to enforce the security in the hands of the creditor may be barred by limitation, the assignee may proceed to enforce it if he brings his suit within 12 years from the date of the assignment. It may be that the right to enforce the security in his own name arises on the date of the assignment; but the limitation has already commenced to run and will not cease to operate just because the creditor has assigned the security to another person. An equitable assignee, in my opinion, stands on no better footing and can only enforce the security in the right of the creditor and, therefore, subject to the Law of Limitation that would affect the creditor. As has been pointed out, subrogation is, in most cases, rather an additional remedy than an additional right, and may exist concurrently with, and as a further security, to the right to a simple action for reimbursement, and the fact that a party entitled to reimbursement and also to subrogation is entitled to two distinct remedies, seems often to be overlooked, to the confusion of both doctrines. (See Pomeroy's Equity Jurisprudence, 5th Volume p. 5183).

That this is the right view is completely borne out by the decision of the Judicial Committee in the the case of *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (4). The facts are somewhat complicated and it is unnecessary to set all the different transactions which had to be considered by the Judicial Committee in order to enable them to decide points which do not arise here. But it is necessary to set out the following transactions.

On the 20th November 1874 certain persons who will be referred to as the mortgagors executed a *zarpeshgi* deed in favour of Girwar Singh by which they borrowed Rs. 12,000 from Girwar Singh and gave as security for the loan eight items of properties. The loan was for a period of 12 years from the date of the mortgage. On the 7th January 1888 the mortgagors executed a simple mortgage in favovr of Gajadhar for Rs. 2,500 and gave one of the properties already mortgaged to Girwar Singh as a security for the loan. On the 17th February 1888 they obtained a loan of Rs. 12,000 from *Musammat* Alfan for the express purpose of liquidating the *zarpeshgi* and executed in her favour a simple mortgage of the properties mortgaged to Girwar Singh including the property mortgaged to Gajadhar. On the 22nd September 1900, the appellants as successors-in-interest of *Musammat* Alfan commenced their suit to enforce the mortgage of the 17th February 1888, and they sought to have the benefit of the mortgage covered by the *zarpeshgi*, deed of the 20th November 1874, and they claimed priority to the various mortgages executed by the mortgagors between the date of the *zarpeshgi* and the mortgage of the 17th February 1888 including the mortgage in favour of Gajadhar. It was assumed that the plaintiffs by discharging the mortgage covered by the *zarpeshgi* deed were subrogated to the securities held by Girwar Singh, the first mortgagee; but the question still arose whether, having regard to the lapse of time, they were entitled to enforce those securities as against Gajadhar. If it be considered that their right to enforce the security of Girwar Singh arose on the 17th February 1888, that is to say, the date on which they discharged the mortgage debt of Girwar Singh, their suit was well within time: but the Judicial Committee came to the conclusion that the suit, in so far as it sought to enforce the security of the 20th November as against Gajadhar, was barred by limitation. In rejecting the contention advanced

(4) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.).

on behalf of the plaintiffs the Judicial Committee said as follows: "But as the Rs. 12,000 were under the *zarpeshgi* deed of the 20th of November 1874, re-payable in Jeth 1294 Fasli (September 1887), and this suit was not brought until the 22nd of September 1900, the claim of the plaintiffs to priority is barred by Art. 132 of the Second Schedule of the Indian Limitation Act, 1877." I regard the decision of the Judicial Committee as a complete answer to the arguments advanced before us on behalf of the respondents. I hold that the present suit in so far as it seeks to enforce the security of the 13th December 1904 is barred by Art. 132 of the Limitation Act.

The question still remains whether the plaintiffs' action can be regarded as a simple action for reimbursement, and I am of opinion that it can be so regarded. All the necessary facts are stated in the plaint to enable us to give the appropriate relief to the plaintiffs and they expressly ask for a personal decree against the defendants, The Courts below have concurrently found that on the 17th April 1918, the plaintiffs paid *Musammat* Chandra Badan Kuer the sum of Rs. 1,546-14-5 and thereby discharged her mortgage. This money the defendants were bound by law to pay *Musammat* Chandra Badan Kuer, and the plaintiffs were undoubtedly interested in the payment of the money. The plaintiffs are accordingly entitled to be re-imbursed by the defendants, and the action regarded as an action for re-imbursement is well within time. The plaintiffs are also entitled to interest at the rate of 2 per cent. per month from the 17th April 1918 to the date of the decree, and are also entitled to interest on the amount decreed at the rate of six per cent. per year from the date of the decree up to the date of realization.

I would allow this appeal, set aside the judgments and decrees of the Courts below and in lieu thereof give the plaintiffs a decree as against defendants Nos. 1 to 5 for Rs. 1,546-14-5 with interest as already stated. There will be no order as to costs.

COUTTS, J.—I agree.

N. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3306 OF 1917.

January 6, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

JAGIR SINGH, MINOR, THROUGH *Musammat* RAM KAUR—PLAINTIFF—APPELLANT

versus

Musammat SANTI—DEFENDANT—RESPONDENT.

Custom—Succession—Jats of Ludhiana District—Daughter-in-law, whether succeeds along with son—Riwaj-i-am, entry in, value of—Burden of proof.

Among Jats of the Ludhiana District the widow of a predeceased son succeeds to the property of her father-in-law along with the latter's surviving sons. [p. 712, col. 1]

An entry in a *riwaj-i-am*, even when unsupported by instances, is a strong piece of evidence in support of the custom which it records and is sufficient to shift the *onus* of proof on to the party which disputes the correctness of the custom laid down in the *riwaj-i-am*. [p. 712, col. 1.]

Beg v. *Allah Ditta*, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L J. 175; 44 I. A. 89 (P. C.), followed.

Second appeal from a decree of the District Judge, Ludhiana, dated the 20th August 1917, varying that of the Subordinate Judge, Second Class, Ludhiana, dated the 11th January 1917.

Mr. *Kanwar Narain*, for the Appellant.

Lala *Ganga Ram*, for the Respondent.

JUDGMENT.—Punjab Singh, a Jat of Raowal in Tahsil Jagraon in the Ludhiana District, had three sons, Rala Singh, Indar Singh and Jagindar Singh, of whom the first two died before their father. On the death of Punjab Singh in 1906 his land was mutated in favour of Jagindar Singh and the two widows of Indar Singh, *viz.*, *Musammat* Santi and *Musammat* Ram Kaur. *Musammat* Ram Kaur married Jagindar Singh, and by him had a son Jagir Singh, who has brought the present suit against *Musammat* Santi for possession of the land standing in her name, disputing her right to succeed to a share in the land left by his grandfather. The First Court gave judgment for the plaintiff, but the District Judge on appeal has dismissed the suit, holding that by custom a daughter-in-law is entitled to succeed along with a son. The plaintiff has preferred a second appeal, having obtained a certificate from the District Judge under section 41

(3) of the Punjab Courts Act, and the only question for determination is the point of custom.

The principal piece of evidence in favour of the defendant is the entry in the *riwaj-i-am* (contained in Dunnett's Customary Law of the Ludhiana District, compiled in 1911) in which it is stated in answer to question No. 32 that the heirs to the land of a deceased owner are (1) his sons subject to a right of succession by the widow and a son's widow if sonless; (2) other male lineal descendants; and (3) his widows, son's widow, and mother. According to this statement of the custom a daughter-in-law succeeds along with a son, and although no instances of such succession are mentioned, except one among Hindu Rajputs at page 53, the entry is, in accordance with the ruling of the Privy Council in *Beg* v. *Allah Ditta* (1), sufficient to throw the *onus* on to the plaintiff to prove that a daughter-in-law is excluded by a son.

The defendant's case is also supported by a judgment of Khwaja Tasadduq Hussain, dated the 9th August 1917, in the case of *Musammat Indo* versus *Supuran*. It is true that the present defendants' succession to her father-in-law's property was cited in that case as an instance in support of the custom, but the judgment was based, not on that instance alone, but on other instances as well and, in particular, on a judgment given by Lala Ram Nath in 1907.

An instance of a widow succeeding to her father-in-law's estate is also mentioned by one of the defendant's witnesses, but we do not attach much importance to it.

Some judgments are relied upon by the plaintiff, but only two are in point, *viz*, a judgment of Mr. Kensington, Divisional Judge, of the year 1898 in *Ratan Singh* versus *Musammat Bholi*, and a judgment of *Mirza* Abdul Rab in 1915 in *Partab Singh* versus *Musammat Daya Kaur*. Very little weight can be given to either of these judgments, as Mr. Gordon-Walker's Customary Law of the Ludhiana District, which was in force at the time when Mr. Kensington's judgment was given, did not provide, as the Customary Law compiled by Mr. Dunnett does, for the succession of a daughter-in law in the presence of a son, while *Mirza* Abdul Rab's judgment makes no reference to the Customary Law at all, but mentions only the instances which were adduced in evidence. No reported cases relating to the Jats of the Ludhiana District have been cited.

We are of opinion, therefore, that the *onus* which the entry in the existing *riwaj-i-am* casts on the plaintiff of proving that a daughter-in-law is excluded by a son has not been discharged, and that the lower Appellate Court's decision is correct. We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed*

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 3 0; 92 M. L. J 615; 19 Bom. L. R, 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 145-B OF 1921.

June 17, 1922.

Present:—Mr. Prideaux, A. J. C.

ABDUL RAHIM—DEFENDANT—APPELLANT

versus

Sheikh KAWADOO—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), ss. 17, 49—Kararnama virtually deed of partition, admissibility of, without registration.

A *kararnama*, which is virtually a deed of partition affecting property, valued at more than one hundred rupees, is inadmissible in evidence to prove the partition unless it is registered. [p. 714, col. 1.]

Ranjagamier v. *Ranjagam Iyyar*, 57 Ind. Cas. 18; 39 M. L. J. 82; 12 L. W. 435, *Pothi Naicken* v. *Nagama Naicker* 32 Ind. Cas. 486; 30 M. L. J. 62; 19 M. L. T. 50, 3 L. W. 115; (1916) 1 M. W. N. 79, *Thandavan* v. *Valliamma*, 15 M 336, 2 M. L. J. 180; 5 Ind. Dec. (N.S.) 586 and *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee*, 6 Ind. Cas. 346; 15 C. W. N. 875; 12 C. L. J. 25, followed.

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No 255 of 1920, dated the 26th January 1921.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *A. V. Khare*, for the Respondent.

ABDUL RAHIM v. SHEIKH KAWADOO.

JUDGMENT.—The plaint which started this suit states that in field No. 33, 29 acres 38 *gunthas* rental Rs. 31 of Mauza Basali *alias* Nagapur, Taluk Akot, Haji Mouzdarkhan *wald* Haji Delekhan held western 10 acres 0 *gunthas*, *viz.*, Sub Division No. 1, Abdul Rahiman *wald* Muhammad Hanif defendant central 5 acres 18 *gunthas* now Sub Division No. 2 and Housdarkhan *wald* Jayankhan and Biramkhan son of Nawazkhan held the eastern 14 acres now Sub Division No. 3. These shares were made as between the above co sharers on 4th July 1911 and a *kararnama* was executed to that effect between the said sharers. They have from 1911 to 1916 been cultivating in accordance with these shares. Housdarkhan died and his heir, his daughter, Habibbi, wife of Rahimatulla and daughter-in-law, Rahimti wife of Muhammad Khan and Biramkhan owners of the eastern 14 acres share sold this share to the plaintiff for Rs. 1,500 on 3rd April 1916 by a registered document. They delivered possession. Haji Mouzadarkhan son of Haji Delekhan owner of the western share of the said field sold the above share now No. 33/1, 10 acres 10 *gunthas* to the plaintiff for Rs. 2,000 on 10th June 1918 by a registered document giving possession. By his purchase the plaintiff has become owner of the whole field with the exception of 5 acres 18 *gunthas* owned by the defendant in the middle of the field and defendant has wrongfully and illegally taken possession of 3 acres and 12 *gunthas* from the plaintiff's eastern 14 acres of land and taken the produce therefrom and hence the present suit for a declaration that the defendant has no right to these 3 acres 12 *gunthas* for possession thereof. The plaintiff asks for possession of this land.

The defendant admitted that there had been three sharers in the field, *viz*, Mouzadarkhan, Biramkhan and the defendant, and that he was the owner of the middle one third share, the area of that share being 9 acres 7 *gunthas* and not 5 acres 18 *gunthas* as alleged by the plaintiff. He states that he and his predecessors before have always been in possession of 9 acres and 7 *gunthas* of land as owners. As to *kararnama*, the defendant says he remembers nothing about it though it was signed by him, he being at the time 16 years old. The document is inadmissible in evidence, for want of registration and no effect was given to it as the field was not partitioned in accordance with it and the plaintiff's predecessor was never in possession of more than 10 acres 21 *gunthas* out of 14 acres referred to by the plaintiff and the defendant took forcible possession of the land now claimed. The case went to trial on the following issues:—

i. Whether defendant was a minor when the *kararnama*, dated the 4th July 1911, was executed by him? If so, what is the effect thereof?

ii. Whether the *kararnama* is admissible in evidence though unregistered?

iii. When was the field partitioned and when was the partition given effect to?

iv. Whether plaintiff's predecessor in-title was in possession of 14 acres of land till 1916 as alleged?

v. Whether Biramkhan, Rahimbi and Habibbi executed the sale-deed, dated 3rd April 1916 in plaintiff's favour?

vi. What is the area of the land ABCD in plaintiff's map, *i.e.*, whether 3 acres 12 *gunthas*, or 3 acres 19 *gunthas*?

vii. Whether defendant and his predecessors have been in possession of the land ABCD for more than 12 years before suit?

viii. To what relief is plaintiff entitled?

The Trial Court held that at the date of the *kararnama* the defendant had attained majority. The *kararnama* was held to be a deed of partition and as such inadmissible in evidence for want of registration. It held that the plaintiff failed to establish the partition. The Record of Right shows as regards the share in dispute only 10 acres 21 *gunthas* and the plaintiff had failed to establish when defendant dispossessed him of the 3 acres 12 *gunthas* claimed in the suit. Biramkhan, Rahimbi and Habibbi were found to have executed the sale deed of 3rd April 1916 in plaintiff's favour. The area of the land in suit ABCD was found to be 3 acres 12 *gunthas* and the land claimed being in defendant's possession before the Record of Right enquiry took place. The plaintiff's suit was dismissed.

On appeal that dismissal was set aside and the plaintiff's claim decreed, the Court holding that the predecessors-in title of the plaintiff were not parties to the document. That was document between the owner of one portion of the field and the defendant and contents of this document can thus be proved as against them. The Judge finds that the evidence shows that the sharers cultivated the land separately some 17 or 18 years and that the arrangement of separate cultivation was agreed to by the defendant when he voluntarily executed the *kararnama*, Exhibit P-4. The eastern portion of the field was full of mango trees which affected the crops, therefore, the owner of that share was allotted a larger area. The claim was decreed and against that decision the present appeal has been filed.

It is clear that if the *kararnama* is not admissible in evidence the plaintiff's case fails. On the face of it, the appellant's share would be 9 acres and not 5 acres and some *gunthas*. It is not here denied that the value of the property was over Rs. 100, therefore, if the deed is one of partition registration would be necessary. There is also the question as to whether the partition was acted upon. The appellant argues on the strength of *Ranjagamier* v. *Ranjagam Iyyar* (1), *Pothi Naicken* v. *Nagama Naicker* (2), *Thandavan* v. *Valliamma* (3) and *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (4), that the *Kararnama* is inadmissible in the present case, and it seems to me that there is force in this contention. It is produced here to prove no collateral purposes. The case is based really on the *kararnama* itself and as that is virtually a deed of partition affecting the property valued at over Rs. 100 it seems to me that without registration it is inadmissible in evidence. The evidence in the case does not go to prove that it was acted on. It seems that for many years the defendant held the 9 acres odd in the field and that the execution of this *kararnama* made no difference in the area held by him. It has been here argued that the document can be admitted on the ground that it is one for specific performance of the agreement to hold the entire Survey number in particular division, the agreement being based on an adjustment or mutual promises, or, in other words, the matter was like a family settlement which was final. I am not impressed with this argument. The document itself states: "We have amicably arrived at a settlement and have got our respective land divided in the following shares." It is clearly a deed of partition and as such inadmissible. The evidence without this document does not prove the plaintiff's case.

The result is, that I allow this appeal and set aside the decree of the lower Appellate Court and restore that of the first Court. The respondent will pay the appellant's costs throughout.

W. C. A. *Appeal allowed.*

(1) 57 Ind. Cas. 18; 39 M. L. J. 382; 12 L. W. 435.
(2) 32 Ind. Cas. 486; 30 M. L. J. 62; 19 M. L. T. 50; 3 L. W. 115; (1916) 1 M. W. N. 79.
(3) 15 M. 336; 2 M. L. J. 130; 5 Ind. Dec. (N. s.) 586.
(4) 6 Ind. Cas. 346; 15 C. W. N. 375; 12 C. L. J. 25.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 221 OF 1920.

January 30, 1922.

Present:—Mr. Justice Kumaraswami Sastri.

SUBRAMANIAM CHETTY,—PETITIONER

versus

SANKARA IYER (DEAD) AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73, O. XXXVIII, r. 11—Priority of attachment, whether confers prior right—Attachment before judgment in several suits—Moneys realised before decrees—Rateable distribution.

Priority of attachment by itself confers no prior right. [p. 715, col. 1.]

Where moneys belonging to a judgment-debtor are attached before judgment in a number of suits against him by several creditors and they are realised before decree is passed in any of them, re-attachment is not necessary and the money should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtain decrees if they obtain decrees before any of the others apply for payment. [p. 715, col. 1.]

RAGHO v. SAKHARAM.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif, Thirumangalam, dated the 23rd October 1919, in Execution Appeal No. 576 of 1919, in Original Suit No. 651 of 1918.

Mr. *S. R. Suthusami Aiyar*, for the Petitioner.

Mr. *K. V. Venkatasubramania Aiyar*, for the Respondents.

JUDGMENT.—I am of opinion that the order of the District Munsif is right. The petitioner and counter-petitioners attached the moneys in the hands of the District Board Engineer and the moveables before judgment and the money was remitted by the Engineer and moveables were sold before any of them had obtained decrees. There is, therefore, no reason why the money received by the Court from the District Board Engineer and the money realised by sale should be credited to one suit rather than another. Priority of attachment by itself confers no prior right. Under r. 11, O. XXXVIII it is not necessary to re-attach, and all that is necessary is for the decree-holders to apply for payment as nothing more remains to be done but to pay out the fund in Court.

I am of opinion that in a case like the present the money realised before any of the petitioners obtained decrees should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees if they have obtained decrees before any of the others apply for payment.

The case is one of first impression and is not covered by any authority or by any provision of the Code and, giving it my best consideration, I think the proper procedure in such cases is for notice to be given to all the attaching creditors who obtained decrees and for division of the fund rateably. The petition is dismissed with costs.

M. C. P.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 210-B OF 1921.

July 14, 1922.

Present:—Mr. Kotval, A. J. C.

RAGHO—PLAINTIFF—APPELLANT

versus

SAKHARAM—DEFENDANT—RESPONDENT.

Pre-emption suit—Sale—Cause of action—Registration—Limitation, operation of—Registration Act (XVI of 1908), s. 47, application of.

A right of pre-emption arises only when a sale is completed, that is, when there is an entire cessation of right on the part of the vendor, and until a registered deed is executed there cannot be such cessation of right and no right of pre-emption can arise. [p. 716, col. 1.]

Buksha Ali v *Tofer Ali*, 20 W. R. 216, followed.

Therefore, the period of limitation for a pre-emption suit runs from the date of the registration of the sale-deed. [p. 716, col. 1.]

Section 47 of the Registration Act has no application to such a case. [p. 716, col. 1.]

Appeal from a decree of the Additional District Judge, Amraoti, dated the 18th of March 1921, in Civil Appeal No. 33 of 1921.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *S. Y. Deshmukh*, for the Respondent.

JUDGMENT.—The plaintiff's suit for pre-emption which was filed on the 7th January 1920 has been dismissed as time barred. The facts found are as follows: On the 15th January 1918 the vendors contracted with the defendant to sell to him their share in a field. The defendant took possession of the property on the same day. The sale-deed was executed on the 25th December 1918 and was registered on the 8th January 1919. On the question of limitation the lower Appellate Court writes:—

"From what date should limitation run? I think it should run from 25th December 1918, the date of sale. The possession of defendant as under the sale is from that date. This view is supported by the case in *Ram Peara* v. *Rup Lal* (1). It is futile to argue that there is no effective sale until sale-deed is registered, and, therefore, possession must refer to sale only from 8th January 1919. Section 47 of the Registration Act

(1) 48 Ind. Cas. 102; 80 P. R. 1918; 181 P. W. R. 1918.

is contrary to this view and I find, therefore, that defendant got possession on 25th December 1918 and that the suit is barred."

For a right of pre emption to arise the sale must be complete, that is, that must be an entire cessation of right on the part of the vendor. *Bukshi Ali* v. *Tofer Ali* (2). Until a registered deed is executed there cannot be such cessation of right and no right of pre-emption can arise. In fact if a suit had been brought between the dates of the execution and the registration of the sale-deed it would have been liable to be defeated by a plea on the defendant's part that no right of pre emption had arisen as the sale had not been perfected, that is, that the vendor's right had not ceased and the vendee's right had not come into existence. If the defendant could defeat the plaintiff's claim as above, I do not think that he could, when it suits him, plead that the right arose at the date of the execution of the sale-deed. It would be inequitable to apply section 47, Registration Act, in such a case to give rise retrospectively to a right of pre-emption. Moreover, if Art. 10 is strictly construed, as a matter of fact, no possession was taken *under the sale*, and the first part of that Article would be inapplicable. As the second part is also admittedly inapplicable, Art. 120 would be the only Article governing the case. I hold that the suit is within time. As no other issue than that of limitation was raised, the plaintiff's claim is decreed with costs throughout.

Let a decree be drawn up in terms of O. XX, r. 14 (1). First Schedule, Civil Procedure Code. I fix the 12th September 1922 as the day on or before which the purchase-money shall be paid into Court.

N. H. *Appeal allowed.*

(2) 20 W. R. 216.

LAHORE HIGH COURT,

MISCELLANEOUS FIRST CIVIL APPEAL No. 2648 OF 1921.

May 16, 1922.

Present:—Mr. Justice Martineau.

Musammat TARLOK DEVI—OBJECTOR—APPELLANT

versus

JOTI RAM AND OTHERS—CREDITORS—RESPONDENTS.

Parties—Sale in insolvency proceedings—Appeal against order confirming sale—Auction-purchaser and Official Receiver, whether necessary parties.

In an appeal from an order confirming a sale in insolvency proceedings, the auction-purchaser and the Official Receiver are necessary parties and the omission to make them parties is fatal to the appeal.

Mela Ram v. *Narain Das*, 188 P. R. 1882 and *Khaira* v. *Salem Raj*, 51 Ind. Cas. 935, referred to.

Miscellaneous first appeal from an order of the District Judge, Karnal, dated the 13th August 1921.

Bakhshi *Sohan Lal*, R. B, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the District Judge of Karnal confirming a sale effected in insolvency proceedings by the Official Receiver of the right, title and interest of the insolvent in property belonging to the joint Hindu family of which he is a member.

The auction purchasers and the Official Receiver have not been made parties in the appeal and a preliminary objection is taken that on this account the appeal cannot proceed. This objection must prevail. The persons who have purchased the property at the sale the validity of which is being contested, and the Official Receiver, who represents the insolvent's estate, are the persons principally interested and are clearly necessary parties and the omission to make them parties is fatal to the appeal. *Mela Ram* v. *Narain Das* (1) and *Khaira* v. *Salem Raj* (2) are in point so far as the case of an auction-purchaser is concerned. It is now too late to make the auction purchasers and the Official Receiver respondents as the appeal would be barred by time as against them.

The appeal is, therefore, dismissed with costs.

W. C. A. *Appeal dismissed.*

(1) 188 P. R. 1882.
(2) 51 Ind. Cas. 935.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 896 OF 1920.

August 10, 1921.

Present:— Mr. Justice Oldfield and Mr. Justice Ramesam.

VADDIPARTHI NARAYANAMURTHY—PLAINTIFF—APPELLANT

versus

CADIMSETTI APPALANARASIMHULU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 58 (d), 60, 98—Mortgage deed, construction of—Usufructuary mortgage—Condition barring redemption before and after certain date—Anomalous mortgage—Clog on equity of redemption.

The mere fact that in a usufructuary mortgage that is a condition barring redemption within five years of the date of the mortgage would not take it out of the category of usufructuary mortgage, and make it an anomalous mortgage. [p. 718, col 2]

Kandula Venkiah v. *Donga Pillayi*, 57 Ind. Cas. 724; 43 M. 589; (1920) M. W. N. 348; 28 M. L. T. 56; 13 L. W. 123 and *Perayya* v. *Venkata*, 11 M. 403; 4 Ind. Dec. (N. S.) 281, referred to.

Patte Muhammad v. *Sheikh Davood*, 30 Ind. Cas. 569; 39 M. 101 at p. 1016; 29 M. L. J. 525; 18 M. L. T. 209; (1915) M. W. N. 852, distinguished.

A condition in a usufructuary mortgage barring redemption (1) within five years, and 2 after twenty years, from the date of the mortgage amounts to a clog on the equity of redemption.

Per *Oldfield, J.*—The definition of a usufructuary mortgage in section 58 (*d*) of the Transfer of Property Act refers to payment of the mortgage-money, only in connection with the mortgagee's right to retain possession and includes nothing inconsistent with its application to mortgages, containing a condition for mere postponement of the right to re-pay. [p. 717, col. 2.]

Second appeal against a decree of the District Court, Vizagapatam, in Appeal Suit No. 277 of 1918, preferred against that of the Court of the District Munsif, Yellamanchilli, in Original Suit Nos 305 of 1917.

Mr. *Y. Suryanarayana*, for the Appellant.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The terms of Exhibit A, the mortgage we have to construe, are given in the judgment of my learned brother, which I have had the advantage of reading; they need not be repeated. Shortly, the mortgage is usufructuary with conditions barring redemption, (1) within five years, and (2) after twenty years from its date. If there were only the second of these conditions, the case would be covered by the decision of the Full Bench in *Kandula Venkiah* v. *Donga Pillayi* (1), the clog constituted by that condition on the equity of redemption being disregarded. The question is then whether, as defendants contend, the inclusion of the first condition deprives the document of its character as an usufructuary mortgage As we hold it does not do so, it is not necessary to consider whether the second condition must receive effect as one of the terms of the mortgage with regard to section 98 of the Transfer of Property Act.

If the condition postponing the re-payment of the mortgage money is regarded as intended for the benefit of the mortgagor, it will suspend only his liability to be sued, not his right to redeem before the date fixed, *vide*, *Rose Ammal* v. *Rajarathnam* (2), and it clearly cannot affect the usufructuary character of the mortgage, so as to attract the operation of section 98. Here, however, it must rather be regarded with reference to the possessory character of the mortgage, as intended for the benefit of the mortgagee. No authority directly relevant in such a case has been cited. But the language of section 62 entails that postponement of the right to redeem to a date fixed in one way, with reference to repayment of the mortgage money from the profits, is not inconsistent with the usufructuary character of the mortgage; and we have been shown no reason why such postponement to a date fixed otherwise by actual specification should be so. In fact the simplest and the sufficient ground of decision is that the definition of a usufructuary mortgage in section 58 (*d*) refers to payment of the mortgage money in connection only with the mortgagee's right to retain possession and includes nothing inconsistent with its application to mortgages, containing a condition for mere postponement of the right to re-pay.

The conclusion must, therefore, be in plaintiff's favour and he must have a decree for redemption as proposed by the District Munsif, the respondent being at liberty to

(1) 57 Ind. Cas. 724; 43 M. 589; (1920) M. W. N. 348; 28 M. L. T. 56; 13 L. W. 123.

(2) 23 M. 35; 8 Ind. Dec. (N. S.) 418.

draw the money, which we understand, is in deposit in lower Court.

The appeal is allowed with costs throughout.

RAMESAM, J.—The plaintiff is the appellant. The suit is for redemption of a mortgage (Exhibit I, dated 3rd February 1893). The District Munsif decreed the suit, but on appeal, the learned District Judge allowed the appeal and dismissed the suit. Hence this second appeal.

The portion of Exhibit I material for the purpose of this case runs as follows:—"We have borrowed from you Rs. 1,000, we have put you in possession of the 8 acres 25 cents of land comprising.....towards the yearly interest of Rs. 80 at 8 per cent, and the taxes payable to Sircar. Whatever might be the profits received from the said lands in every year they shall be taken in payment of interest aforesaid and the taxes on the land. You shall enjoy the profits from the said lands without having anything to do with the increase or decrease. You need not receive the said principal sum of Rs. 1,000 even though we should pay you the same within five years from the current year Nandana. It is settled that in case we should pay afterwards at one and the same time the said one thousand rupees on the 15th of Chitrai Sudham of any year, you should give up our land to us. If the principal sum be not paid within 20 years from this date you shall treat and enjoy these lands as having been sold to you absolutely."

The learned District Judge held that this mortgage is an anomalous mortgage as "the circumstance that an arbitrary term of five years has been fixed within which the mortgagor may not redeem is sufficient to take this mortgage out of the category of the usufructuary mortgages." It is clear that but for the special term he relies on, the mortgage would be, in his opinion, a usufructuary mortgage and I agree with him so far. The question, therefore, arises whether on account of the addition of a term providing for irredeemability within five years the mortgage ceases to be usufructuary. No authority has been cited in support of the learned Judge's view and it seems to me that the addition of other terms not inconsistent with the main feature of the transaction does not destroy its character. In my opinion, the mortgage is merely a usufructuary mortgage with a clog on the equity of redemption, *cf.* the first alternative of Spencer, J. in *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (3). I do not think there is a combination of two kinds of mortgages in this case. There is no covenant to pay as in *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (3) (according to the view of Sadasiva Aiyar, J.) and hence no simple mortgage. Nor is there a mortgage by conditional sale. The last clause which provides for an outright sale on non payment for twenty years cannot make the transaction a mortgage by conditional sale. *Vide* the observations of Sadasiva Aiyar, J, in *Srinivasa Aiyangar* v. *Radhakrishna Pillai* (3) (last seven lines) and Kumaraswamy Sastri, J. in *Patte Muhammad* v. *Sheikh Davood* (4) with which I agree. For the same reasons there is no English mortgage.

The case in *Patte Muhammad* v. *Sheikh Davood* (4) is clearly distinguishable. In that case, the essential elements of all the unmixed kinds of mortgage were wanting (see Spencer, J. at page 1012* and Kumaraswami Sastri, J. at page 1016).*

In my opinion the document is not an anomalous mortgage and the suit for redemption ought to have been decreed [see also *Kandula Venkiah* v. *Donga Pillayi* (1) and *Perayya* v. *Venkata* (5).]

In the view taken by me, the more difficult question what is the exact operation of section 98, *i. e.*, whether it should operate subject to section 60 does not arise.

The appeal will be allowed with costs throughout, I agree with the order proposed by my learned brother.

M. C. P.

N. H. *Appeal allowed.*

(3) 22 Ind. Cas. 54; 38 M. 667 at p. 669; 26 M. L. J. 47; 14 M. L. T. 547; (1914) M. W. N. 81.

(4) 30 Ind. Cas. 569; 39 M. 1010 at p. 1016; 29 M. L. J. 525; 18 M. L. T. 209; (1915) M. W. N. 852.

(5) 11 M. 403; 4 Ind. Dec. (N. s) 281.

*Pages of 39 M.—[*Ed.*]

AMBICA CHARAN SEN v. GIRISH CHANDRA SEN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1169 OF 1919.

March 16, 1921.

Present:—Justice Sir N. R. Chatterjee, KT., and Mr. Justice Suhrawardy.

AMBICA CHARAN SEN—PLAINTIFF—APPELLANT

versus

GIRISH CHANDRA SEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Rent fixed by contract, if can be raised by settlement of rent under Diara Act (XXXI of 1858)—Settlement of rent under Chap. X of the Bengal Tenancy Act (VIII of 1885), effect of—Appeal—Document, admission of—Appellate Court, duty of.

A contract contained in a *solenama* between a landlord and a tenant under which the tenant is liable to pay rent at a certain rate, cannot be affected by the settlement of rent at a different rate under the Diara Act (XXXI of 1858). But if the rent fixed under the Diara Act is also the rent settled under Chapter X of the Bengal Tenancy Act, the tenant, in spite of the contract is liable to pay the rent settled under Chapter X of the Bengal Tenancy Act. [p. 720, col. 1.]

When a document is admitted in evidence at the appellate stage and is relied upon by the Appellate Court in its judgment, it ought to record an order admitting the document in evidence and should also record its reasons for admitting it in the appellate stage. [p 720, col. 1.]

Appeal against a decree of the Sub-Judge, Second Court, Faridpur, dated the 4th of April 1919, modifying that of the Third Munsif, Bhanga, dated the 4th of August 1917.

FACTS appear from the judgment.

Babu *Sib Chandra Paulit* (with him Babu *Nani Lal Dey*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for rent. I claimed rent at the rate of Rs. 43 12·0 a year. The defence alleged that the rent payable was Rs. 5 in accordance with the terms of a *solenamah* made in a previous suit. The First Court decreed the suit in full. On appeal, however, the suit was decreed at the rate of Rs. 5 per year. The Judge held that I was bound by the *solenamah*. Now, a part of the lands in suit is Diara land, rent of which was settled at Rs. 43-12 0 under the Diara Act XXXI of 1858 which has also been recorded in the settlement record under Chapter X of the Bengal Tenancy Act. My submission is that under such circumstances I am entitled to the rent as claimed and further Rs. 5 was not a fixed rate. The Judge admitted the *solenamah* which was put in the First Court or in the proper stage of the appeal either and without recording any reasons acted upon it. I submit that is wrong. There is nothing in the order sheet or in the judgment justifying the admission of the *solenamah*.

Babu *Dwijendra Nath Mukherjee* (with him Babu *Promotha Nath Banerjee*), for the Respondents.—There are good reasons for admitting the *solenamah* into evidence which was most important for the case. They did not object to it. As regards the other point the finding of the Judge is conclusive.

Babu *Sib Chandra Paulit* replied in brief.

JUDGMENT.—This appeal arises out of a suit for rent at the rate of Rs. 43-12-0 a year. The defence was that the rent was Rs. 5. It appears that a part of the land which was held by the defendants under the plaintiff was Diara land and the rent of the Diara land was settled at Rs. 43-12 under the Diara Act XXXI of 1858.

The Court of first instance gave a decree to the plaintiff at the rate of Rs. 43-12 annas. On appeal the learned Subordinate Judge has held that the plaintiff was bound by the contract contained in a *solenamah* under which the defendants were liable to pay rent only at the rate of Rs. 5 and that such a contract cannot be affected by the settlement of rent under the Diara Act. He relied upon the case of *Muktakeshi Dasi* v. *Srinath Das* (1) and there are several other cases on the point. See *Mohendra Nath* v. *Shyam Lal* (2), *Pria Nath Das* v. *Ramtaran Chatterjee* (3), *Zamir Mandal* v. *Tarini Charan Singh* (4), *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (5) and *Surendra Nath Roy* v. *Dwarka Nath Chakravarty* (6). The learned Vakil for the appellant contended that the cases referred to above do not apply to the facts of the present case, firstly, because the contract which was relied upon by the learned Subordinate Judge was not produced before the Court of first instance, and although it was produced before the Appellate Court, that Court did

(1) 26 Ind. Cas. 215; 19 C. L. J. 614.

(2) 23 Ind. Cas. 16; 19 C. L. J. 308; 18 C. W. N. 307.

(3) 30 C. 811; 7 C. W. N. 601; 30 I. A. 159; 8 Sar P. C. J. 497 (P. C.).

(4) 5 Ind. Cas. 296; 11 C. L. J. 60.

(5) 3 Ind. Cas. 449; 37 C. 30; 13 C. W. N. 1149; 10 C. L. J. 343.

(6) 50 Ind. Cas. 856; 24 C. W. N. 1 at p. 3; (1919) M. W. N. 811 (P. C.).

KANCHEDILAL v. MOTIRAM.

not admit it, though it was relied upon in the judgment without recording any reasons for the same. Secondly, because the rent was not fixed for ever by the contract and there was, therefore, no bar to the plaintiff's getting a decree at the rate of Rs. 4 3 12 and thirdly, because the rent settled under the Diara Act has also been recorded under the Bengal Tenancy Act.

The last question seems to us to be an important one, because even if the plaintiff is bound by the contract set up by the defendants the defendant is liable to pay the rent settled under Chapter X of the Bengal Tenancy Act. The learned Subordinate Judge says that the rent was not settled under any provision of the Bengal Tenancy Act. The learned Munsif, however, states that the rent settled under section 2 of the Diara Act of 1858 has been recorded in the settlement records prepared under the Bengal Tenancy Act. Some papers were shown to us from the records which would seem to support the statement made in the Munsif's judgment. Evidently the attention of the learned Subordinate Judge was not drawn to those papers. We think that there should be a finding upon the question whether the rent fixed under the Diara Act was also the rent settled under the Bengal Tenancy Act.

With regard to the first contention it appears that when the contract relied upon by the defendants was produced before the lower Appellate Court, the learned Subordinate Judge made an order to the effect that it would be considered at the hearing, but no order has been recorded on the point either in the order-sheet or in the judgment.

We think the learned Subordinate Judge ought to have recorded an order admitting the documents in evidence when it relied upon them in its judgment, and also recorded reasons for admitting the document in evidence at the appellate stage. The learned Vakil for the respondents has contended that there are grounds for the admission of the document at the appellate stage; but if that be so, the Court below ought to have recorded its reasons for the same.

We, therefore, think that the case should go back to the lower Appellate Court for a finding upon the question whether the rent claimed by the plaintiff was settled under Chapter X of the Bengal Tenancy Act, and that Court will state the reasons why the document should be admitted in evidence at the appellate stage.

The appeal will be retained on the file of this Court, and the finding of the lower Appellate Court will be returned within two months from the arrival of this order in that Court. The other questions raised will be considered after the arrival of the finding from that Court.

P. N.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 532 OF 1921.

July 3, 1922.

Present :—Mr. Batten, J. C.

Seth KANCHED LAL—DEFENDANT—APPELLANT

versus

MOTIRAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contingent contract—Contract to sell balance of goods, after satisfying certain other demands, if void for uncertainty—Damages, ascertainment of—Contract Act (IX of 1872), s. 73.

Where a person agrees to sell the balance of certain goods in stock after satisfying the demands of certain other persons, but on account of a rise in the price of goods neither sells the goods to the buyer nor to those other persons within the time specified, the contract is not void for uncertainty but is a contingent contract enforceable in the ordinary manner and damages for its breach can be ascertained in the usual manner. [p. 721, col. 1.]

Appeal against a decree of the District Judge, Hoshangabad, dated the 23rd July 1921, in Civil Appeal No. 41 of 1921.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—The appellant, being afraid that, owing to the uncertainty of the season, there would not be a demand as seed grain for the grain he had in stock, protected himself by entering into a contract with the plaintiffs. The contract was that, if any grain should remain in the appellant's hands after he had satisfied the demands of his

Asamis for seed grain, he would sell the balance of his stock, the amount of which was named, to the plaintiffs at a named rate. It is common ground that the contract was to be completed within a week. The defendant parted with no grain at all to his *Asamis* and failed to deliver any grain to the plaintiffs. There is a concurrent finding of both Courts that it was the defendant who deliberately broke the contract because grain suddenly rose in price. The defendant-appellant has failed to prove that any *Asamis* wanted grain from him or that the contract was broken through any fault of the plaintiffs or that the plaintiffs were in any way to blame for *Asamis* not coming forward. The District Judge has,on these facts, awarded the plaintiffs damages calculated in the usual manner according to section 73 of the Contract Act. It is urged in appeal that the contract was void for uncertainty ; and that the plaintiffs' loss cannot be measured according to the terms of section 73, because they had no idea what amount of grain they were likely to receive, the loss cannot be measured at all. I am unable to agree with these contentions. It appears to me that the right way of looking to the matter is this. The contract was an ordinary contract which was not to be carried out or only to be partially carried out if certain events occurred, namely, the taking of some of the grain by *Asamis* Those events have not occurred and hence the contract should be enforced, and it has been found that the plaintiffs did not break in any way and defendant has failed to prove that the events, which did not happen, did not happen, because of the plaintiffs' fault. It may be mentioned that not a single *Asami* has been called in support of the defendant's contention.

The question of measure of damages is one quite apart from the fact that the contract is a contingent contract. The contingency on which the contract was to be enforced has occurred and damages have to be ascertained in the usual manner

With reference to the second ground of appeal which is to the effect that the contract can be good only to the extent of 50 *Manis*, it has to be observed that the parties agreed that the [illegible] bond sell o the plaintiffs [illegible] balance, whether it was more or less than 50 *Manis*, although a conjecture was hazarded to the effect that possibly the balance might not be more than 50 *Manis*. Both parties were clearly bound by the contract that all the balance, even though more than 50 *Manis*, should be sold.

The appeal is dismissed with costs.

R. N.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1077 OF 1918.

February 27, 1922.

Present :— Mr. Justice Newbould

Mr. Justice Panton.

KARUNA KRISHNA CHAUDHURY— PLAINTIFF—APPELLANT

versus

RAKHALDAS MUKHERJEE AND OTHERS —DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Mortgage—Consideration—Promise to abandon prosecution of non-compoundable criminal case.

Where the consideration of a mortgage-bond is an agreement on the part of the mortgagee to abandon the prosecution of the mortgagor in a non-compoundable criminal case the bond is void, even if part of the consideration of the bond was good in law.

Nujebar Rahman v. *Muktashed Husain*, 15 Ind. Cas. 259; 16 C. W. N. 854; 40 C. 113, referred to.

Appeal against a decree of the District Judge, Murshidabad, dated the 18th of February 1918, affirming that of the Second Munsif, Berhampur, dated the 18th of December 1916.

FACTS appear from the judgment.

Babu *Panchanon Ghose* for Babu *Brojendra Nath Chatterjee*, for the Appellant.—There is no dispute as regards the execution of the mortgage-deed. I submit that the plaintiff can recover the sum of Rs. 400 from defendant No. 1, as the primary Court has come to a distinct finding that the amount for which the mortgage-bond was executed was really due from defendant No. 1.

So far as it is a good consideration the plaintiff should have relief. Refers to

HARI CHAND v. JUGAL KISHORE.

Williams v. *Bayley* (1), *Flower* v. *Sadler* (2), *Kessowji Tulsidas* v *Hurivon Mul i* (3), *Rai Charan Durkait* v. *Amrita Lal Gain* (4). *Nujebar Rahman* v *Muktashed Husain* (5) is clearly distinguishable.

I cannot dispute the proposition that the consideration for stifling a non-compoundable criminal prosecution is void.

The learned Munsif has found that so far as defendant No. 1 was concerned there was good consideration.

Babu *Bansorilal Sarkar*, for the Respondents, was not called upon.

JUDGMENT.—The plaintiff, who is the appellant before us, sued the two defendants on a mortgage deed admittedly executed by them. The first defendant was the plaintiff's *gomasta* for four years up to Ashin 1318 B. S. The second defendant is the first defendant's brother. The first defendant was alleged to have embezzled a sum of Rs. 400 belonging to the plaintiff and was criminally prosecuted under section 408 of the Indian Penal Code. The finding of both the lower Courts is that the bond in suit was executed on an agreement on the part of the plaintiff to abandon the prosecution of defendant No 1. On this finding it has been held that the bond sued on is void under section 23 of the Contract Act. So far as the second defendant is concerned this decision has not been attacked in second appeal. But it is contended that the plaintiff can recover the sum of Rs. 400 from the first defendant since the first Court found that the amount for which the bond was executed was really due from the defendant No. 1. The plaintiff certainly cannot recover that amount treating this suit as a suit on the original debt. The plaint is not so framed as to seek this relief as an alternative remedy and it would appear that, at the time the suit was instituted, a suit on the debt alone would be barred by limitation, nor can we accept the contention that the bond so far as the defendant No. 1 is concerned is a good bond for a lawful consideration. Our attention has been drawn to several decisions, but we do not think it necessary to refer to any other case than that of *Nujebar Rahman* v. *Muktashed Husain* (5). There the facts, so far as the first defendant in this case is concerned, are very similar. The consideration of the bond having been found to be an agreement on the part of the plaintiff to abandon the prosecution of defendant No. 1 in a non-compoundable criminal case the bond must be void, even if part of the consideration of the bond was good in law.

The appeal fails and is dismissed with costs.

D. N.

Appeal dismissed.

(1) (1868) 1 H. L. 200 at p. 220; 12 Jur. (N. S.) 875; 35 L. J. Ch. 717; 14 L. T. 802.
(2) (1882) 10 Q. B. D. 572 at p. 575.
(3) 11 B. 566; 6 Ind. Dec. N. S. 873.
(4) 5 Ind. Cas. 98; 11 C. L. J. 131 at p. 134.
(5) 15 Ind. Cas. 250; 16 C. W. N. 864; 40 C. 113.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 626 OF 1919.
May 16, 1922.
Present:—Mr. Justice Abdul Racof and Mr. Justice Abdul Qadir.
HARI CHAND—PLAINTIFF—APPELLANT
versus
JUGAL KISHORE—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 253 (10)—Limitation Act (IX of 1908), Sch. I, Art. 106—Dissolution of partnership—Death of partner—Contract to continue partnership—Parda-nashin *woman, disposition of property by—Court, duty of.*

Section 253 (10) of the Contract Act, which provides for the dissolution of a partnership on the death of a partner, must be read as qualified by the introductory words "in the absence of any contract to the contrary" [p. 725, col. 2.]

Raghumull v. *Luchmondas*, 38 Ind. Cas. 278; 20 C. W. N. 708, followed.

HARI CHAND v. JUGAL KISHORE.

Where parties to a contract agree expressly or by necessary implication to continue the partnership, as if no dissolution had taken place, upon the death of one of them, a suit for accounts would not be barred under Art. 106, Sch. I, to the Limitation Act. [p. 725, col. 2.]

Maharaj Kishen v. *Har Gobind*, 27 Ind Cas. 69; 101 P. R. 1914; 218 P. L. R. 1915; 209 P. W. R. 1914, followed.

A Court when dealing with the disposition of a property by a *parda-nashin* woman ought to be satisfied that the transaction was explained to her and she knew what she was doing. Consequently, a deed of relinquishment written by a *parda-nashin* lady, during the course of her illness of which she died and in the house of the person in whose favour it was executed without having had any opportunity of consulting her relatives, is open to grave suspicion and it lies heavily upon the person relying upon the deed to show that it was properly obtained and that the lady knew what she was about. [p. 724, col. 1.]

Ashgar Ali v. *Delroos Banoo Begum*, 3 C. 324; 3 Sar. P. C. J. 749; 3 Suth. P. C. J. 444; 2 Ind. Jur 601; 1 Ind. Dec. (N. S.) 794 (P. C.) and *Behari Lal* v *Habiba Bibi*, 8 A. 267; A. W. N. (1886) 91; 5 Ind. Dec. (N. S.) 58, followed.

First appeal against the decree of the Senior Subordinate Judge, Delhi, dated 23rd December, 1918.

Mr. *Shamair Chand*, for the Appellant.
Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—A firm under the name of Jugal Kishore Mutsaddi Lal was started at Delhi some twenty years before the suit, which has led to this appeal, and Jugal Kishore and Mutsaddi Lal were the only two partners in it. The latter died on the 20th April 1908, leaving behind him his widow, *Musammat* Tohfa, his brother, Hari Chand, and his father, Ram Dayal. An account purporting to relate to Mutsaddi Lal was prepared up to the 14th June 1908.

The transliteration of it appears in the printed record at pages 5 to 14. The transliteration of a *chitha*, or balance-sheet, also prepared on that date, is given at pages 14 to 17 of the same record. *Musammat* Tohfa died in December 1917, and Hari Chand, the brother of Mutsaddi Lal, deceased, brought a suit against Jugal Kishore praying that the partnership between Jugal Kishore and Mutsaddi Lal may be deemed as dissolved or be dissolved and the accounts adjusted. This claim is based on the allegation that the death of Mutsaddi Lal in 1908 did not put an end to the partnership which was continued by the widow as representative of her deceased husband, under the same name on the same terms as before. The defendant pleaded that the old partnership had terminated on the death of Mutsaddi Lal; that it had not been continued by *Musammat* Tohfa, who had been paid what was due to her husband, and that, therefore, there were no accounts to be rendered nor was any sum due to the deceased. It was further pleaded that *Musammat* Tohfa had executed a deed of relinquishment in favour of the defendant and also that the suit was barred by time.

The following were the only two issues framed:—

1. Whether the partnership business of Jugal Kishore and Mutsaddi Lal was continued after the death of Mutsaddi Lal by his widow and defendant?

2. Whether after dissolution the share of the deceased partner in the assets of the partnership was paid to *Musammat* Tohfa, the widow?

The plaintiff produced some evidence on issue No. 1, the *onus* of which lay on him, but no attempt was made by defendant to produce any evidence with regard to issue No. 2, the burden of proving which had been placed on him. It was stated on his behalf, however, by his learned Vakil, that issue No. 2, did not arise at that stage and did not need being dealt with. The Trial Court, therefore, left issue No. 2 undecided and on issue No. 1 it came to a conclusion against the plaintiff and dismissed the suit, holding that the partnership had come to an end in 1908. The plaintiff has come up in appeal to this Court against the above decision through Mr. Shamair Chand, whom we have heard at considerable length. We have also heard Mr. Moti Sagar on behalf on the respondent.

The learned Senior Subordinate Judge in deciding the case against the plaintiff-appellant has taken into consideration the deed of relinquishment, dated the 30th November 1907, (Exhibit D-1), and is of opinion that this document is against the creation or existence of partnership between the defendant and *Musammat* Tohfa. The defendant

evidently relied upon this document for two purposes, *firstly*, that it admits that there was no partnership between the defendant and, the widow of Mutsaddi Lal, deceased, and, *secondly*, that whatever, money was due to Mutsaddi Lal had been paid to his widow. We refrain to say anything about this deed, so far as it refers to the last mentioned point, because the Court below has left the point undetermined, but so far as the first point is concerned, we think it cannot be treated as any reliable evidence as to the non-existence of a partnership between Jugal Kishore and *Musammat* Tohfa. No evidence beyond the bare statement of the defendant himself has been given in support of this document. It is admittedly executed by a *parda-nashin* lady, who was, at the time of executing it suffering from illness, of which she died a few weeks after the deed was registered. She was at the time in the house of the defendant at Delhi and does not seem to have had any opportunity of consulting any of her relatives or the relatives of her deceased husband. It need hardly be pointed out that a deed obtained from a *parda-nashin* lady under such circumstances is open to grave suspicions, and it lies heavily on the person relying on the deed to show that it was properly obtained and that the lady understood what she was about. As observed by their Lordships of the Privy Council in *Ashgar Ali* v. *Delroos Banoo Begum* (1) "a Court, when dealing with the disposition of her property by a *parda* woman, ought to be satisfied that the transaction was explained to her, and that she knew what she was doing." Similar views were expressed in *Behari Lal* v *Habiba Bibi* (2) on this question. The remarks made by Mr. Justice Mahmood, in the Allahabad judgment, show that *parda-nashin* women should be placed on a footing somewhat similar to that of persons *non compotes mentis*. He quotes from Story's work on Equity Jurisprudence, where the principle is laid down that, "wherever, from the nature of the transaction, there is not evidence of entire good faith, or the contract or other act is not seen to be just in itself, or for the benefit of these persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests." Following the rulings quoted above, we hold that, considering the circumstances under which *Musammat* Tohfa was made to execute the deed of relinquishment, Exhibit D 1, no reliance can be placed on the recital in that deed that no partnership ever existed between her and the defendant We might add that there are intrinsic indications in the deed of the anxiety of the defendant by means of that deed to get over the circumstances which show the continuance of the old partnership relations between himself and the family of the deceased partner. It is rightly argued by Mr. Shamair Chand that if such relations did not exist, there is hardly any reasonable explanation of the attempt made by the defendant to get a deed of relinquishment from the widow more than nine years after the death of her husband and shortly before her own death.

Coming now to the *chitha*, Exhibit D 2, and the accounts printed at page 5 of the printed record, we find that they have a more than ordinary significance in favour of the case set up by the plaintiff. The one purpose for which they were relied on in the Court below, on behalf of the plaintiff was, that it was shown by means of these accounts that the partnership was continued, at any rate, up to the 14th June 1903, when these accounts were prepared and from that the plaintiff ought to raise a presumption, under section 109 of the Evidence Act, that the partnership which continued at least for some weeks after the death of Mutsaddi Lal must have continued after that. The learned Senior Subordinate Judge considered this circumstance standing by itself as insufficient for the purpose of raising such a presumption. We think there is more in this circumstance than has been recognised by the Court below and an inference of the nature which the plaintiff wishes to be drawn from it can legitimately be drawn. But that is not all. The accounts, having been thus restarted, continued for years and *Musammat* Tohfa in all the time being credited and debited with certain items. It is noteworthy that there is an item of cash payment on the credit side at page 5 which bears date corresponding to the 12th January 1910. This is a comparatively small item, but there is no explanation

(1) 3 C. 324; 3 Sar. P. C. J. 749; 3 Suth. P. C. J. 444; 2 Ind. Jur. 601; 1 Ind Dec. (N. S.) 794 (P. C.).

(2) 8 A. 267; A. W. N. (1886) 91; 5 Ind. Dec. (N. S.) 58.

forthcoming of its being there about two years after the death of Mutsaddi Lal, unless it means that the widow was continuing to make certain payments to the firm whenever she liked and to receive payments. It is remarkable that there are numerous entries as to articles of jewellery received by her from the shop from time to time and the expenses of gold and silver used in making those articles, as well as the cost of getting them made, are debited to her account. Now, it is highly improbable that a widow would be taking so many articles of jewellery from time to time for her own use, while it is not unlikely that as the business of the firm was that of a *sarraf* and as her deceased husband was dealing in buying and selling articles of jewellery, she may have been helping the firm by doing some business of that kind herself. It is also in evidence that she used to live at Delhi, off and on, with the defendant. Admittedly, she is not related to the defendant in any way and, therefore, the likelihood is that her frequent visits to Delhi and to the house of the defendant, were because she wanted to take some interest in the partnership business. Added to this is the fact that the plaintiff Hari Chand was taken by the firm as a Munim soon after the death of his brother and continued to work in the shop in that capacity for about seven years. Hari Chand explains that this provision was made in order to enable him to watch the interests of his deceased brother, whose partnership was continuing through his widow, and we think that this is a statement which is believable and is fully borne out by all the circumstances of the case. The plaintiff produced four witnesses in support of his allegations. Their evidence has not been relied upon by the learned Senior Subordinate Judge, who dismissed it in one word by calling it worthless.

It is urged by the learned Counsel for the appellant that the Court below erred in brushing aside the whole of the oral evidence in such a summary way. He draws attention particularly to the statement of Niadar Mal (P. W. No. 1). He admits that Umrao Singh (P. W. No. 3) does not say anything to the point and that the statement of Bulaki Das (P. W. No. 2) may be eliminated from consideration, as he had some enmity with the defendant. He adds, however, that there is nothing against Niadar Mal's evidence which should be believed. This witness states that when Mutsaddi Lal died his widow succeeded him in the partnership business with the defendant and that Ram Dyal sent the plaintiff to work at the shop. He also adds that the widow lived with Jugal Kishore and used also to visit Shahdara. Now, this witness is a man who is in the same line of business as Jugal Kishore, and states that he had had dealings with the firm and is, therefore, in a position to know something about that firm. There is nothing to impeach his credit and we see no reason for disbelieving him. There is thus the statement of Hari Chand on oath that the widow remained a partner and he continued to work for her and that the sum of Rs. 3,311-11-0 due from the shop to Mutsaddi Lal remained in the shop as a share of the widow. Along with the statement of Niadar Mal, and the circumstances above referred to, the evidence of Hari Chand is sufficient to prove that the partnership was continued either by virtue of a previous understanding that it should not be terminated by the death of one of the partners, or by reason of mutual agreement between the parties, on Mutsaddi Lal's death. In this connection Mr. Shamair Chand refers us to a decision of the Calcutta High Court published as *Raghumull* v *Luchmondas* (3), where it has been held, *inter alia*, that section 253, clause (10), of the Indian Contract Act which provides for the dissolution of a partnership on the death of a partner, must be read as qualified by the introductory words "in the absence of any contract to the contrary." He also refers to certain remarks made in *Maharaj Kishen* v. *Hari Gobind* (4), explaining the principle underlying section 253 (10) of the Indian Contract Act and holding that where the parties to a contract agree expressly or by necessary implication to continue the partnership, as if no dissolution had taken place upon the death of one of them the suit would not be barred under Art. 106 of the Limitation Act. He quotes another ruling of the Calcutta High Court, pub-

(3) 28 Ind Cas. 273; 20 C. W. N. 708.

(4) 27 Ind. Cas. 6; 101 P. R. 1914; 218 P. L. R. 1915; 209 P. W. R. 1914.

lished as *Gokul Krishna Das* v. *Shashi Mukhi Dasi* (5), where a partnership was commenced in 1853 between the husband of the plaintiff and the defendants and where since 1887, when the husband died, the business had been conducted on the assumption that the plaintiff was a partner. It was held that the original partnership must be presumed to have been continued by common consent, and the founders of the partnership must have agreed that it was not to be dissolved by the death of any of the parties. This case is very much similar to the one before us, though some of the features of the Calcutta case are not to be found in it.

Mr. Moti Sagar in replying to the above arguments says that the *chitha* must be taken to indicate nothing more than a settlement of the previous account and that subsequent accounts between Jugal Kishore and the widow cannot necessarily be regarded as an indication of the continuance of a partnership and must be taken to be only an open and current account kept by Jugal Kishore with the widow of his late partner, out of regard for the latter. He also lays stress on the fact that no balance sheets have been prepared after 1908, in spite of the fact that Hari Chand himself was keeping the accounts for a long time, nor have any profits been credited to *Musammat* Tohfa. The first point raised by him as to the nature of these accounts has already been dealt with. With regard to the second point it is enough to say that as the widow was not capable of going into the accounts herself and as payments of money were being made to her from time to time no inference against her can be drawn from balances not having been struck at various intervals. Hari Chand too, though quietly watching her interests, could not insist on the striking of any balances, because he was getting a pay from Jugal Kishore as his Munim and thus had a position subordinate to him. As far as the third point relating to the profits is concerned, it is shown by the statement of Hari Chand that profits were being credited in the name of the firm, and as even in the lifetime of Mutsaddi Lal the profits had sometimes been credited to him and sometimes to the firm, there was nothing very extraordinary in the procedure adopted since 1908. The fact remains that the firm has continued under the old name all this time and that Jugal Kishore was anxious that it should do so. The evidence produced by the plaintiff, oral, documentary and circumstantial, is much more convincing than what Mr. Moti Sagar has said about certain circumstantial inferences to be drawn from the accounts. We have no hesitation in finding, therefore, that the partnership in this case continued till the death of Mutsaddi Lal's widow. The plaintiff is entitled to have the accounts of the partnership gone into and adjusted.

We, therefore, accept this appeal and direct the Court below to give effect to the above finding by passing a preliminary decree in favour of the plaintiff that he is entitled, as a representative of Mutsaddi Lal, to a rendition of the partnership accounts. After passing that preliminary decree the Court will go into the accounts and come to a conclusion as to what is due altogether by Jugal Kishore on the basis that the partnership continued till 1917. It will also have to find what sum, if any, has been paid by Jugal Kishore to the widow of Mutsaddi Lal between 1908 and 1917. The decree of the Court below is set aside and this case is remanded under O. XLI, r. 23, Civil Procedure Code, to the Court below for a decision according to law.

N. K. *Decree set aside.*

(5) 18 Ind. Cas. 23; 16 C.W.N. 299; 15 C.L.J. 204.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 302 OF 1920.

February 16, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Ghose.

RAM RATAN CHOWDHURY—JUDGMENT-DEBTOR—APPELLANT

versus

UPENDRA CHANDRA DAS AND ANOTHER—DECREE-HOLDER—RESPONDENTS.

Limitation (Act IX of 1908), Sch. I, Art. 182—Execution of decree—Incompetent appeal by judgment-debtor—Limitation, running of, whether suspended.

The running of limitation against a decree-holder is not suspended by reason of an incompetent appeal by the judgment-debtor, such as an appeal against an order dismissing his application for review against the decree.

Appeal against an order of the Subordinate Judge, Second Court, Chittagong, dated the 6th of July 1920.

FACTS appear from the judgment.

Babu *Narendra Kumar Das*, for the Appellant.—The application for execution is clearly barred by limitation. See Art. 182, clause (3) of the Limitation Act. No appeal lay against the dismissal of the review application and the Court below is clearly wrong in deducting the period occupied by the incompetent appeal in calculating the period of limitation.

Babu *Chander Sekhar Sen*, for the Respondents.—Rightly or wrongly an appeal was filed against the dismissal of the review application. Consequently, Art. 182, clause (2) of the Limitation Act applied and the application for execution was in time.

Babu *Narendra Kumar Das*, was not called upon to reply.

JUDGMENT.—This is an appeal by the judgment debtor against an order in an execution-case. It is argued before us on behalf of the appellant that the execution is barred. The original decree was obtained on the 1st June 1914 and the application for execution was made on the 17th December 1919. But it appears that against the original decree an application for review was filed on the 24th June 1914 and was not dismissed until 24th June 1915. Against the order of dismissal an appeal was preferred to this Court, which was dismissed on the 28th May 1917. The Court said that no appeal lay against such an order. Now, the learned Judge in the Court below has held that limitation did not begin to run until 28th May 1917. He is clearly in error with regard to this. Assuming that limitation did not commence to run until after the 24th June 1915, clearly limitation began to run after that date, as the appeal against the dismissal of the review application was incompetent.

In the result, the appeal succeeds and we hold that the execution is barred by reason of limitation.

The appellant is entitled to his costs in this Court, hearing fee two gold *mohurs*.

N. H.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2604 OF 1921.

May 17, 1922.

Present:—Mr. Justice Martineau.

YUSAF—DEFENDANT—APPELLANT

versus

Musammat ZAINAB—PLAINTIFF—RESPONDENT.

Majority Act (IX of 1875), s. 2—Muhammadan Law—Guardian for marriage—Majority.

The age of majority of a Muhammadan guardian, so far as his capacity for giving a person in marriage is concerned, is to be determined by the Muhammadan Law, and such age under that law is fifteen years. [p. 727, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 3rd November 1921, reversing that of the Munsif, First Class, Jullundur, dated the 22nd August 1921.

Mr. *Badr-ud Din Qureshi*, for the Appellant.

Khan *Amir-ud-Din*, for the Respondent.

ORDER.—The plaintiff sued for a declaration that she was not the lawful wife of the defendant. She denied that any marriage had taken place between her and the plaintiff, and said that even if it did it was invalid because she was a minor at

the time of the marriage, which had not been contracted by her lawful guardian. The defendant pleaded that he had married the plaintiff on the 16th March 1915, and that the plaintiff had been given in marriage by her brother, Bura, who was her lawful guardian, and that he, the defendant, had cohabited with the plaintiff. The first Court dismissed the suit, finding that the plaintiff had been lawfully married to the defendant that she had cohabited with him for three years, and that she had, therefore, lost her right to repudiate the marriage.

The District Judge on appeal found that it was not proved that Bura was of age when he gave his sister in marriage to the plaintiff, the evidence on the point being unreliable and one of the defendants witnesses having stated that Bura was only 15 years' old at the time of the marriage. The learned District Judge, therefore, held that the marriage was invalid and gave the plaintiff a decree. The defendant has come to this Court in second appeal.

The learned District Judge in finding that Bura was not proved to have been of age at the time of the marriage evidently meant that he was not proved to have attained the age of 18 at that time, being under the impression that the age of majority for a Muhammadan giving a minor in marriage was 18 under the Indian Majority Act IX of 1875. But section 2 of that Act provides that nothing in the Act shall affect the capacity of any person to act in the matter of marriage, so that the age of majority of Bura, so far as his capacity for giving the plaintiff in marriage is concerned, is to be determined by the Muhammadan Law, and the age of majority under that law would be 15. Whether or not Bura had attained the age of 18 at the time of the marriage, there seems no doubt on the evidence that he was over the age of 15 and was, therefore, competent to give his sister in marriage.

It is argued for the respondent that she was *sui juris* at the time of the marriage and that, therefore, her consent was necessary and there should have been no guardian acting for her, but this argument is opposed to the plaintiff's own case, which was that if the marriage took place at all she was a minor at the time and the marriage was not effected through her lawful guardian. I hold, therefore, that the marriage was valid.

The question whether the plaintiff can exercise her option of puberty or has lost her right has not been determined by the lower Appellate Court and I, therefore, remand the case to that Court under O. XLI, r. 25, Civil Procedure Code, for a finding on this point.

Z. K. *Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 230 B OF 1921.

July 21, 1922.

Present:—Mr. Prideaux, A. J. C.

JABARKHAN AND OTHERS PLAINTIFFS—DECREE HOLDERS—APPELLANTS

versus

RAHIMKHAN—DEFENDANT—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (2)—"Appeal," meaning of—Appeal against order dismissing application to set aside ex parte decree whether included

The words "where there has been an appeal" in clause (2) of the Art 182 of the Second Schedule to the Limitation Act mean an appeal from the decree or order sought to be executed, and do not include an appeal from an order dismissing an application to set aside an *ex parte* decree. [p. 729, col. .]

Sheo Prasad v. *Anrudh Singh*, 2 A. 273; 4 Ind. Jur. 804; Ind. Deo (N s.) 750, *Jivaji* v. *Ramchandra*, 16 B 12 ; 8 Ind. Deo (N. S.) 655 and *Baikanta Nath Mittra* v. *Aughore Nath Bose*, 21 C. 387; 10 Ind. Deoi (N. S. 888, followed.

Lutful Huq v. *Sumbhudin Pattuck*, 8 C. 248; 10 C. L. R. 143; 6 Ind. Jur. 357; 4 Ind Deo. (N. S.) 168, not approved.

Appeal from the judgment of the District Judge, Akola, dated the 5th April 1921 in Civil Appeal No. 4 of 1921.

JALAL DIN v. MATHURAM.

Mr. *A. V. Khare*, for the Appellants.
Mr. *M. Y. Shareef*, for the Respondents.

JUDGMENT.—A suit instituted for possession of field Survey No. 20 of *Mouza* Mudhapur was instituted on the 9th April 1912 and dismissed on the 7th May the following year. On appeal the dismissal was set aside, and after re-trial an *ex parte* decree for possession in favour of the plaintiffs was passed on the 25th March 1916.

The defendant applied to get the *ex parte* decree set aside and after two Courts had in turn declined to entertain the application the Appellate Court on the 4th May 1917 directed one of them to do so. The defendant failed to appear in that Court and the application for setting aside the *ex parte* decree was dismissed on the 20th July 1917.

The decree-holders attempted on the 20th June 1920 to execute their decree of the 25th March 1916, and the First Court entertained the application. On appeal the lower Appellate Court dismissed the application for execution as being made more than three years from the date of decree, holding that the time taken by the defendant in prosecuting his application for setting aside the *ex parte* decree could not be deducted nor could limitation be said to commence from the date the application of the defendant was dismissed in 1917. The decree holders appeal. The application falls under Art. 182 of the Limitation Act, sub-section 1 which reads: "Three years from the date of the decree." There is no force in the respondent's contention that clause (2) of the Article applies for clause (2) cannot apply unless there has been an appeal, and when the Court refuses to set aside an *ex parte* decree and an appeal against such order is dismissed, time for executing the original decree is not enlarged under clause (2). The words "where there has been an appeal" of clause (2) of the Article contemplate and mean an appeal from the decree or order sought to be executed and do not include an appeal from an order dismissing an application to set aside an *ex parte* decree. The appeal made by the defendant in the present case was an appeal not from the decree but from the orders of the two Courts declining to entertain his application to set the decree aside.

The efforts of the defendant to set aside the plaintiffs' decree cannot have the effect of extending the period of limitation which the law allows the plaintiffs *Sheo Prasad* v. *Anrudh Singh* (1), *Jivaji* v. *Ramchandra* (2) and *Baikanta Nath Mittra* v. *Aughore Nath Bose* (3). The contrary view taken in *Lutful Huq* v. *Sumbhudin Patwari* (4) can no longer be accepted as good law.

The result is that this second appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

(1) 2 A. 273; 4 Ind. Jur. 304; 1 Ind. Dec. (N. S.) 730.
(2) 16 B. 123; 8 Ind. Dec. (N. S.) 558.
(3) 21 C. 387; 10 Ind Dec. (N. S.) 888.
(4) 8 C. 248; 10 C. L. R. 143; 6 Ind. Jur. 357; 4 Ind. Dec. (N. S.) 158.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 882 of 1919.

April 18, 1922.

Present:—Mr. Justice LeRossignol and Mr. Justice Harrison.

JALAL DIN—PLAINTIFF—APPELLANT

versus

NATHU RAM AND ANOTHER—DEFENDANT—RESPONDENT.

Punjab Pre-emption Act (I of 1913), s. 6—Punjab Pre-emption Act (II of 1905), s. 7—Punjab General Clauses Act (I of 1898), s. 22—Notification under repealed Act whether cancelled by repealing Act.

A notification made under section 7 of the Punjab Pre-emption Act of 1905, excluding an area from the scope of the Act, is not automatically cancelled by section 6 of the Punjab Pre-emption Act of 191 , and continues in force by virtue of section 24 of the Punjab General Clauses Act until such time as Government sees fit to cancel it.

Second appeal from a decree of the District Judge, Lahore, dated the 30th January 1919, affirming that of the Munsif, First Class, Chunian, District Lahore, dated the 13th June 1918.

Diwan *Mehr Chand*, for the Appellant.
Mr. *Kanwar Narain*, for the Respondent.

JUDGMENT.—The only point in this case is whether a notification made under section 7 of the Pre-emption Act of 1905,

excluding an area from the scope of the Act, is still in force or was automatically cancelled by section 6 of the Pre-emption Act of 1913. The question is answered by section 22 of the Punjab General Clauses Act which lays down that any order, scheme, rule, form or bye-law issued under the repealed Act and not inconsistent with the new continues in force until it is superseded by any fresh order, scheme, etc.

Counsel contends that this section does not cover notifications because the word is not used. A notification is only the method adopted for communicating orders, rules, etc. to the general public. No inconsistency has been shown with the provisions of the new Act and, therefore, it is clear that the order stands until such time as Government sees fit to cancel it. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

REFERENCE No. 10 OF 1921.

February 28, 1922.

Present :—Mr. Justice Newbould and Mr. Justice Panton.

SARBO MUSSALMANI—PLAINTIFF

versus

SAFAR MANDAL AND OTHERS—DEFENDANTS.

Court Fees Act (VII of 1870), Sch. II, Art. 6—Security bond by claimant in claim case—Stamp duty payable.

A security-bond given by a claimant in a claim case agreeing to be liable for a certain sum of money in case he failed to produce the property attached, should bear a Court-fee stamp of eight annas under Art. 6, Sch. II, of the Court Fees Act.

Reference under Stamp Act, 1899, *In re*, 20 Ind. Cas. 775; 37 M. 17; 24 M. L. J. 637, followed.

Reference under O. XLVI, r. 1 of the Code of Civil Procedure, made by the Munsif, Meherpur, forwarded to this Court by the District Judge of Nadia, with his letter No. 2259 XV-23. dated the 8th September 1921.

FACTS appear from the judgment.

Babu *Dwarkanath Chakarbarty*, Senior Government Pleader, for the Government.—The matter in issue is this. In a claim case the claimant filed a security-bond which was engrossed on a non-judicial stamp paper of 2-annas. The question referred to is whether that stamp is sufficient or Art. 6, Schedule II of the Court-Fees Act would govern the case. I submit Art. 6 Schedule II of the Court Fees Act would apply inasmuch as the security bond was executed in pursuance of an order of the Court. Refers to *Reference under Stamp Act*, 1899, *In re* (1).

No one appeared in opposition to the Reference.

JUDGMENT.—This is a reference under O. XLVI, r. 1 of the Code of Civil Procedure made by the Munsif of Meherpur and forwarded by the District Judge of Nadia.

In a certain claim case the claimant filed a security-bond executed by one Yad Ali Ahmed who agreed to be liable for Rs. 10 in case he failed to produce certain attached goats. The question referred is, whether this bond had been rightly engrossed on a non-judicial stamp paper of 2 annas, or whether it is governed by Art. 6, Schedule II of the Court Fees Act in which case it would be liable to be stamped with Court-fee stamp of 8-annas. Art. 15 of the First Schedule to the Indian Stamp Act gives the stamp duty payable on bonds not being otherwise provided for by the Court Fees Act. Art. 6 of Schedule II of the Court Fees Act applies to instrument of obligation given in pursuance of an order made by a Court under any section of the Code of Civil Procedure, 1908. The same point arose in a reference made under section 60 of the Indian Stamp Act to the Madras High Court reported as *Reference under Stamp Act*, 1899, *In re* (1) and it was there held that a bond of this kind may be said to be given in pursuance of an order made by a Court under a section of the Civil Procedure Code, and it was held that the proper stamp was 8 annas stamp under the Court Fees Act. We are in agreement with this conclusion and we accordingly answer the question referred by saying that the deed in question is governed by Art. 6 Schedule II of the Court Fees Act and that the proper stamp is 8-annas Court-fee stamp.

W. C. A. *Order accordingly.*

(1) 20 Ind. Cas. 775; 37 M. 17; 24 M. L. J. 637.

SUNDER *v.* SHIAMAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1193 OF 1919.

May 20, 1922.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Abdul Qadir.

SUNDER—PLAINTIFF—APPELLANT

versus

SHIAMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 44, 144—Hindu Law—Alienation by co-parcener of minor co-parcener's share—Suit by minor to recover possession—Limitation.

A suit by a co-parcener in a Hindu joint family to recover possession of his share of the property alienated during the plaintiff's minority by another co-parcener who purported to act as, but was not in fact, the guardian of the plaintiff is governed by Art. 144 and not by Art. 44 of Schedule I to the Limitation Act.

Mata Din v. *Ahmad Ali*, 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 P C), *Kalyan Singh* v. *Pitombar Singh*, 27 Ind. Cas. 687; 13 A. L. J. 94, *Asaram* v. *Ratansingh*, 32 Ind. Cas. 242; 12 N. L. R. 12, relied upon.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 7th February 1919, varying that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 14th August 1918, and dismissing the plaintiff's claim with costs throughout.

Lala *Ramanand*, for the Appellant.

Diwan *Mehr Chand*, for Milkhi Ram and Munshi Ram, Respondents.

JUDGMENT.—From the pedigree-table given at page 8 of the paper-book it would appear that one Nikka had five sons, one of whom being Gandhi, who had two sons, namely Ganga Ram, defendant No. 1 in this case, and Sunder, the plaintiff. Another son of Nikka named Dalipa left a son Udho. Ganga Ram, defendant No. 1, mortgaged 209 *kanals* 4½ *marlas* of land for Rs. 590 to Shyama and Giana on the 19th March 1907. He took Rs. 330 as an additional charge on the land and effected another mortgage on the 11th December 1907. Later on, on the 3rd September 1909 he sold 757 *kanals*. 8½ *marlas* of land for Rs. 937-8-9 to Ram Ditta and Munshi, defendants Nos. 2 and 3. Udho, the cousin of the plaintiff and defendant No. 1, is said to have died some four years before the suit. Sunder, the plaintiff, preferred this claim for possession on the ground that his share in the land was one-fourth and that his brother Ganga Ram had no authority to mortgage and then sell his share in the land as the sale was not for his benefit. Both in the mortgage-deeds and the sale-deeds above referred to Ganga Ram described himself as the *de facto* guardian of the plaintiff. His Pleader, Lala Gurdas Ram, however, made a statement in Court on the 4th May 1918 denying the guardianship of Ganga Ram. Defendants Nos. 4 and 5, the mortgagees, pleaded that the mortgage in their favour was for consideration and necessity and the plaintiff was bound by it for the period of 12 years fixed in the mortgage-deeds. Defendants Nos. 2 and 3 pleaded that the suit was barred by time as the plaintiff was of the age of 24 years at the date of the suit and that the sale was for the benefit of the plaintiff minor. A plea of misjoinder was also put forward on the ground that a joint suit against the mortgagees and the vendees could not be brought. The Trial Court held that the suit as far as it related to a previous mortgage of 1893, Exhibt D.3, was barred by time but that it was within limitation as regards the rest of the alienations. It held the plaintiff to be bound by the mortgage of 1893 but not by the other alienations. It accordingly granted a decree, holding that the plaintiff was entitled to a declaration that he was not bound either by the sale-deed or the mortgage. On appeal by the mortgagees and the vendees the learned District Judge held that, inasmuch as the suit was by a ward, who had attained majority to set aside a transfer of property by his guardians, it was barred by three years limitation under Art. 44 of the Indian Limitation Act. Hence this second appeal.

In order to apply the above Article it was necessary for the learned District Judge to have determined the question whether Ganga Ram was the guardian of the plaintiff. In the plaint it was clearly stated that Ganga Ram had no authority to transfer the share of the plaintiff and in the statement of the 4th May 1918 the plaintiffs' Pleader had clearly denied the fact of Ganga Ram's guardianship. The mere fact that Ganga Ram had described

himself as the *de facto* guardian of his minor brother could not clothe him with the authority of a guardian and make Art. 44 applicable to the plaintiff's claim. The following observation made by their Lordships of the Privy Council in the case of *Mata Din* v. *Ahmad Ali* (1) places the correctness of this proposition beyond any possible doubt :—

"It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was, therefore, necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a '*de facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

The plaintiff and Ganga Ram occupied the position of co parceners in a Hindu family, of which Ganga Ram was probably the manager, being the elder brother. This circumstance also could not clothe him with the character of a *de jure* or *de facto* guardian. The fact of his being the '*de facto*' guardian of the plaintiff could have been proved by evidence but it was admitted by Dewan Mehr Chand, the learned Vakil for the respondents, that no attempt had been made by his clients to prove this fact by evidence.

In the case of *Kalyan Singh* v. *Pitambar Singh* (2) it was held that "a suit to set aside a sale executed by one member of a joint Hindu family, and for possession of the property was governed by Art. 144 of the Limitation Act and not by Art. 44 or 91."

In the case of *Asaram* v. *Ratnsingh* (3) it was held by the learned Judicial Commissioner of Nagpur that "a suit by a minor co-parcener on attaining majority to set aside an alienation by a manager of joint family property is governed by Art. 144 and not by Art. 44 or 91."

In the present case it is, however, not made clear whether Ganga Ram was the manager of a joint Hindu family, but this fact cannot affect the decision of the question as the fact remains that it has not been shown that Ganga Ram was the guardian of the minor plaintiff. The principle enunciated in the two cases above-mentioned is fully applicable to the present case. Authorities bearing on this question may be multiplied, but it will serve no useful purpose to quote and discuss any more authorities, because on the facts of this particular case we are clearly of opinion that Art. 44 cannot apply. We must, therefore, set aside the decision of the lower Appellate Court on this preliminary point and remand the case to it under O. XII, r. 23, Civil Procedure, to be decided on the merits according to law. Costs will abide the result. Court fee paid on the memorandum of appeal in this Court shall be refunded.

Z. K. *Appeal dismissed.*

(1) 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 388; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 P. C.).

(2) 27 Ind. Cas. 687; 13 A. L. J. 94.

(3) 82 Ind. Cas. 242; 12 N. L. R. 12.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 226 OF 1921.

February 6, 1922.

Present :—Mr. Batten, J. C.

Musammat KASTURIBAI—PLAINTIFF—APPELLANT

versus

BALIRAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Notice, constructive—Registration.

Registration does not operate as constructive notice and a purchaser from an ostensible owner

whose title-deeds are themselves complete is not bound to search the registration office to see if the original owner may not have given a title to somebody else.

Sukhnandan v. *Sadaram*, 13 C. P. L. R. 43, relied upon.

Appeal from a decree of the District Judge, Hoshangabad, dated the 29th January 1921, in Civil Appeal No. 167 of 1920.

Mr. *B. V. Pradhan*, for the Appellant.

Mr. *V. D. Kale*, for the Respondents.

JUDGMENT.—The lower Courts have taken quite a wrong view as to the burden of proof both on the subject of payment of consideration by the plaintiff's husband to Baliram and on the question as to whether Lachhmi Narayan, the 4th defendant, was a *bona fide* purchaser entitled to the benefits of section 41 of the Transfer of Property Act. Undoubtedly, the burden of proving want of consideration lay upon Lachhmi Narayan who could not be in a better position than his vendor Khemkaran, and Khemkaran could not be in a better position than his vendor Baliram. Baliram in his sale-deed admits the receipt of consideration, the burden of proof that consideration was not paid lay, therefore, on Lachhmi Narayan. The mere fact that the plaintiff had not taken possession under the sale-deed for a period of over 11 years would hardly be sufficient to prove that consideration was not paid.

As regards the provisions of section 41, Transfer of Property Act, it undoubtedly lies on Lachhmi Narayan to plead and prove that he took reasonable care to ascertain that his transferee Khemkaran had power to make a transfer and that he had taken the sale-deed from Khemkaran in good faith and for consideration. The observations of the District Judge on this point are quite erroneous. There are numerous rulings, which are unnecessary to quote, to show that it lies on the person pleading that he is a *bona fide* transferee for value to make out his case. But on the facts I have seldom seen a stronger case in favour of the person raising this plea, namely, Lachhmi Narayan. Admittedly the plaintiff and her husband have never been in possession. Admittedly after the sale to the plaintiff the vendor remained in possession. When the vendor sold to Khemkaran, Khemkaran was put in possession and was in possession for some years and was in possession when he sold to Lachhmi Narayan. He also held a registered sale-deed from the original owner of the property, that is to say, the plaintiff's own vendor. Lachhmi Narayan found his vendor holding a title deed and in actual possession and he was not put to any further inquiry. It is proved he paid consideration. It is urged for the appellant that if Lachhmi Narayan had searched the records of the Registration Department he would have found that there was a prior registered deed in favour of the plaintiff who was not in possession. It has been held by this Court in *Sukhnandan* v. *Sadaram* (1) that registration does not operate as constructive notice and that the purchaser from an ostensible owner whose title-deeds are themselves complete is not bound to search the registration office to see if the original owner may not have given a title to somebody else.

Though the lower Courts have taken a wrong view of the burden of proof, they have decided rightly on the facts found. The appeal is, therefore, dismissed with costs.

R. N. *Appeal dismissed.*

(1) 13 C. P. L. R. 43.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2002 OF 1921.

February 15, 1922.

Present :—Mr. Justice Scott-Smith.

AMIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

NADIR ALI AND OTHERS—PLAINTIFFS AND *Musammat* BIWO—DEFENDANT—RESPONDENTS.

Mortgage—Subsequent invalid sale by mortgagor—Mortgagee, adverse possession by.

NARAYANASAMI NAICKER v. PERIASAMY ODAYAR.

A mortgagee cannot rely upon the twelve years' rule of limitation in support of a plea of adverse possession unless he can prove a subsequent valid sale.

Ariyaputhira Padayachi v. *Muthu Kumarasawmy Padayachi*, 15 Ind Cas. 343; 37 M. 423; 12 M. L. T. 425; 23 M. L. J. 339; (1912) M. W. N. 854, *Indar* v. *Asa Singh*, 65 P. R. 1908; 113 P. W. R. 1908; 90 P. L. R. 1908, relied upon.

Where one of several mortgagors effects a sale of the equity of redemption the mortgagee cannot set up the plea of adverse possession as against those mortgagors whose shares have been illegally sold.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 7th May 1921, varying that of the Additional Munsif, Second Class, Rawalpindi, dated the 30th November 1920.

Mr. *B. D. Qureshi*, for the Appellants.

Mr. *Muhammad Hasan*, for the Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiff's as representatives of the mortgagors, sued to redeem certain land from the defendants, the representatives of the original mortgagees. The land was jointly mortgaged by Qaim, Sheru and Jalal who were equal co sharers in it. On the 17th May 1901, Hashim son of Qaim having previously succeeded to his father's share, two mutations took place. By one of these Sheru purported to redeem the entire mortgage on payment of Rs. 185, and by the other he purported to sell the whole land to the same mortgagees for a consideration of Rs. 254. The lower Appellate Court has held that there was really only one transaction which was a sale by Sheru of the equity of redemption of the land to the mortgagees. It has dismissed the plaintiff's suit for redemption so far as the shares of Jalal and Sheru are concerned and there is no appeal against this part of the order. It has decreed the claim for the redemption of Hashim's share only and from this order the defendants have filed a second appeal, and it is contended on their behalf by Mr. Kureshi that on the 17th May 1901 there was a redemption of the original mortgage and that after the redemption there was a sale by Sheru and that after the sale the vendees' possession was adverse to Hashim, and that, therefore, the present suit is barred by time.

In my opinion the learned District Judge has rightly held that in 1901 there was only one transaction, namely, the sale of the equity of redemption. In accordance with the rules of the Revenue Department there had to be two mutations, one showing the redemption of the mortgage and the other the sale of the land. The sale by Sheru of Hashim's share to the mortgagees was illegal. *Ariyaputhira Padayachi* v. *Muthu Kumarasawmy Padayachi* (1) and the other authorities cited by the learned District Judge support the proposition that the mortgagees cannot rely on the 12 years' rule of limitation in support of a plea of adverse possession unless they can prove a subsequent valid sale. *Indar* v. *Asa Singh* (2) is also in point.

In my opinion, the decision of the learned District Judge is clearly correct, and I dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) 15 Ind. Cas. 343; 37 M. 423; 12 M. L. T. 425; 23 M. L. J. 339; (1912) M. W. N. 854.

(2) 65 P. R. 1908; 113 P. W. R. 1908; 90 P. L. R. 1908.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 289 OF 1920.

February 2, 1921.

Present:—Mr. Justice Spencer and Mr. Justice Ramesam.

NARAYANASAMI NAICKER (DEAD) AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PERIASAMY ODAYAR—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 134—Transfer of title by mortgagee—Mortgaged property under ownership of Hindu widow—Reversioner, suit by, to recover possession—Limitation—Reversioner's disability, nature of—Acquiescence by female owner, effect of—Art. 141, application of.

NARAYANASAMI NAICKER v. PERIASAMY ODAYAR.

Where the mortgagee of an estate in the ownership of a Hindu widow transfers absolute title to the same, the reversioner must bring a suit for recovery of possession under Art 134 of Sch. I to the Limitation Act, as Art. 141 has no application to such a case. [p. 740, col. 1.]

Per *Spencer, J.*—A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate is not on the same footing as disability of a minor, an idiot, or an insane person in whose favour an extra period of limitation has been allowed for instituting their suits, whatever may be the Article applicable to a suit of the same description by a person not so disabled [p. 736, col. 2.]

A female owner's acquiescence in the transfer of an estate made by the mortgagee will not amount to an act of alienation which a reversioner on succeeding to the estate can sue to set aside. [p. 737, col. 1.]

The expression "hereby otherwise specially provided for" in Art. 141 of Schedule I to the Limitation Act, indicates that that Article is the residuary Article for suits for the possession of immoveable property, but before a plaintiff can have resort to this Article, he must first show that Art. 134 is inapplicable. [p. 736, col. 2.]

Kannusami Thanjiroyan v. *Muthusami Pillai*, 38 Ind. Cas. 194; (1917) M. W. N. 5; 5 L. W. 250, referred to.

Per *Ramesam J.*—Art. 141 covers only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction—in either case resulting in the loss of possession to a stranger and the need of a suit on behalf of the reversioner. But this Article applies only when the suit is of a kind not described in Arts. 134, 135, 138, 140, 142 and 143. [p. 739, col. 2.]

Runchordas Vandravandas v. *Parvatibai*, 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 26 I. A. 71; 7 Sar. P C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.), *Nobin Chunder* v *Issar Chunder* [*Guru Purshad Doss*], 9 W. R. 505; B. L. R. Sup. Vol. 1008 (F B.), *Ishur Chunder* v. *Jibun Kumari*, 16 C. 25; 8 Ind. Dec. (N. S.) 17, *Natesan Chetti* v. *Soundararaja Ayyangar*, 21 M. 141; 7 M L. J. 275; 7 Ind. Dec. (N. S.) 456 and *Meda Vengamma* v. *Mitta Chelamiah*, 15 Ind. Cas. 17, 36 M. 484; 12 M. L. T. 293; 23 M. L. J. 168 referred to.

The object of Art. 134 of Sch. I to the Limitation Act is to cut down the period available to the mortgagor under Art. 148 and to compel him to watch the conduct of the mortgagee and to intervene on a transfer [p. 740, col 1.]

Muthu v. *Kambalinga*, 12 M. 316; 13 Ind. Jur. 255; 4 Ind Dec. (N. S.) 570, *Radhanath Doss* v. *Gisborne & Co.*, 14 M. I. A. 1 at p. 15; 15 W R. P. C. 24; 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 687 and *Bhagwan Sahai* v *Bhagwan Din*, 9 A. 97 at p. 104; A. W. N. (1886) 303; 5 Ind. Dec. (N. S.) 496 referred to.

Though it is true that a reversioner cannot sue to redeem during the lifetime of a widow, yet if the intervening female's conduct is such as to raise an apprehension that the property will never be redeemed or altogether lost, a reversioner can maintain an action for the preservation of the property. [p 740. cols. 1 & 2.]

Mulla Vittil Seeti Kutti v. *Kunhi Pathumma*, 43 Ind. Cas. 31; 40 M. 1040 at p. 1054; 33 M. L. J. 20; (1917) M. W. N. 609; 22 M. L. T. 236; 6 L. W. 464 (F. B.), referred to.

Second appeal against a decree of the Court of the Subordinate Judge, Kumbakonam in Appeal Suit No. 195 of 1918, preferred against the decree of the Court of the District Munsif, Valangiman, in Original Suit No. 35 of 1917.

FACTS appear from the judgment.

Mr. *K. P. M. Menon*, for the Appellant.—Plaintiff is the appellant. He is the reversioner of the last male owner suing for possession. The whole property belonged to one Rangasamy Naick who died in 1867. He was possessed of 4/5ths suit land and a whole house. He had two wives. By the first wife, he had a daughter Ammalu Ammal who died in 1868. Plaintiff is her son. By his 2nd wife he had two daughters. One of them died in 1895 and another named Kaveri Ammal died in 1906. The property is found in the possession of one Vasudeva Naick, a cousin of Kaveri Ammal.

In 1866, Rangasamy Naick created a mortgage of 1/5th land and 1/5th house There was sale made by Vasudeva Naick in 1900. Art. 134 of the Limitation Act has no application: if it is applicable, my suit would be barred. I come specifically under Art. 141. (Suit by reversioner). There is no cause of action for me from 1900. My cause of action accrued only from 1906. Under the old Act XV of 1859, there are certain decisions against me: but in that Act, there is no Article corresponding to Art. 141 of the present Act under which my suit comes specifically. So the decisions under the old Act can have no application to my present suit. I must, therefore, be allowed to recover possession of 4/5ths land and 4/5ths house subject to the encumbrance created by Rangasamy Naick. *Runchordas Vandravandas* v. *Parvatibai* (1), *Venkataramayya* v. *Venkatalakshmamma* (2), *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (3) were then

(1) 23 B. 725: 1 Bom. L R. 607; 3 C. W. N. 621; 26 I. A. 71; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N. S.) 485 (P. C.)

(2) 20 M. 493; 7 M. L. J. 204; 7 Ind. Dec. (N. S.) 349.

(3) 43 Ind. Cas. 31; 40 M. 1040 at p. 1054; 33 M. L. J. 320: (1917) M. W. N. 609; 22 M. L. T. 236; 6 L. W. 464 (F. B.).

quoted. With regard to another 1/5 house, which is the subject of neither mortgage nor sale, I must be allowed to recover possession free from any encumbrance *Ram Chandar* v. *Kallu* (4). The plaintiffs have no present interest in the property. *Narayana Kutti Goundan* v. *Pechiammal* 5). A reversioner cannot sue for redemption. Mitra on Law of Limitation, Vol. II, page 149.

Mr. *T. R. Venkatarama Sastry*, for the Respondent, holds that possession under an informal document would be enough to perfect the title. So this disposes of 3/5ths house and 3/5ths land. With regard to /5th house, the argument is put forward here for the first time. Before **Art. 141** was enacted, the law was that the widow represents the estate fully for all purposes. That law had not come to an end by Art. 141 : where the cause of action arises personally to the widow, Art. 141 applies. Art. 134 appears for the first time in the Act of 1877. The rule of 60 years for redemption is peculiar to India and in England, the period is only 20 years. Since the period is very long in India, the Legislature, in order to protect *bona fide* purchasers for value, thought it necessary to cut down the period into 12 years in 1871. Then on account of certain criticism made, the term '*bona fide*' was taken away in the Act of 1877. Even the suit under Art. 134, is in essence a suit for redemption. Art. 141 has no application to cases, where Art. 134 applies. *Muthu* v. *Kambalinga* (6) is overruled in *Ahamed Kutti* v. *Raman Nambudri* (7). Art 134 does not apply to Court sales. *Radhanath Doss* v. *Gisborne & Co.* (8), *Bhagwan Sahai* v. *Bhagwan Din* (9), *Bava Khan* v. *Bhiku Sahu* (10), *Nobin Chunder* v. *Issur Chunder* [*Guru Purshad Doss*] (11), *Juggernath Sahoo* v. *Syed Shah Mahomed Hossein* (12). Case of reversioner can bring the suit even during the lifetime of the widow. *Rani Anund Kunwar* v. *Court of Wards* (13) and *Kannusami Thanikoyan* v. *Muthusami Pillai* (14), Mayne's Hindu Law, page 906, para. 647.

Mr. *K. P. M. Menon* in reply. All the cases quoted by my learned friend are cases of *cestui que trust*. Mitra, on Law of Limitation Vol. II. page 1149.

JUDGMENT.

SPENCER, J.—In the course of the full and able arguments on either side to which we have listened, no reported case has been cited in which a question arose of a choice between the application of Art. 134 or 141 of the Limitation Act. *Kunnusami Thanikoyan* v. *Muthusami Pillai* (14) was an instance of a conflict between Art. 134 and Art. 144. I then observed that it was clear that the plaintiff could not have resort to Art. 144 unless he first showed that Art. 134 was inapplicable, the reason being that Art. 144 is the residuary Article for suits for the possession of immoveable property, as is indicated by the words "hereby otherwise specially provided for."

There is no indication that Art. 134 should not be applied to suits for possession of immoveable property, which but for that Article might have been governed by the period of limitation prescribed in Art. 141. In *Kulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (3) the learned Chief Justice after discussing the law of limitation applicable to similar actions under the English Act pointed out that Art. 34 of the Limitation Act was in its origin wholly self-contained and was not appended as a proviso to any other section. A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate has not been treated by the Legislature on the same footing as the disability of a minor, an idiot, or an insane person, in whose favour by section 6 of the Act an extra period has been allowed for instituting their suits, whatever may be the Article applicable to a suit of the same description by a person not so disabled.

(4) 30 A. 497; 5 A. L. J 631; A. W. N. (1908) 225.
(5) 15 Ind. Cas. 206; 36 M. 426; 11 M. L. T. 174; (1912) M. W. N. 353; 22 M. L. J. 364.
(6) 12 M. 316; 13 Ind. Jur. 255; 4 Ind. Dec. (N. S.) 570.
(7) 25 M. 99; 11 M. L. J. 323.
(8) 14 M. I A. 1 at p. 15; 15 W. R. P. C. 24; 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 656; 20 E. R. 687.
(9) 9 A. 97 at p. 102; A. W. N. (1886) 303; 5 Ind. Dec. (N. S.) 496.
(10) 9 B. 475; 5 Ind. Dec. (N. S.) 215.
(11) 9 W. R. 505 B. L. Sup. Vol. 908 (P. B.).
(12) 14 B. L. R 386; 23 W. R. 99, 2 I. A. 48 3 Sar. P. C. J. 419; 3 Suth. P. C. J. 61 (P. C.).
(13) 6 C 764: 8 C. L. R 381; 8 I. A. 14; 4 Shome L. R. 78; 4 Sar. P. C. J. 115; 5 Ind Jur. 61; Hafique & Jackson's P. C. No 68; 5 Ind Dec. (N S. 495 (P C.).
(14) 38 Ind. Cas. 194; 5 L. W. 250; (1917) M. W. N. 5.

NARAYANASAMI v. PERIASAMY.

The transfer by the mortgagee, Vasudeva Naick. f the absolute title to the defendant was in 1900. A perusal of Exhibit I I leaves no doubt in my mind that it was an absolute sale for good consideration. Kaveri Ammal, the last female owner died in 1903. She had, 3 years before her death, to sue under Art. 134 to recover the property, and the plaintiff had 6 years after her death till 1912, but he neglected to move in the matter till 1914.

Kaveri Ammal's acquiescence during those first six years will not amount to an act of alienation which the reversioner on succeeding to the estates can sue to set aside Both were equally negligent in preserving the interests of the mortgagor which they in turn represented.

The Subordinate Judge was, therefore, right in holding that the present suit in respect of 1/5th share of lands and house mortgaged by the last male owner in 1866 and afterwards transferred by the mortgagee in 1900 was time-barred under Art. 134. The plaintiff's claim for a 3/5th share of lands and house alleged to have been sold in 1865 is barred by adverse possession that commenced during the lifetime of the last male owner, and he failed to prove that there was any other 1/5th share of the house still remaining unalienated. The result is that the second appeal fails and is dismissed with costs.

RAMESAM, J.—The subject matter of the suit is a house and 4/5th share of certain lands. It is common ground that one Rangaswami Naicker was the original owner of 4/5ths share of the house and 4/5ths share of the lands. Whether he was also the owner of the remaining 1/5th share of the house will be dealt with later on. Rangaswami died in 1867 leaving three daughters, and the youngest of these who survived the others died in 1906. The 1st plaintiff, who is a daughter's son of Rangaswami being the sole reversioner, brought this suit in 1914, that is within 12 years after the death of the last daughter, to recover possession of the properties. The defense is: (1) As to 1/5th share in the house and a like share in the lands, they were mortgaged by Rangaswami in 1865 with possession to one Vasudeva who sold the property in 1900 to the defendant and hence the suit is barred by limitation under Art. 134 of the Limitation Act (2) As to 3/5ths share in the house and a like share in the land. They were sold with Rangaswami's consent in 1865 by Appavu, a mortgagee of Rangaswami, for discharging the mortgage-debt of Vasudeva, who sold them to the defendant in 1900.

It is suggested for the appellant that there is a 1/5th share of the house belonging to Rangaswami and left untouched by these transactions, and the plaintiff is entitled to a decree for this share as his suit is obviously not barred having regard to Art. 141 of the Limitation Act. It does not appear that the plaintiff made this claim in the Courts below. Having regard to the fact that the ownership in the village depended on the *pangu* right or share in a *mirasi* village and the share in the house generally corresponded with the share in the lands, and to the fact that Rangaswami purchased 1/5th share in the house and a like share in the land from his brother Ramaswami and had 3/5th share in both, in his own right, it does not appear that Rengaswamy had ever possessed the remaining 1/5th share in the house by purchase or otherwise. There is no evidence on record to support the right of Rangaswami to more than a 4/5th share of the house. On this ground, the last contention of the appellant must be negatived.

As to the lands said to be sold in 1865, it appears that the sale deed of 1865 was unregistered and the appellant also contends that the secondary evidence of the sale deed has been wrongly admitted. But there is other evidence in the case, including plaintiff's admissions from which it can be reasonably inferred that Vasudeva got into possession in 1865 under an attempted sale whether the sale was valid or not, and adverse possession began during the lifetime of Rangaswami, as found by the Subordinate Judge. If so, the appellant's case fails as to the 3/5ths share also.

The only portion that remains to be considered is the 1/5th share mortgaged in 1866 and this turns on a pure question of law, *viz.*, whether Art. 141 or Art. 134 applies to the case. At the outset, I may point out that the transfer of 1900 was accompanied by possession—thus avoiding the difficult question discussed in *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (3). As it is clear that the language of Art. 134 applies literally, the argument for the appellant may be stated at its best in the form

that where Art. 141 is applicable as well as another Article, the former prevails and as an illustration, the case in *Runchordas Vandravandas* v. *Parbatibai* (1) was relied on, where it was held that Art. 144 did not apply and Art. 144 applied. The obvious reply to the argument so far as it relates to Art. 144 is that that case was not a case to which both Articles apply, as Art. 144 by its language can never be applied if there is another Article which is applicable. But the main argument has still to be considered as to other Articles. The Articles dealing with suits for recovery of immoveable property including, for this purpose, the suit described in Art. 148 also are Arts. 134 to 144 and Art. 148. Omitting Art. 144 from consideration, on the ground that it cannot apply where any other Article applies, those that remain are Arts. 134 to 143 and 148. As to them, it is contended for the appellant that wherever a suit falls under Art. 141 and also under any one of the other Articles, the former ought to prevail as, since the enactment of Limitation Act of 1871, the intention of the Legislature was to do away with the rule that prevailed under the Limitation Act of 1859, *viz.*, that adverse possession against the widow is also adverse possession against the reversioner, [see *Nobin Chunder* v. *Issur Chunder* (*Guru Pursad Doss*) (11)], and to give the reversioner the benefit of a longer period of limitation. Now, the suits of Hindu reversioners which may fall under any of the Arts. 134 to 140, 142, 143 and 148 (and to which Art. 141 may seem also to apply) may be divided into three classes :—

(1) Suits where the cause of action has accrued during the lifetime of the last male owner or his predecessor-in-title and the period of limitation under the specific Article has expired during the lifetime of one of the intermediate female owners. Will Art. 141 help the reversioner in such a case and extend the period under the specific Article to twelve years beyond the death of the female and enable him to recover the property? The appellant's Counsel concedes that Art. 141 does not apply to such cases and the reason he gives is that the reversioner is not entitled, within the meaning of Art. 141, to recover possession, for the right would be already barred in these cases.

(2) Suits where the cause of action has accrued during the lifetime of the last owner or his predecessor in title, but the period of limitation under the specific Article has not expired during the lifetime of the intermediate female owners. In such a case, the period of limitation has only partly run leaving a balance of the period within which the suit may be brought by the reversioner successfully. In such a case, will the reversioner's suit be governed by Art. 141 so as to give him a period of 12 years from the death of the female which will be longer than the balance left under the other Articles, except in the case of a suit under Art. 143 when the result of applying Art. 141 may be even to cut down the period given by Art. 148? The appellant's Counsel concedes that Art. 141 does not govern such a case. But his former reason that the reversioner is not entitled on the death of the female is not available to him here, for, in this case, the reversioner is entitled to possession on the death of the female, whatever Article is applied. Why should Art. 141 be construed so as to exclude this class of cases if the appellant's contention that Article 141 should be applied to all cases to which it apparently applies is correct?

(3) Where the cause of action accrued, not during the lifetime of the last male owner or his predecessor-in title, but, after his death and during or at the end of the life of the intervening female, cases falling under this clause cannot be governed by Arts. 136 and 137, but the other Arts. (134, 135, 138 to 140, 142 and 143 and 148) may be applicable to them. As to these the appellant's Counsel contends that notwithstanding the applicability of any one of these specific Articles, Art, 141 applies also to the suit and prevails over the other Article if it is for the benefit of the reversioner. This last qualification has to be added, for, in a suit of the kind described in Art. 148, the application of Art 141 may have the effect of cutting down the period of 60 years. This argument of the appellant's Counsel depends on the construction of the words "entitled to possession" as meaning "entitled to recover possession or any cause of action," thus giving a

wide scope to the suits described under Art. 141 and, further,—apart from the anomaly of giving no explanation why it should not govern the second class of cases mentioned by me—it involves the following two propositions:

(1) The Articles of the Limitation Act may be overlapping. Two Articles may be both applicable to the same class of suits.

(2) That the Court can pick and choose from the Articles that which ought to be applied to the case—sometimes one and sometimes the other, whichever gives the longer period of limitation with reference to the facts of each case. There is no warrant for these propositions and I do not understand the cases in *Ishur Chunder* v. *Jibun Kumari* (15) and *Natesan Chetti* v. *Soundararaju Ayyangar* (16) as supporting the first proposition. There is always one Article applicable to a case and the Court has to find it, though more than one may *seem* to be applicable and such a construction of the various Articles has to be adopted as to confine each Article to one exclusive category of suits. One principle in the working out of this process is the maxim *generalia specialibus non derogant, specialia derogant generalibus.*

The second proposition is still more untenable and the fact that the appellant's argument involves it is a very strong argument against it. It is true that this strong argument is furnished only by bringing in suits described in Art. 148 for consideration among the suits for recovery of immoveable property. If it is said that such suits are only suits to redeem and there is no analogy between Art. 148 and the other Arts. (134, 135, 138 to 140, 142 and 143), the reply is, that the suit under Art. 134 is certainly analogous to the suit under Art. 148. Both are based on a mortgage; even in Art. 148, the suit may be described as a suit to recover the property if it is the plaintiff's case that a mortgage is discharged; and even in a suit under Art. 134 the appropriate relief against a transferee in a decree for redemption as the transferee gets by the transfer at least the rights of his transferor. In this light I would construe Art. 141 to cover only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction—in either case resulting in the loss of possession to a stranger and the need of a suit on behalf of the reversioner. It does not cover cases where the cause of action includes something more beyond this, *e. g.*, a transaction by the last male owner such as a mortgage (Art. 148), a mortgage by him and transfer by the mortgagee (Art. 134), a purchase in Court auction (Art. 138), a lease (Art. 139) or a carving by him, of life estates with a remainder or a reversion following it (Art. 140), or any transaction involving the possibility of forfeiture (Art. 143), or loss of possession by him (Art. 142). In these cases, the specific Article applies. This is the respondent's contention, and the result of accepting it would be that Art. 141 does not apply to the first two classes of cases,

(a) Of the Arts. 134, 135, 138 to 144 and 148, no two are overlapping.

(b) Art. 144 has to be applied last.

(c) Each of the other Articles has to be applied when the suit is of the kind described in it, even if it is a suit by reversioner;

(d) Only when the suit is of a kind not described in Arts. 134, 135, 138, 140, 142, 143 and 148, does Art. 141 apply to suits by reversioners—the discontinuance of possession in Art. 142 referring to a discontinuance during the last male owner's lifetime.

If the intention of the Legislature when it departed from the Act of 1859 and introduced Art. 141 in the later Acts was to give the reversioners the benefit of a longer period in all suits to recover possession—even where the suits are of the kind described in the other Articles, such intention would have been attained and expressed better, not, by the introduction of a separate Article like Art. 141, but a general section somewhat as follows:

"Where in the suits described in Arts. 134 to 144 and 148 the plaintiff is a person entitled to the right on the death of a Hindu female, and the cause of action

(15) 16 C. 25; 8 Ind. Dec. (N. S.) 17.

(16) 21 M. 141; 7 M. L. J. 275; 7 Ind. Dec. (N. S.) 456.

accrues during or at the end of the life of the female, the interval between the accrual of the cause of action and the death of the female shall be excluded from the computation of the period in the second column."

I am, therefore, of opinion that the suit is governed by Art. 134.

Another argument of the learned Counsel for the appellant is that such a construction will leave the reversioner remediless, for the intervening female may allow the suit to be barred and he himself has no right to bring a suit. Apart from the consideration that the fact that some possible hardship cannot stand in the way of accepting a construction of a Statute otherwise clear, I am unable to agree with the proposition that the reversioner cannot intervene for the protection of the actual reversioner if the widow neglects to take action. In support of this proposition, the learned Counsel for the appellant relied on the dictum of Srinivasa Iyengar, J. in *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (3): "Further the Article cannot, I think, apply to suits where at the time of the transfer the mortgagor was not entitled to sue for possession, etc." This dictum was not necessary for decision of the point before the Full Bench and I respectfully dissent from it. When we see the varying attitude of the Legislature in respect of the suit described in Art. 134 [see *Radhanath Dose* v. *Gisborne & Co.* (8) Act of 1859, *Bhagwan Sahai* v. *Bhagwan Din* (9) on the Act of 1871, *Muthu* v. *Kambalinga* (6)] it is clear that the object of the Article was to cut down the period available to the mortgagor under Art. 145 and to compel him to watch the conduct of the mortgagee and to intervene on a transfer—thus making the transfer a cause of action which otherwise did not exist.

The decisions in *Ram Chandar* v. *Kallu* (4), *Meda Vengamma* v. *Mitta Chelamiah* (17) hold that the reversioner cannot sue to redeem during the lifetime of the widow. Ordinarily this is true, but I do not understand the cases to lay down that in a case when the appropriate allegations are made and the facts proved to the effect that the intervening female's conduct is such as to raise the apprehension that the property will never be redeemed or altogether lost to a transferee, the reversioner cannot maintain an action for the preservation of the property, on the same principle that actions to restrain waste are allowed. [See Mayne's Hindu Law, paragraph 647 and cases cited therein, especially *Nobin Chunder* v. *Issur Chunder* (*Guru Purshad Doss*] (11), per Sir Barnes Peacock.]

I am, therefore, of opinion that Art. 134 applies to the 1/5th share of the house and of the land mortgaged in 1866.

The result is that the whole second appeal fails and is dismissed with costs.

M. C. P.

N. K. & W. C. A.

Appeal dismissed.

(17) 15 Ind. Cas. 17; 36 M. 484; 12 M. L. T. 293; 23 M. L. J. 168.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2492 OF 1918.

January 27, 1922.

Present:—Mr. Justice Abdul Raoof, and Mr. Justice Harrison.

ABDUL KARIM—DEFENDANT—APPELLANT

versus

THE SHOP THAKAR RAM-JAGGU RAM, THROUGH BUTA RAM, AND ANOTHER PLAINTIFFS AND ABDUL HAQ AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 114, ill. (e)—Appeal—Objection taken in grounds of appeal not mentioned in judgment—Presumption.

In illustration (*e*) of section 114 of the Evidence Act it is laid down that the Court may presume that judicial and official acts have been regularly performed, a presumption which, like all other presumptions, may be rebutted but, unless rebutted, is conclusive. [p. 741, col. 1.]

Where it is the duty of a Court to do a particular thing it must be assumed that the Judge of that Court did his duty. [p. 741, col. 1.]

It is the duty of a District Judge to record a finding on all points argued before him, and where a judgment makes no mention of an objection taken in the grounds of appeal, the presumption, in the absence of evidence to the contrary, is that the objection was abandoned. [p. 741, col. 1.]

GANESH MORESHWAR v. VASUDEO VITHAL.

Second appeal from a decree of the District Judge, Ferozepore, dated the 11th May 1918, affirming that of the Subordinate Judge, First Class, Ferozepore, dated the 21st January 1918.

Sheikh *Nias Ali*, for the Appellant.

Chaudhri *Zafrulla Khan*, for the Defendants-Respondents, and Lala *Fakir Chand*, for the Plaintiffs-Respondents.

JUDGMENT.—The only question to be desided in this appeal is, whether the appellant is entitled to have the case remanded in order that the evidence of one remaining witness may be recorded. The first ground of appeal runs as follows:—"The lower Appellate Court has erred in law in not ordering the evidence produced by the appellant to be recorded," and this, Counsel explains to mean that the defendant Abdul Karim was not given the opportunity for which he asked to have a witness re summoned. In clause 9 of the memorandum of appeal presented to the District Judge the appellant did state that the lower Court had not taken all his evidence. The judgment of the learned District Judge is silent on the point and Counsel urges that the point must have been pressed before the District Judge, who must have overlooked it or have failed for some other reason to record a finding. He concedes that it was the duty of the District Judge to record such a finding and he has not supported his ground of appeal by an affidavit from the Counsel in the District Court to the effect that he did not give up the point and did press it. In section 114 of the Evidence Act it is laid down that the Court may presume that judicial and official acts have been regularly performed, a presumption which, like all other presumptions, may be rebutted but, unless rebutted, is conclusive. At page 747 of Woodroffe and Ameer Ali's Law of Evidence, 7th Edition, a mass of authorities is quoted to the effect that if it be the duty of a Court to do a particular thing it must be assumed that the Judges of that Court did their duty. These authorities are precisely in point and, in the absence of any affidavit to the effect that the ground was not given up, and inasmuch as the presumption is that the Court did its duty, we must assume that the ground was definitely given up. The mere recital of the ground in the memorandum of appeal is no reason for making a contrary presumption and holding, as Counsel wishes us to do, in contravention of section 114, that the Court failed to do its duty. The position, therefore, is that the appellant did not ask the District Court to remand the case and abandoned any relief to which he might have been entitled. He cannot now claim to be given any further opportunity. There is no force whatever in any of the remaining grounds put forward in this Court as the questions decided are all questions of fact. We, therefore, dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 510 OF 1921.

June 22, 1922.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

GANESH MORESHWAR JOSHI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VASUDEO VITHAL PARANJPE—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 60—Mortgage—Mortgage on portion of property invalid—Suit for redemption—Portion, omission of, from suit—Mortgage, whether splitted—Parties—Sub-mortgagee, whether necessary party.

B. mortgaged certain property, described as Kelghar, to *P.* in 1890. In February 900 he mortgaged the same property to *J.* for an amount which included the sum payable to *P.* in respect of the first mortgage. In April 1900 *J.* mortgaged certain properties belonging to himself and his mortgage interest in the Kelghar property to *P.* and the consideration included the sum due by *B.* to *P.* under the first mortgage. In 1903 *R.* purchased the Kelghar property in execution of a money-decree against *B*, subject to the mortgage of 900 in favour of *J.* *R* brought a suit against *J* and *P* and obtained a decree holding that the mortgage by *J.* to *P* was colourable and unreal and without consideration, and that *P.* was entitled to a charge in respect of the mortgage by *B.* in his favour In [illegible] *R* obtained a decree for possession of the Kelghar property by virtue of the title acquired by him at the Court sale against *J.* and *P.* In 1917

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J. filed the present suit against *P.* for redemption of the mortgage of 1906 excluding therefrom the Kelghar property :

Held, that the omission to include the Kelghar property, *i.e.*, *J.*'s mortgage right therein which was found not to exist, did not in any sense contravene the rule contained in the last clause of section 60 of the Transfer of Property Act that a mortgage should not be split up. [p. 743, col. 2.]

In a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a *necessary* party though he may be a proper party. [p. 743, col. 2.]

Second appeal from the decision of the District Judge, Thana, in Appeal No. 73 of 1920 confirming the decree passed by the Subordinate Judge at Roha, in Civil Suit No. 594 of 1917.

Mr. *Coyajee*, (with him Mr. *P. B. Shingne*), for the Appellant.

Mr. *K. H. Kelkar*, for the Respondents.

JUDGMENT.

SHAH, ACTG. C. J.—It is necessary to state briefly the facts which have given rise to this second appeal. Certain property belonging to one Bapat, which may be described as the Kelghar property, was mortgaged by him to Paranjpe in 1890. Subsequently, in February 1900, Bapat mortgaged the same property to the present plaintiffs (Joshi brothers) for Rs. 2,000, which included the sum of Rs. 1,200 to be paid by the Joshis to Paranjpe in respect of the first mortgage. The present plaintiffs mortgaged certain properties belonging to them and their interest as mortgagees in the Kelghar property for Rs. 4,000 to Paranjpe in April 1900. The consideration was stated in detail, as including the sum of Rs. 1,186-1-6 which was mentioned as being the amount due to Paranjpe under the mortgage by Bapat to him. This mortgage was renewed in 1906 in the same terms. In 1903 the Kelghar property was sold in execution of a money-decree against Bapat and purchased by the Rodes, but it was subject to the mortgage of 1900 in favour of the Joshis. The Rodes filed suit No. 131 of 1904 against the Joshis and Paranjpe for a declaration that the said mortgage was "colourable, unreal and without valuable consideration" and for a declaration that the property of Bapat was liable to be sold free from that mortgage. The suit was brought in that form, as the property was already declared subject to that mortgage in miscellaneous proceedings before the suit. That suit was dismissed in the first instance, but in appeal (No. 292 of 905) it was held that the mortgage was colourable and unreal and without consideration, and that defendants Nos. 5 and 6 *i.e.*, the Paranjpes) were entitled to a charge of Rs. 1,186-1-6 in respect of the earlier mortgage by Bapat in their favour. Accordingly, a decree was passed declaring the property in that suit (*i.e.*, the Kelghar property) subject to that charge in favour of the Paranjpes and that the mortgage in favour of the Joshis by Bapat was not binding upon the plaintiffs in that suit. This decree was affirmed by the High Court in *Ganesh* v. *Purshottam* (1). Subsequently the Rodes filed another suit in 1909 to recover possession of the Kelghar property on the title acquired by them at the Court-sale against the Joshis and Paranjpe. The claim for possession was allowed ultimately by the Appeal Court, it is relevant to note that it was held in that litigation that the finding as to the true nature of the mortgage of February 1900 in the suit of 1904 was *res judicata* against them.

The Joshis filed the present suit against their mortgagee (Paranjpe) in 1917 for redemption of the mortgage of 1906. In the plaint they described all the mortgaged properties including their interest as mortgagees in the Kelghar property and stated the facts preceeding the suit. They prayed for accounts under the Dekkhan Agriculturists' Relief Act, and further prayed that in taking accounts the property at Kelghar and the amount of Rs. 1,186-1-6 should be excluded. The defendant filed a written statement in which the above facts were stated but the effect thereof was contested. The Trial Court found the first three issues in favour of the defendant and recorded no findings on the remaining issues. It held that the eight annas Khoti Takshim of Kelghar required to be included in the present suit, that the Rodes were necessary parties, and that by the judgment in Appeal No. 292 of 905, confirmed by the High Court in Second Appeal No. 186 of 1907 the defendant was not deprived of his right to claim Rs. 1,186-1-6 with interest from the plaintiffs.

(1) 1 Ind. Cas. 106; 33 B. 181; 11 Bom. L. R. 26; 5 M. L. T. 228.

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The suit was dismissed as the plaintiffs refused to include the Kelzhar property in the suit and to join the Rodes as parties. The plaintiffs appealed, but the same view was taken by the learned Judge, who affirmed the decree of the Trial Court.

In the appeal before us it is contended that the lower Courts are wrong in holding that the inclusion of the Kelghar property and the non-joinder of the Rodes as parties are necessary steps. It is urged on behalf of the respondents that that view is right.

It seems to me, on a consideration of the arguments and of the plaint, that the suit is properly framed. It is really a suit for the redemption of the whole mortgage. The plaintiffs seek to establish that a part of the mortgage-debt should be excluded from the accounts on certain grounds. That is a question to be decided in the suit between the parties on its merits, on the terms of the mortgage bond and in the light of the subsequent events with reference to the mortgage by Bapat in favour of the present plaintiffs, but the suit is one for the redemption of the whole mortgage, treating the mortgage debt as one entire debt.

I do not think that the inclusion of the Kelghar property in the suit is a matter of any practical importance on the facts of this case. It has been referred to in the plaint, and all the necessary facts relating thereto have been stated. If it were absolutely necessary to include it in the suit, it may be treated as having been so included. Mr. Coyajee for the plaintiffs concedes that, if necessary, it may be so treated. But he contends that its inclusion is wholly unnecessary: and I think that that contention ought to be allowed. It must be remembered that the mortgage in suit includes the interest of the Joshis as mortgagees in the Kelghar property. It is clear that as regards the Kelghar property, the transaction in suit is a mortgage by a mortgagee of his interest in that property. The existence of that property depends necessarily upon the rights of the plaintiffs as mortgagees in that property. But it has been effectively determined as between the owner and the mortgagees that the mortgage was not real and that practically it had no existence. That adjudication was made in a suit to which the derivative mortgagee was a party. The derivative mortgagee derives his title from the mortgagee, and if the mortgagee is proved to have no interest as a mortgagee as against the mortgagor (the owner), I do not understand how the derivative mortgagee can now contend that the property (*i. e.*, his mortgagor's interest as mortgagee) should be brought in the suit as part of the property mortgaged to him. The parties to the present suit, the mortgagee and his sub-mortgagee, are bound by the finding that the present plaintiffs have no interest as mortgagees in the Kelghar property The fact of their being in possession of the Khoti Takshim of the village or a part of it, is disputed. The lower Courts have placed some reliance upon this fact. Even if it be a fact it does not appear to me to affect the question. The plaintiffs have stated in the plaint the fact that their interest as mortgagee is found to be non-existent. I do not see how the omission to include the Kelghar property (*i. e.*, the plaintiffs' mortgage right therein, which is found not to exist) can be treated as any transgression of the rule that the mortgage should not be split up. This rule is stated in the last paragraph of section 60 of the Transfer of Property Act. I am unable to hold that the omission to bring the Kelghar property, by which the mortgage right of the plaintiffs therein is meant, can be held to contravene in any sense the terms of the last clause of section 60. The mortgagors here seek to redeem the whole mortgage, and have to pay the whole of the amount, which may be found due on taking accounts under the Dekkhan Agriculturists' Relief Act, before they can redeem the whole of the property mortgaged, *i. e.*, all the property except the mortgage right in the Kelghar property, which was supposed to have been in existence at the time of their mortgage to Paranjpe but which has been subsequently found to have never been in existence really.

In this view of the matter, the question of the non-joinder of the Rodes does not arise. But I may point out that in a suit by a mortgagee to redeem his sub-mortgage the original mortgagor is not a *necessary* party, though he may be a proper party. The following note in Seton on Decrees, page 2011 (7th Edition), is in point:—"The original mortgagee may redeem the derivative mortgagee and the latter

may foreclose the original mortgagee without making the original mortgagor a party."

This view was accepted by this Court in *Someshwar* v. *Naranbhai* (2) which was a case of the sub-mortgagee suing his mortgagor (*i. e.* the original mortgagee) without joining the original mortgagor as a party. The same view is taken in *Ram Shankar Lal* v *Ganesh Prasad* (3).

As regards the third point which has been decided by the lower Courts as to Rs. 1,186-1-6, it is true that it is not *res judicata*. It is clear that the question as to the plaintiffs' liability to pay the sum to the defendant in spite of the fact that the mortgage in their favour of the Kelghar property was a sham and colourable transaction could not have been and has not been decided in the previous suits between the Rodes and the parties to the present litigation. But that is all, we think, that is decided by the lower Courts. We are not called upon to express any opinion, and we express none, as to the merits of the defendant's contention that he is entitled to recover that amount on the terms of the mortgage-bond in suit. That will have to be considered by the Trial Court when the question as to the amount due to the defendant under the mortgage, according to the terms of the bond and the Dekkhan Agriculturists' Relief Act, is dealt with by the Court.

As there has been some confusion in the argument as to this sum of Rs. 1,186-1-6, which originally represented the mortgage amount under the first mortgage by Bapat to Paranjpe, it is desirable to point out that it appears from the judgment in Appeal No. 292 of 1904 that the charge of Rs. 1,186 1-6 was declared in favour of Paranjpe as representing the amount of the mortgage, to him by Bapat, and not on account of the subsequent transactions between (*a*) Bapat and the plaintiffs, and (*b*) the plaintiffs and Paranjpe. Only the amount was taken as settled on account of its having been mentioned in the subsequent mortgages.

I would, therefore, allow the appeal, reverse the decree of the lower Appellate Court and remand the suit to the Trial Court for disposal on the merits. The plaintiffs are entitled to the costs here and in the lower Appellate Court. The costs in the Trial Court to be costs in the suit.

CRUMP, J.—I agree.

W. C. A.

Appeal allowed.

(2) 9 Ind Cas. 765; 13 Bom. L. R. 90.
(3) 29 A. 365 (F. B.); 4 A. L. J. 273; A. W. N. (1907) 97; 2 M. L. T. 248.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 2899 OF 1917.

March 2, 1922.

Present:—Justice Sir William Chevis, KT., and Mr. Justice Harrison.

RUP CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALLAH JAWAYA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O XXI, r. 35—Execution of decree—Decree for possession of immoveable property—Execution not taken out—Possession taken out of Court—Dispossession—Suit, whether maintainable.

Plaintiff obtained a decree against defendant for possession of a piece of land conditional on payment of a certain sum of money. He paid the sum and obtained possession out of Court. Some years afterwards he was dispossessed by the defendant. He brought a suit to recover possession of the land from the defendant:

Held, (1) that although the decree had not been technically executed in the sense in which the word is used in the Code of Civil Procedure, it had been given effect to out of Court, and having been satisfied nothing further remained to be done in execution; [p 745, col. 2]

(2 that plaintiff having been in lawful possession of the land and having been dispossessed therefrom, was entitled to bring the present suit. [p. 745, col. 2]

Khub Ram v. *Surat*, 39 Ind. Cas 758; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917, distinguished.

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 31st July 1917, reversing that of the Junior Subordinate Judge, Shahpur at Sargodha, dated the 16th December 1916.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Raj Krishna* for Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—The present plaintiffs, Rup Chand and others, obtained a decree against the defendant, Allah Jawaya, on the 8th of August 1904 conditional on payment of Rs. 230 by the 15th of August. In November 1915 they instituted the present suit against the same defendants on the allegation that they had obtained possession in September 1904, and, after enjoying the land and building upon it in the interval, had been dispossessed in 1915 and, therefore, ask for a fresh decree for possession. The suit was decreed by the first Court but remanded by the District Judge on appeal for decision of two additional issues as to what was the value of the land and whether the sum of Rs. 230 had been paid or not.

The first point as to the valuation was dropped and on appeal the District Judge dismissed the suit, relying on *Khub Ram* v. *Surat* (1), in spite of the fact that his findings on the facts were as follows:—

(1) The condition that Rs. 230 was to be paid was fulfilled.

(2) The defendant in execution of the decree refused to deliver possession formally, and the decree was never executed legally.

(3) The site was, however, actually taken possession of by the plaintiffs, who let the execution proceedings drop.

(4) Latterly, the plaintiffs being negligent in the use of the property, the defendant took advantage deliberately of the imperfection of the execution proceedings trespassed on the property, and built upon it. In explanation of the slackness of the plaintiffs in pursuing the execution, it is to be noticed that the decree itself was a consent decree.

This second appeal is presented on the ground that the necessary result of the findings is that the plaintiffs are entitled to a decree. The facts are that, after the sum of Rs. 230 had been paid, the successful plaintiffs applied for execution of their decree and to be put in possession of the land in suit. A bailiff was sent with the decree-holders for the purpose, and he appears to have been under a misapprehension as to the necessity of obtaining the signature of the judgment-debtor before he could proceed to put the decree-holders in possession of the vacant site. It is quite clear from his report that the judgment-debtor stated that he had no objection whatever and that he had given up the land, which was lying vacant. Thereupon the plaintiffs took possession and remained in possession for many years and, although it cannot be said that that possession was taken "in execution" in the sense that an official of the Court actually placed the decree-holders upon the land, it was taken in the course of execution proceedings and as a result of the decree which the plaintiffs had obtained. The authority relied upon by the District Judge deals with exactly the opposite set of conditions, that is to say, where a decree-holder has not obtained physical or actual possession, and relies only on the formal proceedings giving him symbolical possession and there it was held that if there be any flaw in those proceedings his proper remedy is to continue to execute his decree. Here the decree had been given effect to out of Court though it may not have been technically executed in the sense in which the word is used in the Code of Civil Procedure and, inasmuch as it had been satisfied, nothing further remained to be done in execution. The plaintiffs, therefore, having been in possession for many years and in lawful possession were fully entitled to bring this suit when they were ousted by the defendant. We, therefore, accept the appeal and give the plaintiffs a decree for possession. The defendant, however, must be given an opportunity to remove the *malta* which he has erected on the land in accordance with the decree of the first Court on which no appeal has been lodged in this Court, and we allow him six weeks for the purpose from the date of this decree. The costs of the plaintiffs will be paid by the defendant in all the Courts.

Z. K. *Appeal accepted.*

(1) 39 Ind. Cas. 752; 20 P. R. 1917; 26 P. L. R. 1917; 22 P. W. R. 1917.

MAHADU KASHIBA v. KRISHNA TATYA.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 568 OF 1919.

June 16, 1922.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

MAHADU KASHIBA AND OTHERS—DEFENDANTS—APPELLANTS

versus

KRISHNA TATYA MAHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bombay Hereditary Offices Act (III of 1874), s. 18—Panch, appointment of—Collector's powers of appointment—Appointment by Deputy Collector—Award, validity of—Jurisdiction of Civil Court.

On an application to a Deputy Collector for the appointment of a Panch according to section 18 of the Bombay Hereditary Offices Act, the Deputy Collector ordered the Mamlatdar to do so, and he, in turn, ordered his Head Karkun to get two Panches appointed by the parties, and appointed the Head Karkun to be Sar Panch: the villagers, however, refused to appoint the Panches whereupon the Mamlatdar directed the Head Karkun to himself appoint the necessary two persons: the Panch so constituted made an award which was approved by the Deputy Collector. In a suit on foot of the award, its validity was challenged:

Held, that the award was not a valid award, as the procedure adopted in appointing the Panches was not a substantial compliance with the terms of section 18 of the Bombay Hereditary Offices Act; that the subsequent approval of the Deputy Collector gave no kind of validity to the award which at the time it was made had no validity, and that such approval was not in accordance with the proviso to the section. [p. 747, col. 1]

A Civil Court has no jurisdiction to determine a matter for the determination of which section 18 of the Bombay Hereditary Offices Act provides the procedure. [p. 747, col. 2.]

Bhiva v. *Vithya*, 25 B. 186; 2 Bom. L. R. 869 and *Parsha* v. *Lagmya*, 13 B. 83; 7 Ind. Dec. (N. S.) 56, followed.

Second appeal from the decision of the Assistant Judge, A. P., at Satara, in Appeal No. 568 of 1919, confirming the decree passed by the Subordinate Judge at Islampur, in Civil Suit No. 539 of 1915.

Mr. *Patvardhan*, (with him Mr. *V. D. Limaye*), for the Appellants.

Mr. *K. N. Koyajee*, for Respondents Nos. 1 to 15.

JUDGMENT.

CRUMP, J.—By our interlocutory judgment of June 22, 1920, we sent down two issues for determination and we are now in possession of the findings of the lower Court upon those two issues and of the materials upon which those findings are based. The first issue was "were the Panchas and the Sar-Panch appointed in this case as required by section 18 of the Hereditary Offices Act?" and upon the facts stated in the judgment of the lower Appellate Court upon remand, I think that this question must be answered in the negative.

Section 18 of the Bombay Hereditary Offices Act lays down the procedure to be followed in determining the rights and duties of certain classes of Vatandars, and it is necessary before the determination can be said to have been made under that section that the provisions of that section should have been complied with at least in substance. Now, what the section requires is that the Collector, if he takes action under that section shall cause the matter in dispute to be defined in writing by a Panchayat of five persons, whereof two shall be appointed by the villagers, two by the Vatandars, and one who shall be Sar-Panch by the Collector. That section further goes on to provide that in case the villagers or the Vatandars fail to nominate members within seven days, the Collector shall appoint such members as may be required to constitute a Panchayat of five.

It may be premised that the Deputy Collector who dealt with this matter had no doubt the powers of the Collector as explained in our previous judgment. It is clear, however, that the Legislature intends that the Collector shall himself appoint the Panchas in case the villagers or Vatandars fail to nominate members within seven days and also that the Sar-Panch shall be appointed by him.

Now, what happened in this case was that on August 1, 1911, a petition was made to the Deputy Collector by the Mhars and on November 3, 1911, the Mamlatdar wrote to the Deputy Collector soliciting the appointment of a Panch according to section 18 of the Bombay Hereditary Offices Act. Had the Deputy Collector proceeded to cause the appointment of a Panch to be made in the manner required by the section, all subsequent difficulties in the case would have been saved. But what he did was to write to the Mamlatdar directing him himself to take action in accordance with the suggestion made by him. From that time onwards he was in no way concerned in the matter. What appears to have happened afterwards is

this. The Mamlatdar ordered his Head Karkun to get two Panchas appointed by each party and appointed the Head Karkun to be himself a Sar-Panch. The Head Karkun then reported to the Mamlatdar that the Mhars had appointed Panchas but that villagers had refused to do so. Thereupon the Mamlatdar ordered the Head Karkun to appoint the necessary two persons under section 18. It thus appears that the Sar-Panch was not appointed by the Deputy Collector but by the Mamlatdar and that the two Panchas whose appointment became necessary owing to the failure of the villagers were not appointed by the Mamlatdar, still less by the Deputy Collector but by the Head Karkun. We are unable to consider that the action here disclosed was a substantial compliance with section 18 of the Bombay Hereditary Offices Act, or that a Panch so constituted could make a valid award. The fact that after the award was made the Deputy Collector approved the action taken and the finding of the Panch, can give no kind of validity to that which had no validity at the time at which it was done. The approval of the Collector is not required by the Act in the case where the Panchas come to a decision. It is only where the Panchas fail to come to a decision that this approval is necessary and, therefore, the Deputy Collector's order cannot be considered as having been made in accordance with the proviso to the section. It follows that the award is invalid, in fact it is a nullity, not having been made in any respect whatever in accordance with the requirements of the Legislature. Therefore, the result must be that the case must be approached as though there was no such award.

Now what is the result? The suit was one by the Mhars to restrain the villagers from giving the carcasses of dead animals to the Mangs in contravention of the award which was thus passed, and if the award was a nullity it must of necessity fail. It was, however, suggested that, apart from the award, the question of the rights of the Mhars arises to be decided on the merits. But it has been held by this Court in *Bhiva* v. *Vithya* (1) following the decision in *Parsha* v. *Lagmya* (2) that a Civil Court has no jurisdiction to determine a matter of this kind having regard to section 18 of the Bombay Hereditary Offices Act which provides the procedure whereby such disputes are to be determined. Following those decisions there is no other course possible except to allow the appeal and to dismiss the suit.

In view of the fact that this point was not raised until the case came before us in second appeal we direct that the parties should bear their own costs throughout.

We wish to add that we regret the result in this case and that we trust that if the Mhar plaintiffs move the Collector for a fresh decision under section 18 of the Act, steps may be taken to ensure a speedy determination of the matter and that attention may be paid to the requirements of the Statute in order that so regrettable a result may not again occur.

SHAH, ACTG. C. J.—I agree.

W. C. A. *Appeal allowed.*

(1) 25 B. 183; 2 Bom. L. R. 869
(2) 13 B. 83; 7 Ind. Dec. (N. S.) 156.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 268 OF 1921.

June 1, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

DALEEP SINGH—PLAINTIFF—APPELLANT

versus

KHURSHED HUSAIN—DEFENDANT—RESPONDENT.

Court of Wards Act (IV of 1912), s. 45—Ward of Court, death of—Property retained under superintendence by Court of Wards—Successor of ward, whether disqualified from incurring liability.

Where a Court of Wards takes under its superintendence the property of a disqualified proprietor, and on the death of that person retains superintendence over the property under section 45 of the Court of Wards Act, the successor to the property of the deceased does not thereby become a Ward of Courts, and is not disqualified from incurring any liability which might affect the property after the debts and liabilities of the deceased have been discharged. [p. 748, col. 2.]

DALEEP SINGH v. KHURSEED HUSAIN.

Second appeal from a decree of the District Judge, Meerut.

Mr. *Nehal Chand Vaish*, for the Appellant.

Mr. *Iqbal Ahmed*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for the recovery of money due on account of cloth supplied and money borrowed by the defendant. The defence, so far as it is material for the purpose of this appeal, was that the defendant was, at the time of the alleged transactions a ward of the Court of Wards and, therefore, incompetent to enter into a contract, to make him pecuniarily liable, under section 37 of the Court of Wards Act.

The Court of first instance decreed the claim; but the lower Appellate Court set aside the decree. The view taken by the Court of first instance was that the defendant was a ward as regards the property which he had inherited from *Musammat* Ahmadi Begam but was not a ward as regards the property which he owned in his own right. The lower Appellate Court, however, held that he was a ward with respect to both the properties.

It appears that *Musammat* Ahmadi Begam was the owner of certain property, the superintendence of which was taken over by the Court of Wards on the 22nd August 1911. She died in 1913 leaving certain heirs, one of whom was the defendant. The Court of Wards retained the property of *Musammat* Ahmadi Begam under its superintendence under section 45, because the debts due by the deceased had not been till then discharged. The property was eventually released on the 7th June 1918. The debts, now in question, had been incurred by the defendant between the 24th September 1916 and the 30th December 1916. Section 45 of Act IV of 1912 lays down that:

"When a ward dies.....before the liquidation is completed of the debts and liabilities with which the property is charged, the Court of Wards may either release such property or may retain it under its superintendence until such debts and liabilities have been discharged."

It further declares that:

"If the Court of Wards retains the superintendence, the person who has succeeded to the property.....shall not be competent to transfer or create any charge on, or interest in, any part of such property while it remains under the superintendence of the Court of Wards, nor shall any debts or liabilities previously incurred by any person who has so succeeded be chargeable on such property until the debts and liabilities due by the Court of Wards have been discharged."

It does not disqualify such a successor from incurring any liability which might affect the property after those debts and liabilities have been discharged.

Section 37 has no application, because that section is applicable in terms to wards, as defined by section 3. A ward is a *disqualified* proprietor whose person or property or any part of whose property is under the superintendence of the Court of Wards. The disqualification is declared under section 8. The defendant was never so declared. He made no application under section 10. The property inherited by the defendant from *Musammat* Ahmadi Begam was under the superintendence of the Court of Wards but only for a specific purpose, namely, for the discharge of the debts and liabilities which were due by *Musammat* Ahmadi Begam at the time when the estate was taken over under its superintendence by the Court of Wards. After these debts were discharged and the estate was released, any liability, incurred by the successors of the lady, might be enforceable, except in so far as that liability creates a charge on the property which was under the superintendence of the Court of Wards while such debts and liabilities had remained undischarged.

The view taken by either of the Courts below cannot, therefore, be upheld. The defendant was not a ward of the Court, so as to disqualify him from entering into a pecuniary obligation of a kind, not forbidden by section 45, that is, of the nature of a simple money debt or liability, not amounting to a charge on any portion of the property which was under the superintendence of the Court of Wards,

In the lower Appellate Court no other plea was pressed. We allow the appeal accordingly and setting aside the decree of the lower Appellate Court, restore that of the Court of first instance with costs, including in this Court-fees on the higher scale.

W. C. A.

Appeal decreed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2685 OF 1917.

April 18, 1922.

Present :—Mr. Justice Le-Rossignol and Mr. Justice Harrison.

Sardar HUSSAIN BAKHSH AND ANOTHER, MINOR, THROUGH *Musammat* RANGO—DEFENDANTS—APPELLANTS

versus

Sardar JHANDA SINGH AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Legitimacy—Acknowledgment.

The rule of legitimation by acknowledgment permitted by the Muhammadan Law applies only when the alleged marriage is uncertain, that is, not proved, but no benefit can be derived from this rule when it is found as a fact that the alleged marriage never took place.

Missellaneous second appeal from the order of the District Judge, Amritsar, dated the 24th August 1917, reversing that of the Subordinate Judge, First Class, Amritsar, dated the 10th July 1917.

Bakhshi *Tek Chand*, Messrs. *Muhammad Rafi* and *D. C. Ralli*, for the Appellants.

Pandit *Sheo Narain*, R. B., and Lala *Kishen Chand*, for the Respondents.

JUDGMENT.—In 1914 one Fateh Muhammad, a convert to Islam, whose original name was Gurbakhsh Singh sold 96 *kanals* of his property, and the present suit was for a declaration by his reversioners that the sale was without necessity and consideration and should not affect their rights as reversioners.

A preliminary plea by Fateh Muhammad was to the effect that he was not without issue as alleged by the plaintiffs but that he had two sons and that the plaintiffs had no right to sue in the presence of those sons. Fateh Muhammad *alias* Gurbakhsh Singh, who was originally a Sikh, set forth as his case that he was converted to Islam and married to *Musammat* Rango, a Muhammadan woman, in 1893 and he produced in support of his contention a document marked Exhibit A. That document, the learned Judge of the Court below finds, has not been proved at all, and he holds for reasons given by him in detail that the marriage and conversion set up by Fateh Muhammad as having taken place in 1893 are disproved. He consequently came to the conclusion that the sons of Fateh Muhammad are not his legitimate sons and he directed the suit of the collaterals to proceed.

In second appeal on behalf of Fateh Muhammad's sons it has been contended before us that under Muhammadan Law the acknowledgment by Fateh Muhammad that the appellants are his sons has the effect of legitimating them. For the respondents it is admitted that the acknowledgment by a Muslim of his offspring is sufficient under Muhammadan Law to legitimate them provided that certain conditions are satisfied, the chief among which is that the marriage should not have been disproved. It is urged that the plea of legitimation was never mentioned in the Court below and that Fateh Muhammad's case reposed upon a definite marriage on a definite date, that the alleged marriage has been disproved and that consequently the rule of Muhammadan Law upon which the appellants rely has no application. In our opinion, the appeal must fail on the finding of fact of the Court below that the marriage in 1893 has been disproved, for no marriage other than that in 1893 has been alleged. The rule of recognition permitted by Muhammadan Law

applies only when the alleged marriage is uncertain, that is, not proved, but no benefit can be derived from it when it is found as a fact that the alleged marriage did not take place.

For these reasons we hold that the recognition by Fateh Muhammad that the appellants are his sons does not legitimate them, and, therefore, they cannot stand in the way of Fateh Muhammad *alias* Gurbakhsh Singh's collaterals. We accordingly dismiss the appeal with costs and remand the case to the First Court for a decision on the issues that remain.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 196 OF 1921.

May 16, 1922.

Present :—Mr. Justice Ryves and Mr. Justice Stuart.

DEBI PRASAD—PLAINTIFF—APPELLANT

versus

Musammat GUJAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 139—Tenant holding over—Adverse possession—Landlord, suit for possession by—Limitation.

A tenant who holds over cannot set up adverse title to the landlord, nevertheless under Art. 139 of Sch. I to the Limitation Act, the latter can only recover possession if he sues within 12 years.

Second appeal from a decree of the District Judge, Benares.

Mr. *Badri Narain*, for the Appellant.

Dr. *S. M. Sulaiman* and Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The plaintiff sued to eject the defendants as his tenants on the allegation that the plaintiff is a transferee of one Mohammad Sadiq. Mohammad Sadiq had leased the premises to Rajjab for one year in 1865. On the expiry of the year, Rajjab held over, and it is found that his heir, *Musammat* Gujar, has been in possession ever since the death of her father and that they

have held the premises between them since 1866.

Both the Courts below have dismissed the suit as barred by limitation and it seems to us rightly; while it is quite true that a tenant who holds over cannot set up an adverse title to the landlord, nevertheless it seems to us that Art. 139 of the First Schedule of the Indian Limitation Act provides that the landlord can only recover possession if he sues within 12 years. In this case it is quite obvious that Mohammad Sadiq could not have ejected the defendants after 1878. He could not give his transferee a better title than he himself had.

The result is that the appeal fails and is dismissed with costs.

N. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 30 OF 1922.

May 13, 1922.

Present :—Mr. Justice Harrison.

SUKHA NAND AND OTHERS—DEFENDANTS—PETITIONERS

versus

JOINT SHOP OF BEHARI RAM ISHAR DAS—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXX, r. 1, O. XXXII, r. 7—Suit against firm—Minor member—Arbitration—Sanction of Court.

Where a suit is brought against a firm the mere fact that one of the members of the firm is a minor would not bring the suit within the purview of O. XXXII of the Civil Procedure Code. The sanction of the Court, therefore, is not required when such a suit is referred to arbitration to validate the reference.

Petition, under section 44 of Act VI of 1918, for revision of the order of the Subordinate Judge, Multan, dated the 31st October 1921.

Lala *Hargopal*, for the Petitioners.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—In this case the plaintiff firm sued the defendant firm to recover Rs. 2,100. The case was referred to arbitration, and the arbitrator gave an award in favour of the plaintiff firm for

SARDAR KHAN *v.* FATEH DIN.

Rs. 1,437. After the award had been given one Sukhanand, a member of the defendant firm, objected, *inter alia*, that there was a minor member of the firm who had not been specifically impleaded or personally served, and that, therefore, the award was bad. A decree was eventually given in the terms of the award and an application for revision has now been presented by all four members of the firm including the minor, and the only point argued at the hearing is that the existence of the minor rendered it necessary for the Court to give special assent under O. XXXII, r. 7 to the reference to arbitration although his existence was not disclosed until after the award had been given.

There would be some force in this contention had the minor been impleaded as such. The suit, however, was brought against the firm, and the mere fact that there is a minor member of the firm, does not bring the suit, in my opinion, within the purview of O. XXXII. The procedure has been perfectly regular and no reason having been shown for interference on revision, I dismiss the application with costs.

Z. K. & W. C. A.

Application dismissed

LAHORE HIGH COURT.

CIVIL REVISION PETITION No, 613 OF 1921.

February 8, 1922.

Present:—Mr. Justice LeRossignol.

SARDAR KHAN—JUDGMENT DEBTOR—PETITIONER

versus

FATEH DIN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Stay of execution by Trial Court—Appeal.

All questions that determine the rights and liabilities of the parties in the matter of the execution of a decree are appealable.

An order of the Trial Court directing stay of execution is a question relating to execution and is appealable.

SARUP SINGH *v.* KHEMAN.

Petition, under section 44 of Act VI of 1918 for revision of the order of the District Judge, Gujranwala, dated the 27th June 1921, reversing that of the Subordinate Judge, Second Class, Gujranwala, dated the 7th April 1921.

Lala *Tirath Ram* and Mr. *B. N. Kapur*, for the Petitioner.

Kanwar *Dalip Singh*, for the Respondent.

JUDGMENT.—The only question argued in this case is that the lower Appellate Court had no jurisdiction to hear an appeal from the order of the Trial Court staying execution.

On the merits the lower Appellate Court's order is perfectly just and reasonable. On the law point, there is some conflict of view, but there is authority on both sides.

In my opinion, specific reference to stay of execution in section 47 of the Code was rendered unnecessary by the alteration of the opening words of the section as compared with section 244 of the old Code.

Under the present law, all questions without exception, *i. e.*, all questions which determine the rights and liabilities of the parties in the matter of the execution of the decree are appealable.

Now, a decision that execution shall not take place does determine a right for the time being and may have very far reaching results.

Stay of execution is a question relating to execution; it stops execution deed.

I dismiss the petition with costs.

Z. K.

Petition dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2602 OF 1918.

April 29, 1922.

Present:—Justice Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

SARUP SINGH—DEFENDANT—APPELLANT

versus

KHEMAN AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 41 (3)—Grazing

OFFICIAL RECEIVER, TRICHINOPOLY *v.* LAKSHMAN AIYAR.

rights—Question of custom—Appeal, second—Cert ficate.

A question relating to grazing rights claimed by the tenants of a village over the *shamilat* area of the village by virtue of custom is a question of custom and cannot be agitated in second appeal without a certificate.

Nanda v. *Jai Chand*, 40 Ind. Cas. 184; 35 P. W. R. 1917, relied upon.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 5th June 1918, affirming that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 3rd March 1916.

Lala *Nanwa Mal* for Lala *Fakir Chand*, for the Appellant.

Mr. *Devi Das*, for the Respondents.

JUDGMENT.—Kheman and others, plaintiffs, residents of Nangal Kalan in the Hoshiarpur District, who are tenants in the village, brought a suit for an injunction to prevent Sarup Singh, defendant No. 1, who is one of the proprietors having a share in the *shamilat*, from enclosing an area of 92 *kanals*, 2 *marlas* over which they claim to have a right to graze their cattle. The Trial Court granted the injunction prayed for and on appeal by defendant No. 1, the decree of the Trial Court was confirmed. Sarup Singh has now come up to this Court in second appeal and we have heard *Lala* Nanwa Mal on his behalf and *Lala* Devi Das for the respondents.

A preliminary objection is raised by *Lala* Devi Das that the question as to the rights of grazing is one of custom and cannot be gone into in second appeal without a certificate. The learned District Judge has relied on the *wajib-ul arz* which gives the plaintiffs the right of grazing over the whole of the *shamilat* of which the plot in dispute is a part. He finds that this area fell to the lot of Sarup Singh by partition among the three then existing proprietors in 1877, and that the land has since continued to be entered in the revenue papers as uncultivated and grazing rights have never been obstructed by the defendant appellant till recently. He finds that the appellant has never enjoyed effective and exclusive possession of the plot which had fallen to his share and the first time when he claimed exclusive possession was in 1913-14. *Lala* Devi Das refers to paragraph 220 of Rattigan's Digest of Customary Law, th Edition, to show that grazing rights are granted by custom to tenants as a body. He also refers to a decision of the Punjab Chief Court, published as *Nanda* v. *Jai Chand* (1) in which it was held that the rights of grazing being based on custom and there being no certificate a second appeal could not be entertained. We think that there is force in this objection and this appeal cannot be heard for want of a certificate. It may be added that on merits also this appeal is bound to fail, because it is concluded by findings of fact, which have been referred to above, and which cannot be questioned in second appeal.

We dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 40 Ind. Cas. 184; 35 P. W. R. 1917.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 220 OF 1920.

January 24, 1921.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE OFFICIAL RECEIVER, TRICHINOPOLY—APPELLANT

versus

LAKSHMAN AIYAR—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 54, 134—Assignment of mortgage—Absence of statutory formalities, effect of.

A mortgage-debt cannot be treated as validly transferred if the conditions imposed by the Statute Law, *i e*, section 54 of the Transfer of Property Act, as requisite for the valid transfer of the mortgage security, are not complied with. [p. 758, col 1.]

Perumal Ammal v. *Perumal Naicker*, 61 Ind. Cas. 461; 40 M. L. J. 25; 13 L. W. 69; (1921) M. W. N. 5; 44 M. 196, followed.

Appeal against an order of the District Court, Trichinopoly, dated the 31st March 1920, in Civil Miscellaneous Petition No. 777 of 1919, in I. P. Nos. 5, 6 and 10 of 1918.

Mr. *O. S. Venkatachariar*, for the Appellant.

Mr. *S. Doraisauramy Aiyar*, for the Respondent.

GHULAM RASUL v. RAMZAN BIBI.

JUDGMENT.

SADASIVA AIYAR, J.—I am clear that by he amendment made in the definition of 'actionable claim" in the Transfer of Property Act in 1900, the Legislature intended that when money is borrowed on mortgage of immoveable property, the creation of the security on the immoveables should be treated as material part of the mortgage transaction and that the mortgage-debt should not be treated as validly transferred if the conditions imposed by the Statute Law as requisite for the valid transfer of the security have not been complied with. I think that the latest pronouncement of the learned Chief Justice in *Perumal Ammal* v. *Perumal Naicker* (1) supports my above view.

The result is that the appeal has to be allowed and the respondent could be treated only as an ordinary creditor and not a secured creditor. The respondent will pay the appellants' costs in both Courts.

NAPIER, J.—I agree.

The mortgage-debt has not been legally assigned as correctly stated by the District Judge. Section 134 of the Transfer of Property Act has no application nor can any principle embodied therein be applied against the other provisions of the Transfer of Property Act.

The appeal is allowed with costs here and in the Court below.

M. C. P.

Appeal allowed.

(1) 61 Ind. Cas. 461; 40 M. L. J. 25; 13 L. W. 69; (1921) M. W. N, 5; 44 M. 196.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 20 OF 1922.

April 1, 1922.

Present:—Mr. Justice Abdul Qadir.

GHULAM RASUL AND OTHERS—DEFENDANTS—PETITIONERS

versus

Musammat RAMZAN BIBI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1 (2)—Order permitting withdrawal of suit—Revision.

The High Court has jurisdiction to interfere in revision with an order under O. XXIII, r. 1 (2) of the Civil Procedure Code permitting the withdrawal of a suit, on the ground that the order was improperly made.

Jhunku Lal v. *Bisheshar Das*, 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495, dissented from.

Nathuni Ram v. *Sheo Koer*, 46 Ind. Cas. 179; 5 P. L. W. 104; (1918) Pat. 220; 3 P. L. J. 460, *Uchant Ahir* v. *Baswan Ahir*, 61 Ind. Cas. 639; 6 P. L. J. 112; 2 P. L. T 634, *Munna Lal* v. *Chhabil Das*, 46 Ind. Cas. 181; 117 P. W. R, 1918, relied upon.

Petition, under section 44, Act IX of 1919, for revision of an order of the Subordinate Judge, Second Class, Gujranwala, dated the 14th November 1921.

Saiyed *Mohsin Shah*, for the Appellant.

Mr. *Zafarulla Khan*, for the Respondent.

JUDGMENT.—In a suit by *Musammat* Ramzan Bibi against Ghulam Rasul, etc., which was instituted on the 12th October 1920, an order was passed by a Subordinate Judge, Second Class, Gujranwala, on the 14th November 1920, allowing the plaintiff to withdraw her suit with liberty to institute a fresh suit, if necessary. There was nothing in that order to show that the requirements of O. XXIII, r. 1 (2) were fulfilled or that there were any grounds for allowing the plaintiff to institute a fresh suit. Though that order refers to a deed of withdrawal, there appears to be none on the record and the order is in all probability granted on the oral suggestion of the Pleader for the plaintiff. The defendants have come up to this Court in revision on the ground that the Court below acted illegally or with material irregularity in allowing the plaintiff to withdraw her suit with liberty to bring a fresh suit without there being any justification for the order passed.

Mr. Zafarulla Khan, who appears for the respondent, raises a preliminary question whether any revision lies against an order of this nature. He refers to *Jhunku Lal* v. *Bisheshar Das* (1) where it was held by the Allahabad High Court that as the Court below had jurisdiction to pass even a wrong order, an order under O. XXIII, (1) (2) could not be interfered with in revision on the ground that it was erroneous. But Mr. Mohsin Shah draws my attention to several other decisions in which a contrary

(1) 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495

view has been held. *Nathuni Ram* v. *Sheo Koer* (2) and *Uchant Ahir* v. *Basawan Ahir* (3) are decisions of the Patna High Court in which the learned Judges of that Court have interfered with an order under O. XXIII, r. 1 (2) on the ground that the order was improperly made and would prejudice the defendant. I am also referred to a decision of the Punjab Chief Court, *Munna Lal* v. *Ohhabil Das* (4), which held that a revision did lie in a similar case. I do not think, therefore, that the preliminary objection of Mr. Zafarulla Khan can prevail. As he himself admits, on the merits he cannot defend the action of the Court in any way. I do not think there was any ground, not to speak of a sufficient ground, for allowing the plaintiff to institute a fresh suit after withdrawing the existing one. The order, dated the 14th November is, therefore, set aside and it is directed that the suit should proceed on the merits and be disposed of according to law, the proceedings to be resumed from the stage at which the order now cancelled was passed.

Pleader's fee in this Court Rs. 16.

Z. K.

Appeal dismissed.

(2) 46 Ind. Cas. 179; 5 P. L. W. 104; (1918) Pat. 220; 3 P. L. J. 460.
(3) 61 Ind. Cas. 639; 6 P. L. J. 112; 2 P. L. T. 634.
(4) 46 Ind. Cas. 181; 117 P. W. R. 1918.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

June 2, 1921.

Present:—Viscount Haldane, Lord Atkinson and Sir John Edge.

AMBA *alias* PADMAVATHI—APPELLANT

versus

SHRINIVASA KAMATHI—RESPONDENT.

Registration Act (III of 1877), ss. 3, 34—Hindu married woman—Minor—Father, if "representative."

The father of a Hindu minor girl ceases to be her natural guardian on her marriage and if he has not been appointed her legal guardian, he is not her representative within the meaning of section 3 of the Registration Act. [p. 757, col. 2.]

Appeal from the judgment and decree of the Madras High Court (Abdur Rahim and Oldfield, JJ.) dated the 28th November 1917, in Appeal Suit No. 24 of 1916 reported as 44 Ind. Cas. 483, confirming a decree of the Court of the Subordinate Judge, South Kanara, in Original Suit No. 73 of 1914.

Mr. *Kenworthy Brown*, for the Appellant.

Mr. *De Gruyther*, *K. C.* and Mr. *K. V. L. Narasimham*, for the Respondent.

JUDGMENT.

LORD ATKINSON.—The appellant, who sues *in forma pauperis*, is a minor and the second wife of the respondent. She was also the niece of one Krishna Kamathi, deceased, a man of considerable property, who died on the 14th April 1909. The respondent is the adopted son of this same Krishna Kamathi. The case made by the plaintiff was that Krishna Kamathi being anxious that his line should be perpetuated, pressed the respondent who was much attached to his first wife to marry the appellant, then a girl only eleven years of age, that the respondent reluctantly consented to do so, and that the marriage accordingly took place upon the 9th March 1908.

It was alleged to be the custom when these child marriages take place that the wife is not brought to reside in her husband's home till she has reached the age of puberty. However that may be, the respondent did not bring this wife of his to his home and in other respects was alleged to have treated her in a way of which Krishna Kamathi so strongly disapproved that he became somewhat incensed against his adopted son. He was the manager of the family property, and, although advanced in years, was admittedly an intelligent man, who managed this property well and looked after all legal matters, such as the institution of suits, etc. On the 30th April 1908 Krishna Kamathi wrote to the respondent a letter, in which he stated that the latter had recently become disobedient to him and had disregarded him, that it appeard to him the respondent would behave in the same manner in future, that it did not

appear to him, Krishna, proper to live with the respondent hereafter as a member of an undivided family, and that he had divided the moveable and immoveable family property into two equal parts, had prepared four lists thereof, and proposed to divide it between himself and his son, in the complicated manner set out in this letter. The respondent, in answer to this letter, wrote to his adoptive father a letter bearing date 30th May 1908, in which, after defending himself against the accusations made against him, he suggested that relatives for interested motives had poisoned his father's mind against him, begged of the father not to break up the joint family and divide the family property, but stated that if his father had made up his mind to do so he was ready to take as his share of it the property mentioned in List No. 2.

Krishna Kamathi, in pursuance of the resolution he had formed, employed two Pleaders to draw up for him two deeds, dated respectively the 19th and 23rd May 1908. The first is a partition deed between him and his son, the respondent, in which he again sets forth the charges against the latter, as he had already done in the letter already referred to, stating that he had separated and delivered to his son the property in the aforesaid List No. 2, which the latter had accepted, and provided he, the respondent, should enjoy the immoveable and moveable property mentioned in that list from generation to generation, he paying the Sircar Terva and by the entry of Kudthala in his, the respondent's name. The second deed is a deed of gift to the appellant, his niece, by which, after reciting that he had effected a partition between himself and his son, of the moveable and immoveable property, he, Krishna, out of the part of the same which fell to his share, had made to his niece of his own free will, because of the love he had for her, a gift of the moveable and immoveable property described in a schedule attached thereto and estimated to be of the value of Rs. 15,000. This deed contains the following passage:—

"Though I have given up to you just now the full right of the undermentioned property, still as you are now a minor and unable to look to the management of the property, I shall look after the management of the property as your trustee till you become a major, and I shall myself take the rice and cash amount settled to be paid by you each year for my and my wife's maintenance and keep a regular account and spend the amount necessary for the due performance of the Mana Mariyade pertaining to this property and pay the remaining meane profits to you as soon as you become a major, or I shall get a document executed in your name for such an amount on the safe security of immoveable property and deliver the said document to you."

Both these deeds were executed by Krishna Kamathi alone. Neither the appellant nor her father executed them.

On the 1st June 1908, Krishna Kamathi duly presented both these deeds at the office of the Sub-Registrar of Vittal for registration. Registration, however, did not take place owing to some question as to the amount of stamp-duty leviable. This involved a reference to the Registrar of the district, which caused delay. The deeds meanwhile remained with the Sub-Registrar. The respondent having in the meantime learned that his father had presented these deeds for registration, requested him to obtain a return of them, and the latter accordingly, on the 5th June 1908, presented a petition to the Sub-Registrar praying for a return of the two deeds without their being registered. On the 9th June 1908 Krishna and the respondent entered into an agreement (*Tahanama*) to the effect that during their lifetime they would not partition the family property. This agreement was duly registered three days later, namely, on the 12th June 1908. On 10th June 1908, Ramayya Shanbhogue, the father of the appellant, presented on her behalf a petition to the said Sub-Registrar objecting to the return to Krishna of the two deeds aforesaid until they had been registered, and informing this official of his, the petitioner's intention to institute a suit to secure their compulsory registration.

In answer to this petition the Registrar, on the 19th October 1908, informed the petitioner that the two before-mentioned deeds would be returned to the presentant,

AMBA v. SHRINIVASA KAMATHI.

Krishna Kamathi, by the Sub-Registrar of Vittal unless the claimant under the deed of gift obained an injunction order of a competent Court against their return within one month from the receipt of this notice. Accordingly the minor, Amba Bai, by her father as next friend, instituted a suit (No. 44 of 1908) against Krishna Kamathi and her husband to obtain the suggested relief. The 1st defendant, Krishna, then filed a long written statement which is significant in its terms. After admitting that he had executed the two deeds and had presented them for registration, and after stating that his adopted son left his own house and went to reside in the house of his father-in-law at Mangalore for many days, he alleged that Ramayya Shanbhogue, taking advantage of his, Krishna's, old age, disease and helpless condition, had represented to him that the conduct of his son, the 2nd defendant, amounted to deliberate disobedience and to a disregard of his, Krishna's, comforts; that his said son intended to abandon him altogether, and if necessary to marry a third girl or to himself adopt a son; that by these fraudulent misrepresentations the plaintiff, Amba Bai's father, had prevailed upon him, Krishna, to consent to a partition of his property and to make a provision for this girl, his niece, out of his own share; that in this way the two deeds in question were by fraud, misrepresentation and undue influence, procured from him, an old man struck with disease. He further alleged that he only became aware of the effect of the two deeds after he had presented them for registration and, therefore, was entitled to have them returned to him unregistered. And he made the point that the plaintiff, not being a party to the deed of partition, had no right to maintain a suit for its registration under the Registration Act. It clearly appears from these statements that Krishna Kamathi thus early clearly made the case afterwards strenuously insisted upon that the plaintiff's father, for the purpose of procuring for his daughter the benefis conferred upon her by the two before-mentioned deeds, exercised upon Krishna undue influence by the insidious method of poisoning his mind against his adopted son. This suit was dismissed as against Shrinivasa, the appellant's husband, but compromised as between her father on her behalf, and her uncle Krishna. The terms of the compromise were embodied in a deed dated the 29th March 1909, styled in the proceedings the deed of rectification. By this deed it was provided that Krishna would consent and thereby did consent to the registration of the two deeds dated 19th May 1908 and 23rd May, 1908, respectively, and further that the appellant should enjoy the partitioned property subject to certain amendments and conditions therein set out. These alterations and conditions seriously modified and diminished the provision made for Amba Bai by the deed of gift of the 29th May, 1908. For instance, it burdens the property given to her by the latter instrument with a liability to pay Rs. 360 annually to Krishna's wife, Devi. Though providing that he, Krishna, should continue to be her trustee till her majority, it provides that owing to his ill-health her father should manage the property given to her on her behalf. It further provided that though the property given to her by the deed of gift was to be enjoyed by her from generation to generation, if she and her husband came together and lived amicably, and had children, the property was to be enjoyed on that line in succession; but that if she should have no children, and her Savathe (co-wife) should have children, this property should be enjoyed by the latter's descendants after her, Amba's death. Numerous provisions are, in addition, introduced in reference to adoption contingent on the many events named, and then the important provision is introduced that Amba should have no right to alienate the properties given to her in any manner while she behaved herself according to the conditions contained in the deed. This deed was executed by Krishna Kamathi in the presence of many witnesses. It was not executed by Amba Bai nor by her father, Ramayya Shanbhogue, nor by her husband, the respondent. It is obvious that it supersedes the deed of gift of the 29th May 1908. Its aim, object and effect are substantially different. A decree by consent was accordingly made in the compromised suit on the 31st March 1909 in which, after reciting at length the effect of the compromise, it was ordered and decreed "that the partition-deed of the 19th May 1903 and the gift deed of the 23rd May 1908 in dispute be returned to the plaintiff's next friend for presentation

before the Sub-Registrar of Vittal, that the Sub-Registrar do register them if they be duly presented before him for registration within thirty days from this date."

The deed of the 29th March 1909 was duly registered. The two deeds of the 19th and 23rd May 1908 were returned to the appellant's father and on the 14th April 1909, the day upon which Krishna Kamathi died, were presented by the appellant's father to the Sub-Registrar and registered.

The suit out of which this appeal has arisen was, on the 17th August 1914 brought by the appellant, suing *in forma pauperis* by her father as her next friend, to recover from her husband possession of the property given to her by the deed of gift of the 29th May 1908. On the 26th November the defendant filed a written statement in the suit in which the main defences relied upon were (1) that the execution of these two deeds of May 1908 was procured by the misrepresentation, fraud and undue influense of the father of the plaintiff upon Krishna Kamathi, by whish the mind of the latter was poisoned against the respondent and the said deeds were, therefore, inoperative and unenforceable and not binding upon him; (2) that the compromise of the Suit No. 44 of 1908, and the execution of the deed of the 29th March 1909, respectively, were instituted and procured by similar means, and that the decree made in said suit was void and of no effect; (3) that the deed of gift of the 29th May 1908 was cancelled and annulled by the execution of this rectification deed; and (4) that the registration of the two deeds of May 1908 was invalid and ineffective under the provisions of the Registration Act, and was, therefore, void *ab initio*.

The Subordinate Judge found (1) that the two deeds of May 1908 were procured by undue influense by the appellant's father exercised upon the respondent's aged father, and were, therefore, void; (2) that the agreement of the 9th June 1908 entered into between the respondent and his father was valid, that the deed of rectification was, therefore, invalid and void, that, therefore, the appellant was not entitled to recover possession of the properties mentioned in the plaint; and (3) that the two deeds of May 1908 were validly registered. He [in the result dismissed the plaintiff's suit with costs. On the appeal from this decree to the High Court of Madras, Abdur Rahim, J., concurred with the Subordinate Judge's finding that the two last mentioned deeds upon which the appellant's case rested, had been obtained by the undue influence of the appellant's father. Also that the two deeds were repudiated by Krishna Kamathi before they were registered, and that they were not properly presented for registration and were not validly registered.

Oldfield, J., differed from his colleague on the question of the procurement of these deeds by the exercise of undue influence on Krishna Kamathi, but agreed with him in the view that Krishna had the right to revoke the deed of gift of the 23rd May 1908 and had revoked it, and both of these learned Judges held that under the provision of the 32nd section of the Registration Act the two deeds of May 1908 were not validly registered. They accordingly affirmed the judgment of the Subordinate Judge.

Their Lordships do not think it necessary to pronounce any decision on the question upon which these two learned Judges differed. It was not and is not disputed that these two deeds cannot be given in evidense or enforced if they have not been duly registered. Their Lordships are clearly of opinion that as the appellant was not only a minor but a married woman, her father had ceased to be her natural guardian, and had never been appointed her legal guardian, and was not, therefore, her assignee or representative within the meaning of section 3 of the Registration Act, 1877. He was not an executant of the said deeds or either of them; neither was within the meaning of section 34 of that Act the representative, assign or agent duly authorised on the behalf of Krishna Kamathi, deceased, the only executant. The presentation by him of the two deeds for registration was in direct conflict with the express provisions of this 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity; and if that be so, as in their Lordships' opinion it must be held to be, it is not disputed that the deeds would be void

and unenforceable, and this apart altogether from the question whether they have not been impliedly revoked by the agreement dated the 9th of June 1908 entered into between Krishna Kamathi and the respondent and duly registered by the former on the 12th of June 1908. It is, therefore, unnecessary for their Lordships to expressly decide this latter question. They are of opinion that owing to the invalidity of the registration of the two deeds of May 1908 the appeal fails and must be dismissed, and they will humbly advise His Majesty accordingly.

N. K.

Appeal dismissed.

Solicitor for the Appellant.—Mr. *Douglas Grant.*

Solicitor for the Respondent.—Mr. *H. S. L. Polak.*

MADRAS HIGH COURT.

(CIVIL APPEAL No. 324 OF 1920.

April 26, 1921.

Present:—Mr. Justice Sadasiva Aiyar.

and Mr. Justice Spencer.

DOORVAS J. SUBBAYYAR AND ANOTHER —APPELLANTS

versus

THE FIRM OF K. M. SUBBARAYALUA IYER AND SON, MADURA, BY MANAGING AGENT, K. M. S. R. KUPPUSWAMI IYER —RESPONDENTS.

Evidence Act (I of 1872), s. 92—Unconditional promise to pay—Oral agreement, calculated to make it conditional, admissibility of.

Where there is an absolute, unconditional promise to pay a certain amount as liquidated damages, oral evidence of a contemporaneous agreement which has the effect of making it conditional and defeasible, is inadmissible. [p. 760, col. 1.]

Motabhoy Mulla Essabhoy v. *Mulji Haridas*, 29 Ind. Cas. 223; 39 B. 899; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 42 I. A. 103 and *Hitchings and Choulthurst Co.* v. *Northern Leather Co. of America*, (1914) 3 K. B. 907; 83 L. J. K. B. 1819; 20 Com. Cas. 25; 30 T. L. R. 688, referred to.

Ramjibun Serowgy v. *Oghore Nath Chatterjee*, 25 C. 401; 2 C. W. N. 188; 13 Ind. Dec. (N. S.) 266, explained.

Goseti Subba Rao v. *Varigonda Narasimham*, 27 M. 368, *Jnanendra Mohan Chowdhury* v. *Gopal Das Chowdhury*, 8 C. W. N. 923; 31 C. 1026, *Kamla Sahai* v *Nandan Mian*, 2 Ind. Cas. 13; 11 C. L. J. 39, *Jugtanund Misser* v. *Nerghan Singh*, 6 C. 433; 7 C. L. R. 347; 3 Ind. Dec. (N. S.) 282, distinguished.

Appeal against a decree of the Court of the Subordinate Judge, Madura, in Original Suit No. 66 of 1919.

FACTS appear from the judgment.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellants.—The oral agreement as to the effect of the cancellation of the contract by the Mills should not have been excluded. It was an independent agreement and related to a matter on which the original agreement, Exhibit A, was silent. It neither contracted nor varied from the terms of Exhibit A. Reference was made to *Goseti Subba Row* v. *Varigonda Narasimham* (1), *Jnanendra Mohan Chowdhury* v. *Gopal Das Chowdhury* (2), *Kamla Sahai* v. *Nandan Mian* (3) and *Jugtanund Misser* v. *Nerghan Singh* (4).

Mr. *V. V. Sreenivasa Aiyangar*, (with him Mr. *T. Krishnaswamy Aiyangar*), for the Respondent.—The oral evidence of the contemporaneous agreement is inadmissible. The damages were fixed by the parties at Rs. 5,000 and the appellants undertook unconditionally to pay it. The effect of letting in the alleged agreement of the respondent with the Mills would be to make the written agreement, Exhibit A, defeasible. The finality of the original agreement would be impaired. See *Hitchings and Coulthurst Co.* v. *Northern Leather Co. of America* (5).

(1) 27 M. 368.
(2) 8 C. W. N. 923; 31 C. 1026.
(3) 2 Ind. Cas. 13; 11 C. L. J. 39.
(4) 6 C. 433; 7 C. L. R. 347; 3 Ind. Dec. (N. S.) 282.
(5) (1914) 3 K. B. 907; 83 L. J. K. B. 1819; 20 Com. Cas. 25; 30 T. L. R. 688.

SUBBAYYAR v. SUBBARAYALUA IYER.

JUDGMENT.

SPENCER, J.—The appellants, who belong to a trading family, contracted to purchase from the respondents, a similar firm, 50 bales of yarn manufactured by the Madura Mills and actually took delivery of 6 bales. Owing to a fall in prices in the market the appellants were unwilling to receive the remaining 44 bales on the terms agreed upon. The contract was thereupon cancelled on the condition that appellants paid Rs. 5,000 to the respondents to make good their losses upon their contract with the Mills. These Rs. 5,000 were included in a larger sum of Rs, 10,800 which represented the aggregate amount found to be owing by the appellants to the respondents on a settlement of accounts made on February 2nd, 1919, and an unconditional promise to pay Rs. 10,800 to respondants' order on demand was written in the appellant's ledger, (Exhibit A), kept by the respondents and was signed by the appellants.

At the trial in the Sub-Court the appellants sought to prove by oral evidence that there was a contemporaneous agreement, that, in the event of the Mills consenting, to cancel their contract with the respondents, the appellants should be excused from their liability to pay Rs. 5,000 to the respondents.

The Subordinate Judge refused to admit such evidence, holding that to do so would be tantamount to admitting parol evidence of an agreement in defeasance of the written contract contained in Exhibit which was an unconditional contract to pay Rs. 5,000 on demand.

He held that the evidence sought to be admitted was made inadmissible by section 92 of the Indian Evidence Act. He further held that the letter (Exhibit II) written on the same date as the promise to pay in Exhibit A did not amount to a written agreement varying the terms of the first agreement.

Mr. Anantha Krishna Iyer argued that the evidence that was excluded was evidence of a separate oral agreement as to a matter on which Exhibit A was silent and which was not inconsistent with its terms. He drew our attention to the case of *Motabhoy Mulla Essabhoy* v. *Mulji Haridas* (6) as being an instance of the application of proviso (2) of section 92. Their Lordships of the Privy Council in that case went into the evidence observing that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings. So in this case I have considered, whether, if the respondents' suit had not been based on the accounts but had been brought to recover damages on account of the appellant's breach of countract in respect of the 44 bales which they refused to receive, it would have been open to them to plead in mitigation of the damages due upon their breach of contract that the respondents had not suffered to the extent claimed by them owing to the Madura Mills having excused them from their liability to receive the remaining bales from the Mills. After full consideration I have come to the conclusion that the result would be the same. When the promise in Exhibit A to pay Rs. 10,800 to respondents' order on demand was signed there was an unconditional agreement to pay Rs. 5,000 as liquidated damages for the cancellation of the order for the remaining 44 bales. No doubt Exhibit A is not a very formal document and there are no calculations to show how the firgure Rs. 5,000 was arrived at. But on the strength of the promise to pay on demand, the respondents might have called on the appellants to pay the sum of Rs. 10,800 the next minute after they had signed Exhibit A and it would then have been inconsistent with the unconditional nature of that promise to set up a contemporaneous undertaking that the respondent would re-pay the sum of Rs. 5,000 paid as compensation in the event of the Mills allowing them to countermand their order, as to do so would be to destroy the finality of the settlement then made which was irrespective of the respondents' liability to the Mills. In the respondents' letter, Exhibit I, there is no acceptance of the proposal in Exhibit II that the compensation should be returned if the Mills were prepared to cancel the order for bales of quality Nos. 50 and 44. In *Motabhoy Mulla Essabhoy* v. *Mulji Haridas* (6) the separate oral agreement that the money paid on December 23rd, 1907, should be treated as a pre-payment in lieu of the advance due on January 30th, 1908, and that in satisfaction of the promissory note of December 23rd the payee should give the holder an acknowledgment of the

(6) 29 Ind. Cas. 223; 39 B. 399; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 42 I. A. 103 (P. C.).

receipt of the instalment due on the later date was held to be an agreement which could be proved under proviso (2) to section 92. There the oral agreement was quite distinct from the agreement under the promissory-note and not inconsistent with it. The facts of the case before us are more analogous to those in *Hitchings and Coulthurst Co.* v. *Northern Leather Co. of America* (5) where Bailhache, J. held that an oral agreement that the defendant would not pay if the goods supplied to his Company should be unequal to *sample* was an agreement in defeasance of the contract to pay contained in the promissory note, and evidence to prove it was inadmissible.

In *Ramjibun Serowgy* v. *Oghore Noth Chatterjee* (7) there was an attempt to set up an oral agreement restricting the absolute engagement in a promissory note to pay on demand and to bring it under proviso (3) which relates to agreements constituting a condition precedent to the attaching of an obligation under the contract, and it was ruled out as being an agreement to postpone the legal obligation to perform a promise which was absolute in its terms.

Although the alleged agreement in the present case not to enforce the absolute promise to pay on demand is not put forward as a condition precedent to the attaching of the obligation to pay, it is an agreement which would have the effect of converting an absolute unconditional promise into a conditional, defeasible one.

The other cases cited in the arguments are not of much assistance. *Goseti Subba-Row* v. *Varigonda Narasimham* (1) is an authority on the application of proviso (4). *Jnanendra Mohan Choudhury* v. *Gopal Das Choudhury* (2) is an authority on section 91. *Kamla Sahai* v. *Nandan Mian* (3) deals with an agreement *de hors* section 92 altogether, as it provided for the discharge of a debt secured by a mortgage deed by means of putting the mortgagee in possession and letting him enjoy the profits of the mortgaged property. *Jugtanund Misser* v. *Nerghan Singh* (4) simply laid down that evidence of part performance of a contract negatived a plea that there was an oral agreement constituting a condition precedent to the contract becoming enforceable.

I think that the appellants' contentions are not acceptable and that the appeal should be dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree both with the conclusion of my learned brother and with his reasons for arriving at that conclusion.

M. C. P.

Appeal dismissed.

(7) 25 C. 401; 2 C. W. N. 188; 13 Ind. Dec. (N. s.) 286.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 148 OF 1922.

February 16, 1922.

Present :—Mr. Justice Scott-Smith.

WARIS—JUDGMENT-DEBTOR—PETITIONER

versus

FATEH DIN—DECREE-HOLDERS—RESPONDENTS.

Specific Relief Act (I of 877), s. 9—Execution of decree—Order in execution—Appeal.

An order passed in execution of a decree under section 9 of the Specific Relief Act is not appealable.

Mohfuz Ali v. *Birji Nand Kerat*, 28 Ind. Cas. 282; 45 P. L. R. 1915; 201 P. W. R. 1915, *Thomas Souza* v. *Gulam Moidin Beari*, 6 M. 438; 13 M. L. J. 214, *Kanai Lal Ghose* v. *Jatindra Nath Chandra*, 42 Ind. Cas 711; 45 C. 519; 26 C. L. J. 325; 22 C. W. N. 446, relied upon.

Petition for revision of an order of the Senior Subordinate Judge, Hoshiarpur, dated the 23rd August 1921, reversing that of the Munsif, First Class, Hoshiarpur, dated the 1st August 1921.

Mr. *Shamair Chand*, for Lala *Fakir Chand*, for the Petitioner.

Sheikh *Niaz Muhammad*, for the Respondents,

MADHO DAS v. GOKAL DAS.

JUDGMENT.—On 14th June 1919 Fateh Din got a decree for possession of certain property against Waris under section 9 of the Specific Relief Act. On the 1st December 1919 Waris in a regular suit against Fateh Din was granted a declaratory decree to the effect that part of the property which was the subject of the suit under section 9 belonged to him. Subsequently Fateh Din applied for execution of his decree and the Munsif rejected the application on the ground that his decree had been set aside by the declaratory decree obtained by Waris. Fateh Din appealed and the Subordinate Judge who heard the appeal accepted it and directed that the First Court should execute Fateh Din's decree in respect of the portion of the site as to which no declaration had been given. Waris has filed a second appeal to this Court and it is contended on his behalf that no appeal lay to the Subordinate Judge from the order of the Munsif rejecting the application for execution. It was held by a single Judge of the Chief Court in a case reported as *Mohfuz Ali* v. *Birji Nand Kerat* (1) that an order passed in execution of a decree under section 9 of the Specific Relief Act was not appealable. This decision was based upon *Thomas Souza* v. *Gulam Moidin Beari* (2). *Kanai Lal Ghose* v. *Jatindra Nath Chandra* (3), in which the Punjab ruling and the Madras ruling were approved, is to the same effect. I, therefore, hold that no appeal from the order rejecting Fateh Din's application for execution was competent and that the Senior Subordinate Judge in hearing the appeal acted without jurisdiction. As no appeal lay I hold that no second appeal lies from the order of the lower Appellate Court, but revision is competent under section 44 of the Punjab Courts Act.

Mr. Niaz Muhammad for the respondent contends that the order of the Senior Subordinate Judge does substantial justice and that, therefore, this Court should not interfere on the revision side. There is force in this contention. I have myself perused the records, both of the suit under section 9 of the Specific Relief Act and of the declaratory suit, and I find that the latter was not in regard to the whole of the land about which the first suit was brought. There is no reason why Fateh Din should not be allowed to execute his decree in respect of that portion of the site which was not the subject of the declaratory suit. The Senior Subordinate Judge says that Lala Iqbal Rai's decree covers only the red portion of the property shown in the "plan attached to the plaint in that case." It is doubtful whether this is correct. The Executing Court should itself examine the plans and the measurements given in both the suits and should decide to what extent Fateh Din can execute his decree.

No second appeal lies, and for the reasons given above I decline to interfere in revision. Costs of this Court shall be borne by the parties.

Z. K. *Order accordingly.*

(1) 28 Ind. Cas. 282; 45 P. L. R. 1915; 201 P. W. R. 1915.

(2) 26 M. 438; 13 M. L. J. 214.

(3) 42 Ind. Cas. 711; 45 C. 519; 26 C. L. J. 325; 22 W. N. 446.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1166 OF 1921.

June 16, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Sulaiman.

MADHO DAS—PLAINTIFF—APPELLANT

versus

GOKUL DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract—Earnest money—Question of fact—Appeal, second.

The question as to what is and what is not earnest money turns on the construction of the document which contains the contract, but where there is no written contract, the question must be decided

according to the evidence on the record, and becomes a question of fact and a decision on that question cannot be disturbed in appeal.

Second appeal from a decree of the District Judge, Benares.

Dr. *Kailas Nath Katju*, for the Appellant.

Dr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—The plaintiff instituted a suit for the recovery of a sum of money which, he stated, he had paid in excess to the defendants. The facts, as found by the Courts below, are that the plaintiff agreed to purchase 20 bales of cloth from the defendants; that he broke his contract to the extent that he refused to take delivery of 11 bales of cloth. He took delivery of 9 bales and refused to take delivery of the remainder. It is further found that the plaintiff paid Rs. 1,000 on one occasion, Rs. 1,000 on a second occasion before he received any cloth, and that he subsequently paid Rs. 4,950, Rs. 4,675 and Rs. 1,236. He thus paid Rs. 12,861 in all and took delivery of 9 bales of cloth which were priced at Rs. 11,305-15-0. This left a balance of Rs. 1,556-1-0 which the plaintiff has sued to recover from the defendants. The lower Courts have dismissed his suit holding that he had agreed to pay Rs. 2,000 earnest-money and that he had actually paid Rs. 2,000 earnest-money and that, inasmuch as he had broken the contract, he forfeited his earnest-money and was, therefore, not entitled to recover anything. The learned Counsel for the plaintiff, who appeals before us, has scrupulously confined himself to the points of law which are open to him in second appeal. He does not contest, in addition, the findings of the Courts below in every particular. He admits the facts as we have stated them with the exception that he denies that Rs. 2,000 were paid as earnest-money. He says that Rs. 1,000 only were paid as earnest money. Thus he has argued before us only in favour of a relief of Rs. 556-1-0 with interest. The law in respect of what is and what is not earnest-money, in a contract of such a nature as the present, and the liability to forfeiture of such earnest-money in respect of a failure to perform the contract, is laid down in the leading case of *Howe* v. *Smith* (1). There the decision as to what was and what was not earnest-money, turns on the construction of the document which contained the contract, and it was stated by Bowen, L. J., at page 97, that in each case it is a question of construction. When, as is the case here, there is no written contract, the point as to determination of what is and what is not earnest-money, must be decided according to the evidence on the record and becomes a point of fact. This being the case, the finding of the lower Appellate Court, which we can only interpret as a finding that Rs. 2,000 were paid as earnest-money, would conclude the matter. It has, however, been argued with skill by the learned Counsel for the appellant that, in view of the defendants' own written statement, it was not open to the defendants to suggest that more than Rs. 1,000 had been paid as earnest-money, and his plea at first sight finds support from the wording of the second paragraph of the written statement. The wording of this paragraph is not, however, such as to exclude the possibility of the plea that Rs. 2,000 had been paid as earnest-money. Reading paragraphs 1 and 2 together, we understand the plea to be that Rs. 2,000 were paid as earnest-money, and it is perfectly clear from the proceedings that as soon as the suit came to trial, the defendants urged that Rs. 2,000 had been paid as earnest-money and based practically the whole of their defence upon that plea. In these circumstances, we consider that it was open to the Courts below to decide as they have decided, that Rs. 2,000 were paid as earnest-money and we cannot interfere with that decision as it is a decision of fact. We, therefore, dismiss this appeal with costs.

W. C. A.

Appeal dismissed.

(1) (1884) 27 Ch. D. 89; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R 802; 48 J. P. 773.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2458 OF 1921.

April 11, 1922.

Present :—Justice Sir William Chevis, KT.

HIRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARDAT SINGH—DEFENDANT—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 59—Succession to occupancy rights—Customary heir—Adopted son—Hindu Law—Adoption of married man, validity of.

In order that an adopted son may succeed to the occupancy land left by his adoptive father, the adoption must be under Hindu Law, and must comply with the requirements of that law as applicable to the parties concerned, the mere appointment as an heir according to custom is not sufficient. [p. 764, col. 1.]

Under Hindu Law, among the twice-born classes a boy may be adopted at any time before his investiture with the sacred thread, and among *Sudras* an adoption is valid only up to the time of marriage and not later. [p. 763, col. 2.]

Dharma Dagu v. *Ramkrishna Chimnaji*, 10 B. 80; 10 Ind. Jur. 266; 5 Ind. Dec. (N. S.) 438, *Pichuvayyan* v. *Subbayyan*, 13 M. 128 at p. 129; 4 Ind. Dec. (N. S.) 801, *Rup Chand* v. *Jambu Parshad*, 6 Ind. Cas. 272; 32 A. 247; 14 C. W. N. 545; 7 A. L. J. 349; 12 Bom. L. R. 402; 11 C. L. J. 454; 8 M L. T. 3; 20 M. L. J. 439; (1910) M. W. N. 432; 37 I. A. 93 (P. C.) and *Jhunka Prasad* v. *Nathu*, 18 Ind. Cas. 960; 35 A. 263; 11 A. L. J. 293, referred to.

Second appeal from a decree of the District Judge, Delbi, dated the 1st August 1921, reversing that of the Munsif, First Class, Jhajjar, District Rohtak, dated the 14th January 1921.

Mr. *Shamair Chand*, for the Appellants.

Lala *Jogan Nath*, for the Respondent.

JUDGMENT.—The plaintiffs are the landlords in this case and they sue for possession of the occupancy land held by the late Sarjit. The defendant Hardat is a collateral of Sarjit and claims that he has a right to succeed to his occupancy land by reason of adoption. If the adoption is a valid adoption in Hindu Law, then, admittedly, the defendant has a right to succeed to the land: while if it is not a valid adoption, then it can count no higher than the customary adoption of an heir, and in this case the defendant cannot succeed. The First Court decreed the claim holding that the adoption was merely one under Customary Law and was equivalent to the appointment of an heir. The learned District Judge noting that the parties reside in the Rohtak District in which District adoptions under Hindu Law are commonly found, held that the adoption was one under Hindu Law, and dismissed the suit. The plaintiffs appeal to this Court and on their behalf Mr. Shamair Chand argues that the adoption cannot possibly be recognised as valid under Hindu Law, because the adopted person was a married man.

The parties are *Jats*, and Counsel on both sides are agreed that they must be regarded as *Sudras*. There are rulings of the Bombay High Court to the effect that marriage is no bar to adoption among *Sudras* provided that the person adopted is of the same *gotra* as the adopter. [See *Dharma Dagu* v. *Ramkrishna Chimnaji* (1).] The Madras and Allahabad High Courts, however, hold a different view. In *Pichuvayyan* v. *Subbayyan* (2) it is held that a married person cannot be adopted. The learned Judge referred to the Bombay cases and stated that they proceeded on texts which have no authority in the Madras Presidency and that, apart from the Bombay cases, no text or other authority were cited to justify an adoption taking place after marriage. The learned Judges held further that even among *Sudras*, an adoption, in order to be valid, must take place before the marriage of the adopted son. The same view as regards the higher classes is held in *Rup Chand* v. *Jambu Parshad* (3) where their Lordships of the Privy Council say: "There is no longer any question that by the general Hindu Law applicable to the twice-born classes, a boy cannot be adopted after his marriage," and in *Jhunka Prasad* v. *Nathu* (4) the learned Judges held that an adoption, in order to be valid even among *Sudras*, must take place before the marriage of the adopted son. The rule seems to be as laid down in Mayne's Hindu Law, paragraph 141, that among the twice-born classes a boy may be adopted at any time before his investiture with the sacred thread and that among *Sudras* an adoption is valid only up to the time of marriage and not later.

(1) 10 B. 80; 10 Ind. Jur. 266; 5 Ind. Dec. (N. S.) 438.

(2) 13 M. 128 at p. 129; 4 Ind. Dec. (N. S.) 801.

(3) 6 Ind. Cas. 272; 32 A. 247; 14 C. W. N. 545; 7 A. L. J. 349; 12 Bom. L. R. 402; 11 C. L. J. 454; 8 M. L. T. 3; 20 M. L. J. 439; (1910) M. W. N. 432; 37 I. A. 93 (P. C.).

(4) 18 Ind. Cas. 960; 35 A. 268; 11 A. L. J. 293,

Counsel for the defendant urges that Hindu Law is not strictly followed in the Punjab and he cites as an instance *Hari Kishen* v. *Chandu Lal* (5) where it is laid down that a son cannot compel partition in the lifetime of his father. The ruling in this case, however, seems to follow the provisions of the Punjab Civil Code. As regards adoption, I know of only two forms in the Punjab, *viz.*, adoption amongst agriculturists of the greater part of the Province, which is, strictly speaking, not an adoption but merely the customary appointment of an heir, and adoption under Hindu Law as practised in the south-east part of the Punjab. In order that the adopted person may succeed to the occupancy land left by the adopter, the adoption must be under Hindu Law, and must, in my opinion, comply with the requirements of that law as applicable to the parties concerned.

According to the Benares School the adoption of a married man even among *Sudras* is invalid, I do not say that a custom could not be pleaded as applicable to the parties concerned and authorising an adoption of a married person, but certainly no such custom has been proved in the present case for the simple reason that no such special custom was ever pleaded. The plaintiffs pleaded generally that there was no adoption and the defendant pleaded an adoption, and the issue framed by the lower Court was whether the defendant had become legally an adopted son. Thus it was for the defendant to prove an adoption legal according to the Hindu Law. He has failed to do so, and I think the plaintiffs must succeed. At the same time the particular question which has been raised before me, namely, the question of marriage being a bar to adoption under Hindu Law does not seem to have been pleaded specifically in the lower Courts, and, therefore, I shall not allow costs. I accept the appeal and setting aside the decree of the learned District Judge dismissing the suit, I restore the decree of the First Court but leave the parties to bear their own costs in all Courts.

Z. K & N. H.] *Appeal accepted.*

(5) 43 Ind. Cas. 667; 105 P. R. 1917 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1255 OF 1920.

May 16, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BAIJNATH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MOHAMMAD ISMAIL—DEFENDANT—RESPONDENT.

Religious Endowments Act (XX *of* 1863), *s.* 7, [*Committee appointed under—Mosque property—Lease of shops—Committee, powers of, whether restricted to those of* Mutwalli *under Muhammadan Law—Muhammadan Law—Trust property—Power of* Mutwalli—*Lease of house property for more than one year.*

The powers of an "Islamia Committee" appointed under section 7 of the Religious Endowments Act to take charge of a mosque and the property attached to it are not necessarily governed by the rules of Muhammadan Law relating to the powers of a *Mutwalli*. Such a Committee can, in a proper case, lease house property for more than one year. [p. 765, col. 2; p. 766, col. 1.]

Obiter:—According to the Muhammadan Law, a *Mutwalli* is not in general authorised to make a lease of house property for a period longer than one year, but a Qazi might empower him to grant leases for a longer period if such a grant is for the benefit of the trust estate. [p. 766, col. 1.]

Second appeal from a decree of the District Judge, Agra

Dr. *Surendro Nath Sen*, Dr. *S. M. Sulaiman*, and Mr. *Baleshwari Prasad*, for the Appellants.

Mr. *Narain Prasad Asthana*, for the Respondent.

JUDGMENT.—We have heard Counsel on both sides in this appeal and have come to the conclusion that the judgment of the lower Appellate Court is wrong and must be set aside and the decree of the Court of first instance restored.

The suit was a suit in ejectment brought by two plaintiffs, Baijnath and L. Bankey Lal.

It appears that there is in Agra a body known as the Islamia Committee which is entrusted with the duty of looking after the Jama Masjid.

It appears that attached to the Masjid there are certain shops and for the purpose of providing funds for the upkeep of the mosque, it has been the practice of this Committee to make arrangements for the

leasing out of these shops so as to secure a ragular income.

In their plaint the plaintiffs stated that they were the lessees of these shops on behalf of the Islamia Committee under a lease executed in their favour for a period of five years with effect from the 1st April 1919. The allegation was that Muhammed Ismail was in possession at the time the lease was granted in favour of the plaintiffs. He was told to quit but refused to give up possession: hence this suit for ejectment and also for damages in the way of rent for occupation.

The defendant took a number of pleas. He asserted, in the first place, that the plaintiffs had no title to bring a suit as they were not lawfully lessees on behalf of the Islamia Committee. It was pleaded that the Islmia Committee had no power to give these plaintiffs a lease for the shops for a period of five years. The defendant also denied that he was the tenant of the plaintiffs. Further, it was pleaded that, in any case, if he was deemed to be the plaintiffs' tenant, the suit was not maintainable inasmuch as no proper notice to vacate had been given to him. The Court of first instance decreed the suit but the lower Appellate Court has reversed the First Court's decree, and the first question we have to consider is the legal position of the plaintiffs in the present case.

The view taken by the Judge was that according to Muhammadan Law the *mutwalli* of a trust property has no authority to grant a lease of house property for a period exceeding one year. In the view of the learned Judge the Islamia Committee stood in the same position with regard to the property in question as a *mutwalli*. Consequently the learned Judge was of opinion that the lease in favour of the plaintiffs conveyed no valid title to them.

In our opinion this view of the learned Judge is erroneous.

We have to refer, in the first instance, to the Bengal Regulation XIX of 1810. That was a Regulation passed in order to secure the due appropriation of rents and produce of lands granted for the support of mosques, Hindu temples, colleges and other pious purposes, and from the preamble to the Regulation it is made to appear that this legislation was undertaken by reason of the fact that there was mismanagement or want of management on the part of persons responsible in connection with property which had been endowed for the upkeep of religious buildings such as those which we have mentioned. It was declared, therefore, by the Regulation (section 2) that the general superintendence of all lands granted for the support of mosques, Hindu temples, colleges and for other pious and beneficial purposes was vested in the Board of Revenue and Board of Commissioners in the several Districts subject to the control of these Boards respectively.

The words of this section are as general as they can be, and it is to be noticed that the language of the section itself imports no restriction on the power of the Board of Revenue in the management of the lands referred to in the section. We may also in this connection refer to the terms of section 4 of the Regulation which lays down that in cases where buildings have fallen into decay and cannot be conveniently repaired, the Boards shall recommend that they be sold by public auction or otherwise disposed of as may appear most expedient.

This arrangement for the management of property dedicated to the support of religious institutions remained in force for many years but was ultimately put an end to by the provisions of the Religious Endowments Act XX of 1863. It was then declared that it was no longer expedient that the Board of Revenue should be entrusted with the powers of management assigned to it under the Bengal Regulation, and arrangements were made whereby the duties and powers of the Board of Revenue were to be assigned to Committees, or, in cases where there were properly appointed trustees of the property for the transfer of the Board's powers to these trustees. The relevent section we have to consider in this connection is section 7 which lays down that in all cases described in section 3 of the Act the Local Government shall once for all appoint one or more Committees in every Division or District to take the place and exercise the powers of the Board of Revenue and local agents under the Regulation hereby repealed.

There can be no doubt that the Islamia Committee is a Committee which was appointed under section 7 of Act XX of

1863, and, consequently, it must be taken that they were appointed to take the place of and to exercise the powers of the Board of Revenue.

The learned Judge, as we have said, was of opinion that when the Board of Revenue took over the duties of superintendence under Regulation XIX of 1810, it was necessarily governed by the rules of Muhammadan Law relating to the powers of a *mutwalli* to lease trust property. We can find no warrant for this opinion in the language of the Regulation itself, and indeed, as we have pointed out, the language of section 4 which directed that the Board should in certain cases recommend the sale of religious buildings, is altogether inconsistent with the provisions of Muhammadan Law. It seems to us that the proper view is that in taking over the duties of management of these trust properties the Board of Revenue was entrusted with all reasonable powers which might be exercised for the benefit of the trust.

We may mention, moreover, that the provisions of the Muhammadan Law are not quite so rigid as the learned Judge seems to have understood. It is quite true that there was a rule laid down with regard to house property that a *mutwalli* should not in general be authorised to make a lease of such property for a period longer than one year, but there was this qualification attached to it, namely, that in all cases the Qazi might empower the *mutwalli* to grant leases for longer periods if he thought that such a grant was for the benefit of the trust estate.

If we were really called upon to decide whether the action of the Islamia Committee in leasing out this property for a period of five years to the plaintiffs was justifiable we should have no difficulty in finding that this course is really in the best interests of the property. It could hardly be expected in modern times that any person would be willing to take a lease of a shop from which he would necessarily have to be removed at the expiry of one year. Further, it is not to be doubted that this arrangement by which the Committee hands over the control of the property to *thekadar* for a period of five years, is, from their point of view, a most convenient arrangement. It secures to the Committee a regular income which they can collect without any trouble. The Committee is saved the expense and trouble of maintaining a staff to collect the rents and otherwise look after the property, and, further, it seems to be quite clear that by this arrangement they are enabled to get as high a rent as they could possibly expect to obtain. The procedure seems to be that the Committee puts up the *theka* for auction for a period of five years and hands over the *theka* to the highest bidder.

We are of opinion, therefore, that no question can possibly arise regarding the right of the present plaintiffs to maintain this suit in ejectment. We have read the document by which the *theka* was granted to the plaintiffs and from that it is apparent that they have been vested with full control over the shops in dispute. They are under an obligation to pay monthly to the Committee a sum of Rs. 700 and it is declared in the deed that the lessees are to be entitled to get any rents they can from the persons to whom they let out the shops. They are given full powers to eject tenants and to make all arrangements which are necessary for the renting out of the property.

The next question that arises is, whether the defendant was entitled to raise a plea that he could not be ejected without notice. It is perfectly clear from the pleadings and also from other evidence in the case that the defendant has denied the right of the plaintiffs and he has been maintaining that he is a tenant not of the plaintiffs but of the Islamia Committee. As regards this latter contention, there is no evidence whatever and it seems to us to be clear on all hands that he has never been at any time, regarding which we have any evidence, a tenant holding directly under the Committee.

It seems to be true that the defendant has been in occupation of some of these shops for a number of years. On the other hand, we have evidence to show that for the last 15 or 20 years at least the Islamia Committee has been in the habit of giving these five years' leases to *thekadars*, and the obvious inference is that the defendant must have been admitted to occupation of these shops under a grant made by the

thekadars. We cannot for a moment allow the plea that the defendant is a tenant holding directly from the Committee.

Then as regards the present plaintiffs whose lease, as we have said, dates from the 1st April 1919, it is clear on all hands that the defendant is nothing more than a trespasser. Some stress has been laid in the Courts below upon a previous litigation between the defendant and previous *thekadars*. It seems that prior to the date of the lease in favour of the plaintiffs, attempt had been made by the previous *thekadars* to eject the defendant. The case was compromised under some arrangement by which the defendant vacated some of the shops in his possession and came to an understanding with the then *thekadars* that the rent for the remaining shops was not to be enhanced nor was he to be ejected from them before the 31st March 1919, that being the date upon which the lease of the previous *thekadars* expired.

The fact that this arrangement was made with the previous *thekadars* cannot help the defendant in the present case. The previous lessees were in control of the property only for the period of the lease which had been given to them by the Committee and they could not, either by agreement or otherwise, confer upon the defendant a right to occupy the shops beyond the period of their own *theka*, which, as we have said, came to an end on the 31st March 1919. The result, therefore, is that when the lease of the present plaintiffs came into existence, the defendant was in possession under some arrangement made with the earlier lessees—an arrangement which the present plaintiffs are in no way bound to recognize. The defendant cannot, therefore, be heard to say that any tenancy exists which under the law must be put an end to by the giving of a regular notice as required by the Transfer of Property Act. He has besides denied the title of the present plaintiffs. He is nothing more than a trespasser and he is in no way entitled to notice.

We hold, therefore, that the rights of the case are with the plaintiffs and we allow this appeal accordingly, set aside the decree of the learned District Judge and restore the decree of the Court of first instance.

N. K, & N. H.

Appeal decreed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 289 OF 1919.

March 11, 1922.

Present:—Justice Sir William Chevis, KT.

SHER DIL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GULAB AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Non-proprietor—Grandson of first cousin.

As a general rule, a grandson of a first cousin has no right to succeed to the rights of a non-proprietor in a village.

(Case-law reviewed.)

Second appeal from the decree of the District Judge, Attock at Campbellpore, dated the 7th November 1918, affirming that of the Honorary Munsif, Second Class, Shamasabad, District Attock, dated the 12th January 1918.

Mr. *Nanak Chand*, for the Appellants.

Mr. *B. R. Puri*, for the Respondents.

JUDGMENT.—This suit relates to a house in a village which was occupied by one Aziz Ullah. The plaintiffs are the proprietors of the site. Aziz Ullah, the non-proprietor, has died and Sher Dil, whose grandfather was a first cousin of Aziz Ullah, has taken possession of the house. The plaintiffs sued for possession and the lower Court has decreed the suit, and the District Judge has dismissed the appeal holding that by custom Sher Dil is not entitled to succeed. Sher Dil has preferred a second appeal to this Court.

On behalf of the plaintiffs a preliminary objection is raised that the appeal cannot be entertained as there is no certificate. It is to be noted that the District Judge has treated Sher Dil as a collateral in the 5th degree, whereas according to the proper method of computing degree of relationship Sher Dil must be regarded as a collateral in the third degree, being a great-great-grandson of Sharaf, the grandfather of Aziz Ullah. It is urged that this mistake on the part of the District Judge has vitiated

his judgment and, consequently, a second appeal lies. It is urged that the real question is whether a collateral in the third degree is entitled to succeed and that this is not the question which has been decided by the District Judge who has treated the question as if it were one whether a collateral in the fifth degree is entitled to succeed. Whether the flaw in the District Judge's judgment is such as to absolve the appellant in this Court from the necessity of producing a certificate for second appeal seems to me a question of some difficulty. I have, therefore, given the appellant the benefit of doubt and have heard arguments on the merits.

Both sides produced witnesses but no instances of succession relating to this particular village have been cited. The decision must, therefore, rest on cases already decided in Court. Firstly, there is a Division Bench case in *Sher Jang* v. *Munshi Ram* (1). This is a recent ruling bearing date 16th November 1921. I fail, however, to see how it helps me as it is a case relating to a village in the Hoshiarpur District, and the claimant whose claim to succeed was then disallowed was a collateral in the fourth degree.

In *Kalu* v. *Pir Bakhsh* (2) the claim of a brother was allowed.

In *Kala* v. *Hasham* (3) the claim of nephews was allowed. This was a Gujrat case.

In *Beli Ram* v. *Umar Bakhsh* (4) an uncle was allowed to succeed. This was a case from the Gujranwala District.

In *Ata Ali Khan* v. *Kala* (5), a first cousin was allowed to succeed. This case, like the one before us, came from the Attock District.

Then there are the four rulings quoted under Art. 138 A in Rattigan's Digest.

In *Attra* v. *Moda* (6), collaterals in the fourth degree were held to be not entitled to succeed.

In *Wali Muhammad Khan* v. *Surji* (7), a first cousin was allowed to succeed.

In *Karam Chand* v. *Hakam Singh* (8), collaterals in the sixth and seventh degree were held to be not entitled to succeed.

Bug v. *Asad Ali* (9) does not seem to me a relevant ruling.

The rulings seem to sum up to this that no collateral in the second degree has even been barred and that no collateral beyond the third degree has ever succeeded. We have the case of an uncle succeeding [*Beli Ram* v. *Umar Bakhsh* (4)] and two cases of first cousins succeeding [*Ata Ali Khan* v. *Kala* (5) and *Wali Muhammad Khan* v. *Surji* (7).] There is no case apparently of a first cousin having been held to be not entitled to succeed, but the claimant in the present case is not himself the first cousin but is the grandson of a first cousin. No doubt according to the method of computation adopted in the Punjab he must be called a collateral in the third degree. According to the method adopted in England he would be described as a first cousin twice removed.

Now, as regards the succession to proprietary rights, the principle of representation generally recognized in the Punjab is that if a man be dead his place is taken by his son, or, if the son also be dead, by the grandson and in such a case the son or grandson is in just as good a position as the father or grandfather. But I am not at all sure that it can be said that this principle of representation applies to all cases including cases of succession to the rights of a non-proprietor in a village. It is not for me to draw analogies and to guess what the custom is or should be; I can only go by evidence and see what custom is really proved to exist. I have been unable to find a case in which the son or grandson of a first cousin has ever been held to be entitled to succeed, and, therefore, I am not prepared to hold that a grandson of a first cousin has any right of succession. I, therefore, think that the learned District Judge's decision is correct and I dismiss this appeal with costs.

B. Z. K.

Appeal dismissed.

(1) 67 Ind. Cas. 964; 3 L. 33; 22 P. W. R; 1922.
(2) 9 Ind. Cas. 735; 34 P. W. R. 1911; 33 P. L. R. 1911.
(3) 35 Ind. Cas. 291; 127 P. L. R. 1916; 63 P. W. R. 1916.
(4) 48 Ind. Cas. 723; 116 P. R. 1918; 25 P. L. R 1919.
(5) 60 Ind. Cas. 11; 106 P. R. 1919.
(6) 37 P. R. 1887.
(7) 76 P. R. 1888.
(8) 71 P. R. 1889.
(9) 75 P. R. 1897.

HAR BHAGWAN v. HUKAM SINGH.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 812 OF 1920.

March 27, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

HAR BHAGWAN AND OTHERS—PLAINTIFFS —APPELLANTS

versus

HUKAM SINGH AND ANOTHER—DEFENDANTS —RESPONDENTS.

Succession—Exclusion from inheritance—Murderer—Descendants, lineal, position of—Personal law—Public policy—Evidence, admissibility of—Document, invalidly registered.

A murderer as well as his lineal descendants are precluded from inheriting the property of the person murdered [p 774, col 2.]

The question of the exclusion of the murderer and his lineal descendants from inheritance has reference to the broad view of public policy and justice rather than to the provisions as to exclusion from inheritance of the personal law to which the parties may be subject. [p 773, col. 2.]

Shah Khanam v. *Kalandhar Khan*, 74 P. R. 1900; P. L. R. 1900 at p. 455, followed.

Brojo Mohun Thakoor v *Gouree Parshad Chowdhry*, 15 W. R. 70, *Nilmadhab Mitra* v. *Jotindra Nath Mitra*, 18 Ind Cas. 764: 17 C. W. N. 341, distinguished.

Muhammad Khan v. *Sis Bano*, 41 P. R 1906; 95 P. L. R 1906; 82 P. W. R. 1906, *Girimallappa Channappa* v. *Kenchava*, 61 Ind. Cas. 294; 45 B. 768; 23 Bom. L. R. 213, *Vedanayaga Mudaliar* v. *Vedammal*, 27 M. 591, *Vedammal* v. *Vedanayaga Mudaliar*, 31 M. 100: 18 M. L. J. 70; 2 M. L. T. 533, referred to.

Therefore, the son of a Hindu murderer is also excluded from inheriting to the murdered person even though under his personal law he may have a right to succeed to the murdered man independently of his father. [p 774, col. 2.]

A deed which is not legally registered is invalid and a nullity and as such is inadmissible in evidence. [p. 775, col. 2.]

Basheshar Das v. *Bhagwan Das*, 44 P. R. 1898, disapproved.

Amba v. *Shrinivasa Kamathi*, 68 Ind. Cas. 754; 26 C. W. N. 769; 14 L. W. 575, followed

Udit Narain Chowdhury v. *Mathura Prasad*, 29 Ind. Cas. 413, *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*, 23 Ind. Cas. 637: 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T 6; 18 C. W. N. 817; 19 C. L. J. 484; 6 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A 110 P. C.), *Ram Lal* v. *Musammat Tamkin Bano*, 49 Ind. Cas. 543; 17 A. L. J. 363; 41 A. 385, referred to.

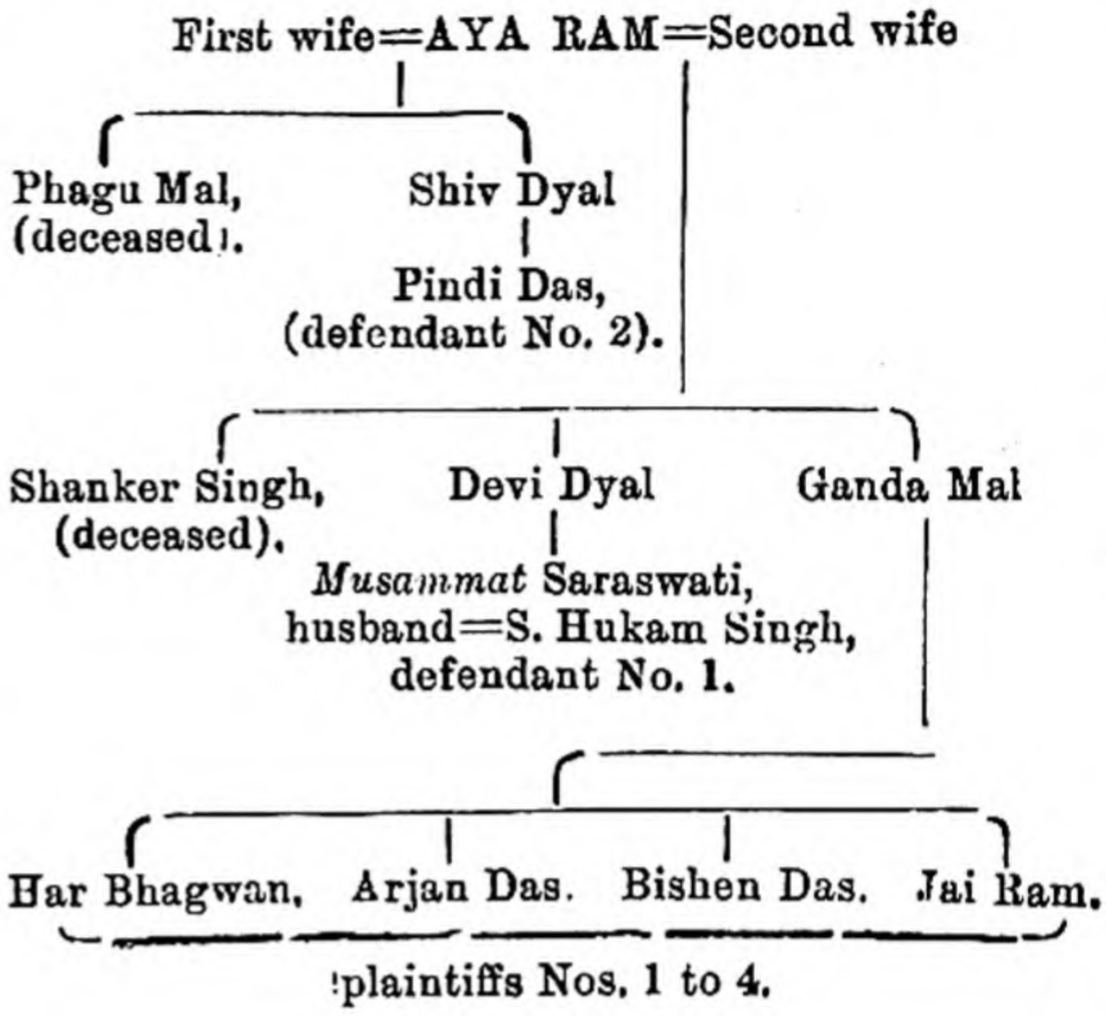
First appeal from a decree of the Senior Subordinate Judge, Lyallpur, dated the 5th January 1920.

Lala *Moti Sagar*, R. S., and Lala *Badri Das*, R. B., for the Appellants.

Pandit *Sheo Narain*, R. B, for Respondent No. 1.

Bakhshi *Tek Chand*, for Respondent No. 2.

JUDGMENT.—The pedigree-table given below illustrates the relationship between the parties:—



Devi Dyal, son of Aya Ram, was murdered on the 27th December 1907, along with his wife, *Musammat* Jamna Devi. It was found that Ganda Mal, real brother of Devi Dyal, was responsible for this double murder and he was tried for this offence and convicted. He was sentenced to be hanged and the sentence was duly executed. He left four minor sons behind him, two of whom have now attained their majority and have brought this suit, on their own behalf and on behalf of their minor brothers, for possession of four squares of land in the Lyallpur District which belonged to Devi Dyal deceased They have also sued for the recovery of Rs. 8,000, as mesne profits for four years and for future mesne profits. Their suit has been dismissed by the Senior Subordinate Judge and they have preferred this appeal against the orders of the Senior Subordinate Judge through Mr. Moti Sagar. Certain cross objections with regard to the findings of the Court, regarding two side issues in the case, relating to the alleged adoption of one Balwant Singh by *Musammat* Saraswati, daughter of Devi Dyal, and to a Will made by her in favour of the former have been filed on behalf of the respondents by Pandit Sheo Narain and this order will dispose of the appeal as well as the cross-objections. We have heard Mr. Moti Sagar for the appellants and Mr. Sheo Narain for Hukam Singh respondent and have also heard Mr. Tek Chand who represents Pindi Das, the

son of step-brother of Devi Dyal, deceased, who had been impleaded as a defendant, because he was a possible heir and also on the ground that he had executed a sale-deed in favour of the plaintiffs transferring his rights, if any, in the property of the deceased, to the plaintiffs for Rs. 500, but he denied the receipt of any consideration for this document and contended that it was not admissible in evidence.

Another brief reference to the history of the case may be made before considering the various points which are in dispute between the parties. On the death of Devi Dyal the whole of his land was mutated in favour of his daughter, *Musammat* Saraswati, on the 6th June 1908 and she continued to be in possession of it till she died on the 8th May 1914. She had no children of her own, but it is stated by her husband Hukam Singh, defendant No. 1, that she had adopted Balwant Singh, son of Gopal Singh, brother of Hukam Singh, as her son, and had executed a Will (Exhibit D-1) in Balwant Singh's favour on the 6th May 1914, *i. e.*, two days before her death. It is also said that she had the power to adopt him and to leave the whole property to him, because she had got an absolute estate on the death of her father, by virtue of a letter dated the 26th Decemer 1907, written by Devi Dayal making her the owner of the whole of his property, which may be taken to amount to a Will in her favour. On the death of *Musammat* Saraswati the land in dispute was mutated in favour of her husband, Hukam Singh, who is still in possession of it. On the 21st May 1918 the plaintiffs brought their suit relying on their relationship with the deceased and claiming to be entitled to succeed to the property after *Musammat* Saraswati. They alleged, that their father and Devi Dyal deceased were members of a joint Hindu family and that the property had been acquired by Devi Dyal by paying for the proprietary rights in the squares in question out of the joint family funds. They denied that there was any Will in favour of *Musammat* Saraswati or that Hukam Singh had any right to hold the property. They also added that Pindi Das had no rights in the property and that if he had any they had now purchased the same from him. Hukam Singh pleaded in reply that the plaintiffs had lost all rights to inherit the property of Devi Dyal, deceased, because their father had been guilty of murdering him and joined issue with them on the other points urged by them and added that Balwant Singh should also have been impleaded. For reasons given in his judgment the Senior Subordinate Judge did not add Balwant Singh as a party to the suit and the points in dispute have been fought between the plaintiffs on the one hand and Hukam Singh and Pindi Das on the other.

The learned Senior Subordinate Judge framed no less than ten issues in this case and subsequently added two more at a very late stage, but it does not appear to be necessary to discuss most of those issues at any great length in this judgment, because some of them are no longer disputed, while others are not very seriously pressed, and the case hinges practically on the decision of Issue No. 7, as to the sons of Ganda Mal being excluded or not from inheriting the property of their deceased uncle, who met with his death at the hands of their father.

Perhaps, it would be convenient to take up first the issue which can be easily disposed of before taking up what is now the main issue in the case. The issue as to the existance of a joint Hindu family has not been proved by the plaintiffs. In fact it is noted by the learned Senior Subordinate Judge that the plaintiffs' Counsel gave up this contention while arguing the case. Before us also this issue has not been urged by the learned Counsel for the appellants. The fact that the property was self-acquired is also not disputed before us and cannot be disputed, because the existence of no joint funds is proved. Issue No. 2 has thus been rightly decided against the plaintiffs. Under these circumstances, it is conceded by the learned Counsel for the appellants that so far as the succession of *Musammat* Saraswati to the property of her father is concerned, it was perfectly in accord with Hindu Law, by which the parties are admittedly governed. He contends, however, that all that *Musammat* Saraswati had, was a limited estate for life and that since her death the succession has opened out for the reversioners of Devi Dyal and that the plaintiffs as his nephews are

entitled to it. He denies that *Musammat* Saraswati ever got an absolute estate or obtained any rights under the so called Will dated the 26th December, 1907. This brings us to a consideration of the question whether this document is genuine or not and whether it amounts to a Will. Mr. Moti Sagar argues that this letter is a piece of forgery and was regarded with suspicion by the Sessions Judge when it was produced before him in the trial of Ganda Mal for the murder of Devi Dyal and has been similarly suspected and rejected by the Senior Subordinate Judge in the present suit. It is marked as Exhibit D 3 and is printed at page 26 of the printed record. It is written in Urdu in the handwriting of one Gurdas (D. W. No. 13) and purports to have been signed in Hindi by Devi Dyal, deceased. It is addressed to Hukam Singh and desires him to come to take charge of the land, declaring *Musammat* Saraswati to be the owner of it and authorising Hukam Singh to treat the letter as a Will, as Ganda Mal was troubling him (Devi Dyal) very much. D. W. No. 13, Gurdas, while admitting that he wrote this letter, states that he did so after the death of Devi Dyal, at the instance of Hukam Singh and the Sub-Inspector of Police. Gurdas also states that the Hindi signature at the end of it was not put there in his presence. Pandit Sheo Narain argues that the Court below has erred in insisting on any formal proof of this document, as a Hindu Will does not require any technical evidence to prove it and does not stand in need of any attestation. He also urges that there was no motive to fabricate this letter, because the proof against Ganda Mal in the murder case was so clear that this letter could hardly strengthen the case against him and there was no occassion at that stage to fabricate any evidence in advance for the purposes of civil litigation which might follow. We are not, however, pressed by the argument of the learned Counsel in support of this document. Much technical proof may not be necessary for a Hindu Will, but there must be some evidence to show that a document purporting to be a Will by a Hindu was executed by him. Here that evidence is absolutely wanting. It is true that the witness Gurdas, in his statement in the murder case before the Sessions Judge, deposed that the letter was dictated to him by Devi Dyal and was signed by him in his presence, but when he was confronted with that statement he explained that he had made it under undue influence. Whatever may be the truth, so far as the two statements of Gurdas are concerned, he has, at any rate, shown himself to be a man on whom no reliance can be placed and yet he was the only men who was produced to prove this so-called Will and failed to do so. Moreover, there are, as pointed out by the learned Senior Subordinate Judge, many other things which make this document open to serious suspicion. It is curious that it was addressed to Haranpur and not to Sargodha where the addressee was living. It was at a late stage of the investigation in the criminal case that it was produced by Hukam Singh and the explanation he and his father gave of the way in which its delivery to either of them was delayed is far from satisfactory. We think that this document is not genuine and has been rightly rejected. The questions as to the adoption of Balwant Singh and of the execution of a Will by *Musammat* Saraswati have also been argued before us, but in view of our finding given above as to the alleged Will in favour of *Musammat* Saraswati herself, we think it unnecessary to discuss the *pros* and *cons* of these two questions. Her right to adopt depended on her having an absolute estate and as we find that there was no Will in her favour and that she had nothing more than a limited estate, an adoption by her, even if it were proved, would hardly be of any consequence. We agree, however, with the learned Senior Subordinate Judge in thinking that the adoption has not been established. With regard to the Will of *Musammat* Saraswati in favour of Balwant Singh it has been found by the Trial Court that the Will was probably approved of by *Musammat* Saraswati, but it is open to doubt that she had a disposing mind at the time, owing to her extremely week condition at the time the Will was prepared. It has been rightly observed that if Balwant Singh had been adopted, there was no necessity to have a Will in his favour and it seems that Hukam Singh in his desire to retain

the property of his deceased wife in his hands, has been resorting to various devices and the idea of getting a Will from *Musammat* Saraswati shortly before her death was one of those devices. Thus the pleas of the defendants as to the Will, Exhibit D-3, and the adoption of Balwant Singh and the Will dated the 6th May 1914, fail, and we come to the important issue relating to the rights of the plaintiffs as the nephews of Devi Dyal and to the question whether they are affected or not by their father having murdered Devi Dyal in order to take his land.

Mr. Moti Sagar started his argument on the main issue by questioning the finding of the Court below as to Ganda Mal having murdered his brother with the object of taking his land. He argues that it is not enough for the purposes of a case like the present to show that a man has been convicted of the offence of murder by a Criminal Court, the findings of which are not in any way binding on the Civil Courts, and that it must be shown by positive and reliable evidence that the murder was committed by the man whom it is sought to deprive of any property he would have otherwise inherited or whose descendants are to be shut off from their heritage on grounds of public policy. This proposition is correct so far as it goes. The finding of the Senior Subordinate Judge is in no way based on that of the Sessions Judge in the criminal case but is arrived at independently after considering the evidence on this record about the facts of the murder. Three witnesses have been examined on this point. Dittu (D. W. No. 14), *Musammat* Bhagwan Devi (D. W. No. 17) and Arura (D. W. No. 18). The last named witness professes to have seen Ganda Mal giving *toka* blows to Devi Dyal and afterwards to strike *Musammat* Jamna Devi. He is a man who made a statement to the Police on the day of the occurrence and gave evidence at the Sessions trial and was believed. *Musammat* Bhagwan Devi is the mother of the plaintiffs and the widow of Ganda Mal. She says that her husband killed *Musammat* Jamna Devi and that on the same day Devi Dyal was found killed, though she came to know of it after witnessing the murder of *Musammat* Jamna Devi. Dittu (D. W. No. 14) heard the outcry of *Musammat* Jamna Devi and went to the spot. She was murdered in his presence, but Devi Dyal had been killed already in the same house. Mr. Moti Sagar's contention is that this evidence is hardly sufficient to prove that the father of the plaintiffs was the murderer of Devi Dyal. We do not see, however, any force in this contention and have no hesitation in believing the statement of Arura, who saw the whole of the occurrence, and the statements of *Musammat* Bhagwan Devi and Dittu, who saw the latter part of the occurrence and whose evidence clearly points to Ganda Mal being the perpetrator of the double murder. We have no doubt that Ganda Mal murdered his brother, with the object of taking his land.

From the above question of fact Mr. Moti Sagar passes on to a point of law and argues that even if it is found that Ganda Mal was the murderer of his brother this should not deprive the plaintiffs of their rights to the estate of Devi Dyal, because under Hindu Law they do not derive those rights from their father but they have their own rights from the moment of their birth and are heirs to their uncle. He says he is aware that the Punjab Chief Court has ruled in *Muhammad Khan* v. *Sis Bano* (1), that the descendants of a murderer are precluded from inheriting the property of the person murdered, where the sole object of the crime was to secure the property of the latter, as such a succession is opposed to public policy. He also to refers an unpublished* Division Bench ruling of this Court, *Jind Kaur* v. *Indar Singh*, Second Appeal No. 252 of 1919, which has followed *Muhammad Khan* v. *Sis Bano* (1) but adds that both those rulings are under Customary Law and an heir under the Hindu Law stands on a different footing from that of a reversioner under the Customary Law of the Punjab. It is contended that so far as the texts of the Hindu Law are concerned there is no prohibition against even a murderer succeeding to the property of the man whom he has murdered, but an inference has been drawn from one or two texts and it has been held that the murderer himself may be excluded under Hindu Law on the ground of public policy. It is urged that it would be wrong to extend

(1) 41 P. R. 1906; 95 P. L. R. 1906; 82 P. W. R. 1906.

*Since reported as 67 Ind. Cas. 526; 3 L. 103; 23 P. W. R. 1922—[*Ed.*].

the disability to the sons and other descendants of the murderer simply on the ground of public policy in cases where the personal law of the parties does not justify such an extension and where such descendants were absolutely innocent of the offence in question, as they admittedly were in this case.

Mr. Moti Sagar cites the Mitakshara, translated by Macnaghten and Colebrooke, page 373, where Yajnawalkya thus propounded an exception to the ordinary rule of succession. According to Hindu Law "an impotent person, an outcast, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease" are excluded from participation. He points out that the murderer is not excluded and that even if the word 'outcast' were to be taken as including a man who has committed a heinous crime and his son is to be excluded according to the above text, there is ample authority in Hindu Law for the view that the exclusion of the son of an outcast applies to sons born after the commission of the act, which resulted in the excommunication of the father, but not to sons born before the father became subject to any taint. It is further argued that if the sons of Ganda Mal had tried to succeed Devi Dyal immediately after his death and if there had been no daughter of Devi Dyal to intervene between them and their succession it might possibly have been urged with some reason that they should be excluded, but they now claim to come in when succession has opened out to them by the death of *Musammat* Saraswati, and they come in under Hindu Law not as sons of their father but as nephews of their uncle in which capacity they claim under their personal law a right independently of their father. Reliance is placed for this contention on *Brojo Mohun Thakoor* v. *Gauree Parshad Chowdhry* (2), where it was held that a nephew succeeds under the Mitakshara not as the heir of his father, but as the direct heir of his uncle. We are also referred to another decision of the Calcutta High Court, *Nilmadhab Mitra* v. *Jotindra Nath Mitra* (3), where a son who was excluded from inheritance by reason of his murdering his father, had served out the punishment inflicted upon him and claimed maintenance from his son who had got the inheritance, and where it was held that the murderer was entitled to maintenance and so his after-born son. He also referred to *Girimallappa Channappa* v. *Kenchava* (4) where a murderer was disqualified from inheriting the estate of the person murdered as a case that might possibly be considered against him. He argued that even that case was no authority for extending the disqualification farther than the murderer himself. We think the two rulings relied upon by him cannot be of much help to him in this case. *Brojo Mohun Thakoor* v. *Gauree Parshad Chowdhry* (2), may be an authority in ordinary cases of succession under the Hindu Law to determine whether a nephew has an independent right of inheritance from his uncle but it cannot furnish any guidance in a case where the question is, whether the direct lineal descendants of a murderer are to be allowed or not to benefit by his crime. Similarly *Nilmadhab Mitra* v. *Jotindra Nath Mitra* (3), is a clearly distinguishable case. No doubt the son of a murderer does appear in that case to have succeeded to the estate of his murdered grandfather, because no objection appears to have been raised by any one against his succession, but the point that was directly before the High Court related to the right of maintenance which the convict had against his co parcener, which has nothing to do with the point involved in the present case. It is generally recognised that the exclusion of the murderer is not based on the principles of either Hindu, Muhammadan or Customary Law, but on public-policy and justice and it is from this standpoint rather than that of the personal law of the parties that the question before us is to be approached. This was held by a Division Bench of the Punjab Chief Court in *Shah Khanam* v. *Kalandhar Khan* (5) where the learned Judges laid down that public policy and justice demand that no criminal should benefit by the result of his crime, and that it is unnecessary to consider either the Muhammadan or Customary Law on the point. The same view was expressed in *Vedanayaga Mudaliar* v. *Vedam-*

(2) 15 W. R. 70.
(3) 18 Ind. Cas. 764; 17 C. W. N. 341.
(4) 61 Ind. Cas. 294; 45 B. 768; 23 Bom. L. R. 213.
(5) 74 P. R. 1900; P. L. R. 1900 at p. 455.

mal(6) and *Vedammal* v. *Vedanayaga Mudaliar* (7). Both the decisions related to the same case. The learned Judges observed in *Vedanayaga Mudaliar* v. *Vedammal* (6) in remanding the case for re-trial of the question of fact, whether the person sought to be excluded from inheritance on the ground of having committed a murder had actually committed that offence or not :

"The question whether a Hindu who has been party to a murder is prevented from succeeding to the estate of the person murdered is not answered by the Hindu Law. But the principle that no one shall be allowed to benefit by his own wrongful act is of universal application."

The same principle was adopted in *Muhammad Khan* v. *Sis Bano* (1) by Mr. Justice Chatterji and Mr. Justice Kensington, who held that if the son of a murderer is allowed to succeed, the law excluding the father will be stultified altogether. In the unpublished ruling of this Court in *Jind Kaur* v. *Indar Singh*, Civil Appeal 252 of 1919, a case decided by a Division Bench, the same principle has been further emphasised. The following observations in the last mentioned ruling are worthy of attention :—"The murderer's right in such a case is swept away and with it is carried away the right of every one who claims through (and not merely from) him..... ..... If this were not so, the object of this principle of exclusion would be, in many cases, rendered nugatory : an aged father who had a right of reversion to a large estate could murder the holder of that estate and suffer the extreme penalty cheerfully knowing that by his action he had benefited his sons very materially. Ram Singh was not the source of Indar Singh's right of succession but he was the channel through which his right went to Indar Singh, and when the channel becomes tainted, or blocked, the right to succeed ceases to flow on to the son." As noticed already, Mr. Moti Sagar tries to distinguish the present case from *Muhammad Khan* v. *Sis Bano* (1) and *Jind Kaur* v. *Indar Singh* [Civil Appeal No. 252 of 1919*] on the ground that they were both rulings under Customary Law and that they should not be applied to cases falling under Hindu Law, as the rights of a Hindu heir are on a different footing from those of an heir under the Customary Law. In the first place we fail to see that there is much appreciable difference between the position of the two heirs, so far as the question of deriving their title through a person is concerned. For instance, the sons of Ganda Mal may be the heirs of Devi Dyal independently of their father but they certainly derive their status as heirs through that relationship and, as observed above, if the channel through which that right to succeed was to flow is blocked, they cannot assert their relationship, which was created through the murderer and which has been tainted by his criminal act. In the second place, on consideration of public policy, it seems to be quite unjust to allow the sons of a murderer to derive any benefit from their father's crime, because in that way the public policy on which the rule of exclusion is based would be defeated. Our attention is drawn by Mr. Tek Chand to certain principles of English Law on which the principles of public policy propounded by the Indian Courts seem to be based. He cites the following passage from Jones Blackstone, page 254, in this connection :—

"There is yet a further consequence of the corruption and extinction of hereditary blood, which is this, that the person attainted shall not only be incapable himself of inheriting or transmitting his own property by heirship, but shall also abstract the descent of lands or tenements to his posterity in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel, which conveyed the hereditary blood from his ancestors to him is not only exhausted for the present, but totally dammed up and rendered impervious for the future. This is a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony. But by the Law of England a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestor, at least on the part of their attainted father."

The law of attainder in England may be different to the law in India relating to murder but we think that the principle enunciated above is one which can stand

(6) 27 M. 591.

(7) 31 M. 100; 18 M. L. J. 70; 2 M. L. T. 533.

* Since reported as 67 Ind. Cas. 526—[*Ed.*].

should apply to cases where the descendants of a murderer claim to benefit by his crime. As remarked already, the question involved in this case ought to be decided on broad principles of public policy and we think that it is compatible with justice, equity and good conscience that the exclusion of a murderer from the inheritance of the man whom he had murdered must be taken to include his direct lineal descendants, and, holding that view, we are of opinion that the suit of the plaintiffs has been rightly dismissed.

As to the part of the case relating to Pindi Das (defendant No. 2), who was made only a *pro forma* defendant without any relief being sought against him, there seems to have been no adjudication between the rights of the defendants *inter se* and the only points decided with regard to him are those involved in Issues Nos. 1, 11 and 12. The point raised in Issue No. 1 was, "did Pindi Das alienate his share in the estate of Devi Dyal deceased in favour of the plaintiffs?" It has been found that though he had executed the deed dated the 8th January 1918, Exhibit P 3, in favour of Har Bhagwan, plaintiff, that deed was void for want of consideration, that it was very suspicious in its nature and invested the plaintiffs with no title to claim possession of any part of the property in suit on the basis of that deed. With regard to this it has been contended by Pandit Sheo Narain that this deed was inadmissible in evidence, as it was registered at Haranpur where no part of the property concerned was situated and that, therefore, the registration was without jurisdiction and the deed was inadmissible in evidence. He refers to *Udit Narain Chowdhury* v. *Mathura Prasad* (8) where the Calcutta High Court has held that the Registrar of a district has no jurisdiction to register the bond where the person giving the bond has no property in the district. He refers in the same connection to *Harendra Lal Roy Choudhuri* v. *Hari Dasi Debi* (9) and *Ram Lal* v. *Musammat Tamkin Bano* (10). He also points out that the authority followed by the Court below for holding that the deed was admissible, *i.e.*, *Basheshar Das* v. *Bhagwan Das* (11), was based on the Allahabad case, the decision in which has been reconsidered since by the Allahabad High Court. He draws attention to the Privy Council ruling *Amba* v. *Shrinivasa Kanathi* (12) which lays down that a deed which was not legally registered is invalid and a nullity. We are inclined to think that this contention is correct and the deed is inadmissible in evidence. We also agree with the clear finding of the Court below that the deed was without consideration. In fact it is admitted before us by the learned Counsel for the appellants that no part of the consideration has been yet paid and as far as we can see the transfer has been rightly characterised as a nominal one, because it is evident that no one could have parted with title to so valuable a property for such a paltry sum as Rs. 500. It is not proved, therefore, that there was any valid transfer of any rights which Pindi Das may have in the property in dispute.

As regards Issue No. 11, the finding of the Court below is that the parties are governed by Hindu Law under which the brothers and nephews of whole-blood exclude those of half blood and no custom to the contrary is shown and the issue is, therefore, decided against Pindi Das, but in view of what we have held regarding the claim of the plaintiffs, who are the whole blood nephews of the deceased, the result of this issue hardly affects the case. Similarly the pronouncement of the Court below on Issue No. 12, does not require any decision from us. The issue was whether the plaintiffs were estopped by their conduct from claiming preference over Pindi Das, and it has been held that there was no conduct of theirs which could operate against them by way of estoppel. This is again a decision with which we have no concern, as the suit of the plaintiffs fails. We, therefore, dismiss this appeal with costs. The cross-objections filed on behalf of Hukam Singh, defendant, are also dismissed. They related only to the findings of the Court below regarding the adoption of Balwant Singh by *Musammat* Saraswati and the Will made by her in his favour which points have been duly disposed of above.

N. H. *Appeal dismissed.*

(8) 29 Ind. Cas. 413.

(9) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 13 Bom L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

(10) 49 Ind. Cas. 543; 17 A. L. J. 863; 41 A. 385.

(11) 44 P. R. 1898.

(12) 68 Ind. Cas. 754; 23 C. W. N. 369; 14 L. W. 575.

BIND BAHADUR SINGH v. RITURAJI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 122 OF 1920.

May 16, 1922.

Present:—Sir Grimwood Meare, Kt., Chief Justice, and Mr. Justice Gokul Prasad.

BIND BAHADUR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RITURAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Widow, death of—Next reversioners, not seeking to obtain possession of estate—Remoter reversioners, right of.

One *K.* died leaving a widow after whose death a dispute arose as to succession. *K.*'s daughter sued for declaration and obtained a decree against next reversioners. Upon a suit brought by the remoter reversioners who alleged a custom excluding daughters from inheritance, which they said, the next reversioners being in collusion with the daughter had failed to urge in the previous suit:

Held, that the suit was not maintainable inasmuch as even if the custom as alleged were found to exist, the persons entitled to succeed would be the next reversioners and if the latter did not choose to avail themselves of their right to the possession of the property, such inaction on their part would not confer any right on the remoter reversioners.

First appeal from a decree of the Subordinate Judge, Basti.

Mr. *Shiva Prasad Sinha* with him Mr. *S. M. Sulaiman*, for the Appellants.

Dr. *Surendro Nath Sen* (with him Mr. *Gulzari Lal*), for the Respondents.

JUDGMENT.—The circumstances under which this appeal has arisen are as follows:—One Kunj Behari Singh died many years ago leaving a widow *Musammat* Jamna Kunwar. She died in the year 1914. After her death, two persons, Sheo Narain Singh and Chotku Singh, applied for mutation as next reversioners. Their application was opposed by *Musammat* Rituraji, the respondent No. 1, who represented herself to be the daughter of Kunj Behari Singh, and said she was as such entitled to the property. She lost her case in the Revenue Court and afterwards brought a suit for declaration of her title as the heiress of Kunj Behari Singh as against Chotku Singh and Sheo Narain Singh, the next reversioners. Her suit was decreed by the Court of first instance and that decree was confirmed, on appeal, by this Court, in 1919.

The present plaintiffs, who allege themselves to be remoter reversioners, as compared to Sheo Narain Singh and Chotku Singh, commenced this litigation on the 17th of June, 1919, claiming possession of the property of Kunj Behari Singh against *Musammat* Rituraji Kunwar, and Chotku Singh and Sheo Narain Singh, the immediate reversioners. After stating the facts, of which we have given a brief *resume*, the plaintiffs say that the Chotku Singh and Sheo Narain Singh did not bring forward evidence in the previous suit to prove that under a custom set out in the present plaint *Musammat* Rituraji Kunwar, even if she was the daughter of Kunj Behari Singh, was not entitled to succeed. It is suggested, but there is no evidence to support it, that Chotku Singh and Sheo Narain Singh did not set up this custom as a defence in the previous suit, possibly because they were in collusion with *Musammat* Rituraji. It may be mentioned that in this case they gave no particulars to lay the foundation of any such custom, and these would have been necessary if the plaintiffs had been able to get over the plea that their plaint disclosed no cause of action. The plaintiffs say that their cause of action arose on the 2nd of January 1914, and subsequent dates, and also on the 13th of January, 1919, when the High Court confirmed the decree of the Subordinate Judge in favour of *Musammat* Rituraji Kunwar.

The point raised in the defence was that, on their own case, as put forward in the plaint, the plaintiffs had no cause of action to maintain the present suit. The main defence was that, on a careful reading of the plaint it disclosed no cause of action, and it was to this matter that the Judge addressed himself in the first instance and has decided that question adversely to the plaintiffs-appellants, and dismissed their suit.

The plaintiffs come here in appeal and challenge the judgment of the lower Court. The learned Subordinate Judge has, in a very careful judgment, discussed the various pleas put forward before him, and we agree with him in his conclusions. This is not a case in which a remoter reversioner is suing by reason of the action or inaction of a nearer reversioner to set aside an alienation by an owner with limited powers. In this case it is a suit by a person alleged to be entitled to certain property because some person with better title to that property has failed to take advantage of the rights which he had. In this case, as soon as

Musammat Jamna Kunwar died in the year 1914, the succession opened out. If the ordinary Hindu Law applied, the next heir would be the daughter, *Musammat* Rituraji Kunwar, provided she succeeded in proving that she was the daughter of the deceased and if she succeeded in meeting the alleged custom excluding daughters. If she did not succeed because of either of the two reasons aforesaid, the property would go to Sheo Narain Singh and Chotku Singh, and if Sheo Narain Singh and Chotku Singh did not choose to avail themselves of their right to possession of the property, such inaction of theirs would not confer any rights on the plaintiffs who do not claim to be his heirs. The reasoning on this question cannot be put better than it has been put by the learned Subordinate Judge at pages 12 and 13 of the paper book. We agree with the view taken by the Subordinate Judge that the pliantiffs are not entitled to maintain the present suit. We, therefore, dismiss the appeal with costs.

N. K. & N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 2515 OF 1921.

April 26, 1922.

Present :—Mr. Justice Abdul Raoof.

MADAN GOPAL—DECREE-HOLDER—APPELLANT

versus

MALAWA RAM—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 12—Civil Procedure Code (Act V of 1908), s. 122, O. XLI, r. 1—Appeal, second—Limitation—Time spent in obtaining copy of First Court's judgment, whether can be excluded—Extension of time—Sufficient cause.

Under section 12 of the Limitation Act the time requisite for obtaining the copy of the judgment on which the decree appealed against is founded can alone be excluded in computing the period of limitation. In the case of a second appeal, therefore, the period spent in obtaining a copy of the First Court's judgment cannot be excluded under the provisions of this section, even where the Rules of the High Court require a copy of the First Court's judgment to be filed along with the memorandum of appeal

A High Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to section 122 of the Code, but it has no power to alter the period of limitation provided by the Limitation Act.

Narsing Sahai v. *Sheo Parsad*, 42 Ind. Cas. 855; 40 A. I; 15 A. L. J. 835, relied upon.

A Court is not bound to show indulgence to an appellant under section 5 of the Limitation Act who has not been prompt in applying for copies.

Miscellaneous second appeal from an order of the District Judge, Jullundur, dated the 21st April 1921, affirming that of the Senior Subordinate Judge, Jullundur, dated the 8th February 1921.

Lala *Badri Das*, R. S., for the Appellant.

Lala *Mehr Chand Mahajan*, for the Respondent.

JUDGMENT. — This appeal is clearly barred by time. The judgment appealed against was given on the 21st April 1921. The appeal was lodged in this Court on the 12th October 1921. The period of 90 days allowed under the law expired on the 20th July 1921. Therefore, the appeal was clearly barred by time on 12th October 1921; but the appellant was entitled to time occupied in obtaining copy of judgment which he was required to file with the memorandum of appeal. The application for copy of judgment was made on 4th July 1921. The copy was ready for delivery on 6th July 1921. Thus appellant was entitled to three days on this account. Mr. Badri Das, however, has contended that the copy was actually delivered on the 11th July 1921. This would give to the appellant 8 days for obtaining copies. The appeal according to this calculation would be within time up to the 28th July 1921 and it ought to have been filed then. The long vacation commenced on the 29th July 1921. Thus the period of limitation had expired before the commencement of the long vacation. Therefore, the appeal of the appellant cannot be treated as within time.

Mr Badri Das for the appellant has argued that as, according to the rules of this Court, it is incumbent upon appellant to file a copy of the judgment of the First Court also, the appellant in this case was entitled to the benefit of the period spent in obtaining copy of the judgment of the first Court. The application for copy of the first Court's judgment was made on the 20th July 1921 and it was not delivered till the 29th of July 1921. If this period were to be allowed to the appellant his appeal would certainly be within time. It is provided in clause (3) of section 12 of the Limitation Act that where a decree is appealed from or sought

to be reviewed the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded. Now, in this case the decree appealed from is the decree of the Appellate Court. Therefore, only the time requisite for obtaining the copy of the judgment on which the decree appealed against is founded should be excluded. I am aware that this Court has framed a rule making it necessary to file a copy of the First Court's judgment with the memorandum of appeal. This Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to section 122 of the Code; but it has no power to alter the period of limitation provided by the Limitation Act. This view of the law is supported by the Full Bench decision of the Allahabad High Court in *Narsingh Saha* v. *Sheo Prasad* (1). Mr. Badri Das has asked me to extend the period of limitation in this case under section 5 of the Limitation Act and treat the appeal as within time, but I see no sufficient reason for doing this. The judgment appealed against was delivered on the 21st of April 1921 and the appellant did not apply for copy of judgment and decree till the 4th of July 1921. A Court is not bound to show indulgence to a litigant who is not prompt in seeking his remedy.

The appeal is clearly barred and is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 42 Ind. Cas. 855; 40 A. 1; 15 A. L. J. 836.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 383 OF 1921.

May 25, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

NEHAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FATEH CHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 23—Contract, enforcement of—Stranger—Equity.

A stranger to a contract is, as a rule, not entitled to sue, but relief may sometimes be granted in his favour on principles of equity. [p. 779, col. 2.]

B. contracted to sell certain property to *N.* in order to satisfy a money-decree obtained against him by *S.* The consideration was fixed at Rs. 2,900. Out of this *B.* actually received Rs. 300 and the balance of Rs. 2,600 was left with the purchaser for payment to *S.* The sale, however, was not carried out, and eventually *S.* himself got a sale-deed from *B.* of the same property and out of the price fixed appropriated Rs. 3,000 to the satisfaction of his decree. Subsequently *N.* sued *B.* for specific performance. The suit was decreed and *S.* lost possession of the property. *S.* brought the present suit to recover from *N.* Rs. 3,000 being the amount appropriated in satisfaction of his decree. The lower Courts held that although *N.* was not liable to pay Rs. 3,000 he was liable to the extent of Rs. 2,600, being the amount which under his contract with *B* was left with him for payment to *S.* In second appeal *N* contended that *S.* being not privy to that contract was not entitled to enforce any covenant under the same:

Held, dismissing the objection, that though *S.* was at the outset a stranger in dealings between *N.* and *B.*, nevertheless by reason of the subsequent proceedings terminating in the decree for specific performance, *S.* was brought into a degree of privity with *N.* so as to be entitled to relief on principles of equity. [p. 780, col. 1.]

Debi Narain Dutt v *Ram Sadhan Mandal* [*Chunnilal Ghose*], 20 Ind. Cas. 650; 41 C. 137; 17 C. W. N. 1143; 18 C. L. J. 603, followed.

Second appeal from a decree of the District Judge of Mainpuri.

Dr. *Kailas Nath Katju*, for the Appellants.

Mr. *Girdharilal Agarwala*, for the Respondents.

JUDGMENT.—This case has been argued at considerable length before us but we have come to the conclusion that the decree of the lower Court ought to stand.

The suit was a suit for the recovery of a sum of Rs. 3,034-6 alleged to be due from the first two defendants, Kunwar Nehal Singh and Kunwar Dwarka Singh. The plaintiffs in the suit were Lala Fateh Chand and Lala Hira Lal who admittedly are the brothers and survivors of one Lala Sewa Ram.

It is necessary to set out in some detail the earlier history of this case. Sewa Ram had obtained in the year 1908 a simple money-decree against a judgment-debtor, named Kunwar Bhawani Singh, who is impleaded in the present suit as defendant No. 3.

In execution of that decree Sewa Ram attached certain immoveable property on the allegation that it belonged to his judgment-debtor.

This attachment produced an objection on the part of Bhawani Singh's wife, *Musammat* Durga Kunwar, who put forward the plea that the property had been transferred to her.

This objection of *Musammat* Durga

Kunwar was allowed. Thereafter Sewa Ram brought a declaratory suit for the purpose of establishing that the property which he had got attached was, in fact, the property of his judgment-debtor. Sewa Ram won this case and, thereafter, began execution proceedings.

Meanwhile, on the 19th February 1910, Bhawani Singh entered into an agreement with Nehal Singh and Dwarka Singh to sell to them certain Zemindari property, his object being to pay off the decree which was outstanding in favour of Sewa Ram.

There can be no question that by this agreement Bhawani Singh undertook to sell the property to Nehal Singh and Dwarka Singh for a sum of Rs. 2,900, Rs. 100 was given as earnest money, Rs. 200 was paid in cash, and the balance of Rs. 2,600 was left with the purchasers for payment to Sewa Ram in satisfaction of his decree.

This sale, however, was not carried out, and on the 7th June 1910, Sewa Ram, the decree-holder himself, got a sale-deed from the judgment-debtors, Bhawani Singh and his wife, Durga Kunwar. The consideration of this deed was a sum of Rs. 3,300. Out of this Rs. 3,034-6 were appropriated by Sewa Ram in satisfaction of his decree. Sewa Ram certified satisfaction to the Court. The rest of the money was paid to the vendor in cash.

Following on this in the year 1912 Nehal Singh and Dwarka Singh brought a suit for specific performance of the contract for conveyance which had been executed in their favour on the 19th February 1910. They lost this suit in both the Courts below but in second appeal this High Court gave a decree directing that specific performance of the contract to sell should be enforced. It was directed by this Court that Sewa Ram, the subsequent purchaser, and Bhawani Singh should join in executing a conveyance in favour of the successful plaintiffs, Nehal Singh and Dwarka Singh, and that conveyance was ultimately executed on behalf of Sewa Ram and Bhawani Singh by the learned Subordinate Judge of Mainpuri. The terms embodied in this conveyance were the terms which had been agreed upon by the parties to the contract of the 19th February 1910. After this conveyance had been executed by the Court in favour of Nehal Singh and Dwarka Singh, Sewa Ram lost possession of the property, and now we have this present suit brought by the survivors in interest of Sewa Ram to recover from Nehal Singh and Dwarka Singh a sum of Rs. 3,034-6, that being the amount which under the sale-deed executed in favour of Sewa Ram was appropriated in satisfaction of Sewa Ram's decree.

The suit was contested on every imaginable ground. The main plea with which we are concerned was that there was no privity of contract between Nehal Singh and Dwarka Singh on the one side and the plaintiffs or their predecessor on the other. Great reliance was placed upon the fact that Sewa Ram was a stranger to the contract of the 19th February 1910, and it was pleaded that, being a stranger to that contract, neither he nor his successors were entitled to sue for the purpose of enforcing any covenant entered into between the defendants and their vendor.

The result has been that both the Courts below have decreed the claim though not to the extent to which the plaintiffs desired. Both the Courts have held that although the defendants Nos. 1 and 2 are liable to these plaintiffs, they are only liable to the extent of Rs. 2,600, that being the amount which under the contract of 19th February 1910, was left with them for payment to Sewa Ram. Interest on this sum to the amount of Rs. 144-11 has been allowed.

It has been strongly argued before us that the suit was not maintainable inasmuch as Sewa Ram was no party to the contract of the 19th February 1910. There can be no doubt that the general law is that a stranger to a contract is not entitled to sue, but there are cases in which the Courts have granted relief in favour of a stranger to the contract on principle of equity. We have been referred to a great many cases of various Courts but we shall content ourselves with referring to the case of *Debi Narain Dutt* v. *Ram Sadhan Mandal* [*Ohunnilal Ghose*] (1) There the whole law on the subject has been lucidly laid down in the judgment of Jenkins, C. J. We consider that there is a close analogy between the facts of the present case and the facts of the case with

(1) 20 Ind. Cas. 630; 41 C. 137, 17 C. W. N. 1143 18 C. L. J. 603.

which the Bench of the Calcutta High Court was dealing in the reported case, and we think, when all the facts are examined it is not possible to maintain the plea that Sewa Ram or his successors-in-interest, the present plaintiffs, are altogether strangers to the dealings between Bhawani Singh on the one side and Nehal Singh and Dwarka Singh on the other so as to preclude them from asking for the relief which has been asked for in this case. We start with the fact that Sewa Ram was outside the contract of 19th February 1910; but then we have the fact that Sewa Ram was impleaded as defendant in the suit for a specific performance of that contract which was brought by Nehal Singh and Dwarka Singh, and we have the fact that under the decree of this Court Sewa Ram and Bhawani Singh were both directed to convey the property in dispute to Nehal Singh and Dwarka Singh. Further, it is not to be doubted that it was the intention of this Court that this conveyance to be executed both by Sewa Ram and Bhawani Singh was to be executed upon the very terms which were embodied in the contract of the 19th February 1910, and one of those terms was that Nehal Singh and Dwarka Singh were to be liable to pay Rs. 2,500 to Sewa Ram in discharge of the debt owing to him from Bhawani Singh under the decree. In other words, although Sewa Ram was at the outset a stranger to the dealings between Bhawani Singh and his purchasers, nevertheless by reason of these subsequent proceedings terminating in a decree for specific performance passed by this Court, Sewa Ram was brought into a degree of privity with Nehal Singh and Dwarka Singh which, in our opinion, justifies us in holding that this is a case in which the equitable relief ought to be granted as it was granted in the Calcutta case to which we have referred. There the relief was granted on the ground of certain subsequent dealings between the plaintiff and the defendant No. 5, dealings by which the parties were brought into a relation of privity, and it was upon that basis that the Calcutta Court considered that the plaintiff was entitled to equitable relief. Similarly, in the present case we think there can be no doubt that in equity the plaintiffs are entitled to the sum which was awarded to them by the Court below. In our opinion no question arises of *res judicata* or of the application of section 47 of the Code of Civil Procedure. The case is to our mind a straightforward case in which the plaintiffs had a cause of action arising out of a decree which was passed by this Court for specific performance and out of the conveyance which followed upon that decree.

The result, therefore, is that we affirm the decision of the Court below and dismiss this appeal with costs.

Appeal dismissed.

N. H.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER NO. 21 OF 1921.

August 27, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

BALEY MAHAMMAD SAHI AND OTHERS—DECREE-HOLDER—APPELLANTS

versus

AIJANMAI AND OTHERS—JUDGMENT-DEBTOR—RESPONDENTS.

Execution of decree—Decree-holder seeking to certify payment made to him out of Court—Limitation—Application to certify payment, if must be distinct from application to execute decree—Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (1)—Limitation Act (IX of 1908), Sch. I, Arts. 174, 181, application of.

Where a decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor under sub-rule (1) of r. 2 of O XXI of the Code of Civil Procedure, the Article of the Limitation Act applicable to an application for the purpose is Art. 181, and the right of the decree-holder to apply accrues as soon as he receives payment. [p. 781, col. 2.]

The Code of Civil Procedure does not prescribe that an application to certify payment by a judgment-debtor must necessarily be distinct from an application for execution of the decree: there can be no objection to a combined application embodying a two-fold prayer, namely, first, that the alleged payment be recorded, and secondly, that the decree be executed for the balance of the judgment-debt. [p. 782, col. 1.]

Lakhi Narain Ganguli v. *Felamani Dasi*, 27 Ind. Cas 11; 20 C. L. J. 131; 18 C. W. N. cxcvi (196), *Eusufzeman Sarkar* v. *Sanchia Lal Nahata*, 34 Ind. Cas. 60?; 44 C. 207; 23 C. L. J. 39?; 20 C. W. N. 272, *Harendra Chandra Bhattacharjee* v. *Gagan Chandra Das*, 35 Ind Cas. 177; 22 C. W. N. 325, *Jotindra Kumar Dass* v. *Gagan Chandra Pal*, 45 Ind. Cas. 903;

46 C. 22, *Elahi Bux* v. *Nawab Lall*, 50 Ind. Cas. 364; 4 P. L. J. 159; (1919) Pat. 260, *Masilamani Mudaliar* v. *Sethuswami Aiyar*, 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L. T. 115, *Pandurang Balkrishna* v. *Jagya Bhau*, 59 Ind. Cas. 399; 45 B. 91; 22 Bom. L. R. 1120 and *Bahuballav Roy* v. *Jogesh Chandra Banerjee*, 50 Ind. Cas. 242; 23 C. W. N. 320, referred to.

Bireswar Mookerjee v. *Ambika Charan Bhuttacharjee*, 42 Ind Cas. 472; 45 C. 630, distinguished.

Art. 174 of Schedule I to the Limitation Act is applicable only to a case under sub-rule (2) of r. 2 of O. XXI of the Code of Civil Procedure. It has no application to a case under sub-rule (1). [p. 781, col. 2]

Appeal against an order of the District Judge, Dinajpur, dated the 5th October 1920, affirming that of the Munsif, Dinajpur, dated the 18th December 1919.

Babu *Girija Prasanna Sanyal*, for the Appellants.

Babu *Jatindra Mohan Chowdhury* for Babu *Phanindra Lal Maitra*, for the Respondents.

JUDGMENT.—This is an appeal by the decree holders from an order of dismissal made on an application for execution of a mortgage-decree. The preliminary decree in the mortgage-suit was made on the 8th May 1912. This was followed by the final decree on the 15th January 1916. On the 11th August 1919, the decree-holders applied for execution. This application was *prima facie* barred by limitation under Art. 182 of the Schedule to the Indian Limitation Act. Consequently, the decree-holders sought to escape from the bar of limitation by reference to a payment alleged to have been made by the judgment-debtors on the 25th October 1917. The Court of first instance held that the alleged payment, which had not been certified or recorded under O. XXI, r. 2 of the Code of Civil Procedure, could not be recognised, and dismissed the application as barred by limitation. This decision of the primary Court has been affirmed by the District Judge. We are of opinion that the view taken by the Courts below cannot be supported.

O. XXI, rule 2 consists of three sub-rules. Sub rule (1) deals with the case where the decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor. The sub-rule provides that where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly. Sub rule (2) deals with the case where the judgment-debtor seeks to inform the Court of a payment alleged to have been made by him out of Court to the decree-holder. In this event, the judgment-debtor may inform the Court of such payment and apply to the Court to issue a notice to the decree-holder to show cause on a day to be fixed by the Court why such payment or adjustment should not be recorded as certified; and if after service of such notice the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly. Sub-rule (3) finally provides that a payment or adjustment, which has not been certified or recorded as aforesaid, that is, at the instance of either the decree holder or the judgment-debtor, shall not be recognised by any Court executing the decree Let it be conceded that sub-rule (3) is expressed in wider terms than the corresponding provisions of the Code of 1882, which laid down that a payment or adjustment not certified should not be recognised as payment or adjustment of the decree. But this does not solve the problem raised before us. The question is, whether the decree-holder can certify the alleged payment in the manner attempted in his application for execution. In this connection it is important to observe that Art. 174 of the Limitation Act is applicable only to a case under sub rule (2) of rule 2. That Article provides that an application for the issue of a notice under the Civil Procedure Code to show cause why any payment made out of Court or any money payable under a decree or order should not be recorded as certified shall be made within 90 days from the date when the payment or adjustment is made. This is clearly not applicable to a case under sub rule (1). We must consequently consider, whether there is a period of limitation for an application by a decree-holder who has received payment from the judgment-debtor out of Court, to record the payment. Plainly, the only Article applicable is Art. 181, which provides that an application for which no period of limitation

is provided elsewhere in this Schedule shall be made within three years from the time when the right to apply accrues. The right of the decree-holder to apply accrues as soon as he receives payment, because from that moment he is under an obligation to certify the payment to the Court whose duty it is to execute the decree.

In the case before us, the alleged payment was made on the 25th October 1917. Consequently it was open to the decree-holder to apply to the execution Court within three years from that date to record the payment. The Code does not prescribe that such application must be distinct from an application for execution of the decree and there is obviously no objection to a combined application embodying a two-fold prayer, namely, first, that the alleged payment be recorded, and secondly, that the decree be executed for the balance of the judgment-debt. This view has been adopted by this Court in the cases of *Lakhi Narain Ganguli* v. *Felamani Dasi* (1), *Eusuffeeman Sarkar* v. *Sanchia Lal Nahata* (2) and *Harendra Chandra Bhattacharjee* v. *Gagan Chandra Das* (3). That the decree-holder is not bound by the rule of limitation applicable to the judgment-debtor has also been recognised in a series of decisions of this Court, namely, *Lakhi Narain Ganguli* v. *Felamani Dasi* (1), *Eusuffeeman Sarkar* v. *Sanchia Lal Nahata* (2), *Harendra Chandra Bhattacharjee* v. *Gagan Chandra Das* (3) and *Jotindra Kumar Dass* v. *Gagan Chandra Pal* (4). A similar view has not been adopted by the Patna High Court in *Sheik Elahi Bux* v. *Nawab Lall* (5) by the Madras High Court in *Masilamani Mudaliar* v. *Sethuswami Aiyar* (6) and by the Bombay High Court in *Pandurang Balkrishna* v. *Jagya Bhau* (7). Our attention has, however, been drawn to the decision of this Court where an apparently different conclusion was reached. The first of these cases, *Bireswar Mookerjee* v. *Ambika Charan Bhattacharjee* (8) need not detain us, because the *ex parte* judgment in that case was re-called on an application for a re-hearing by the opposite party in the Rule upon whom no notice has been served and the case was subsequently decided on another ground. But we may point out that the facts of that case were of a very special character and even on the view which we take the result would not have been different. In that case, the decree was made on the 24th November 1909. The application for execution was presented on the 7th June 1916, and was *prima facie* barred by limitation. To escape from the bar of limitation the decree-holder relied upon two payments alleged to have been made by the judgment-debtor on the 8th October 1912, and 9th June 1913. In respect of the first payment dated the 8th October 1912, the prayer to have it recorded (as contained in the application for execution dated the 7th June 1916) was barred by limitation under Art. 181. In respect of the second payment, dated 9th June 1913, the application was not so barred, but that payment, even if recorded, would clearly be of no avail by itself to save from the bar of limitation a decree dated 24th November 1909. The second case brought to our notice is *Bahuballav Roy* v. *Jogesh Chandra Banerjee* (9) where it was ruled that the decree holder can certify payment made at any time, subject to the ordinary rule of limitation that the certification must take place within such time as is required to save the application from being barred by limitation. It may be doubtful whether the application mentioned is the application for execution, or the application to have the payment recorded; the latter interpretation would be in harmony with the provision in Art. 181, which prescribes the only restriction upon the rights of the decree-holder to bring the payment to the notice of the Court. In these circumstances we must hold that the balance of judicial opinion is in favour of the view that the present application for execution is not barred by limitation.

The result is that this appeal is allowed,

(1) 27 Ind. Cas. 11; 20 C. L J. 131; 18 C. W. N. cxcvi (196).
(2) 34 Ind. Cas. 606; 43 C. 207; 23 C. L. J. 390; 20 C. W. N. 272.
(3) 35 Ind. Cas. 177; 22 C. W. N. 325.
(4) 45 Ind. Cas. 903; 46 C. 22.
(5) 50 Ind. Cas. 364; 4 P. L. J. 159; (1919) Pat. 260.
(6) 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L T. 115.
(7) 59 Ind. Cas. 399; 45 B. 91; 22 Bom. L. R. 1120.
(8) 42 Ind. Cas. 472; 45 C. 630.
(9) 50 Ind. Cas. 242; 23 C. W. N. 320.

the order of the Court below set aside and the case remanded to the Court of first instance in order that the Court may investigate whether the alleged payment was in fact made and whether the requirements of section 20 of the Indian Limitation Act have been fulfilled. The appellants are entitled to their costs both here and before the District Judge. The costs of the Court of first instance will abide the result. We assess the hearing fee in this Court at one gold *mohur*.

B. N.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 862 OF 1921.

June 5, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Sulaiman.

BASDEO RAM SARUP—DEFENDANTS—APPELLANTS

versus

DILSUKHRAI SEWAK RAM—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 63—Acceptance of smaller sum than amount due—Discharge—Presumption—Question of fact

Where a plaintiff agrees to accept a smaller sum in full payment of the amount due to him, it is not open to him to go behind that admission and claim the recovery of the balance. On the other hand, if he does not agree to accept that amount in full satisfaction of his claim, he cannot claim the benefit of section 63 of the Contract Act, for that section only applies where a promisee agrees to remit wholly or in part the performance of a promise made to him or accepts instead of it any satisfaction which he thinks fit. [p. 784, col. 1.]

Where a debtor sends to his creditor a cheque for a smaller amount than what he owes, the mere retention and encashment of the cheque by the creditor, who at the same time refuses to receive the amount in full discharge of the payment of the debt, does not raise any conclusive presumption that he had accepted the cheque as a conditional offer by the debtor. [p. 784, cols. 1 & 2.]

Ram Chandra Marwari v. *Rani Keshobati Kumari*, 2 Ind. Cas. 935; 6 A. L. J. 617; 10 C. L J. 1; 6 M. L. T. 1; 11 Bom. L R. 765; 13 C. W. N. 1102; 36 C. 840; 19 M L. J. 419; 36 I. A. 85, referred to.

Day v. *McLea*, (1889) 22 Q. B. D. 610; 58 L. J. Q. B. 293; 60 L. T. 947; 37 W. R. 483; 53 J. P. 532, followed.

A finding that a plaintiff did not really agree to accept a smaller sum in full discharge of his debt is a question of fact. [p. 784, col. 2.]

Second appeal from a decree of the District Judge, Agra.

Mr. *Narayan Prasad Asthana*, for the Appellants.

Mr. *Girdhari Lal Agarwala*, for the Respondents.

JUDGMENT.—Second Appeal No. 862 and Second Appeal No. 960 of 1921 are connected appeals arising out of the same suit. The plaintiff's firm brought a suit to recover a sum of Rs. 1,265-13-0 with interest, on the following allegations. Their case, devoid of all unnecessary details was that the plaintiffs, as agents of the Standard Oil Company, sold 900 tins of Kerosine oil to the defendants the price of which was Rs. 3,982-13 0, that the defendants paid only a sum of Rs. 2,717 and that the balance of Rs. 1,265-13-0 was still due. The plaintiffs' claim to recover this amount with interest.

On behalf of the defendants it was contended that the sum of Rs. 2,717 had been paid in full payment of the plaintiffs' claim and that having accepted that amount, the plaintiffs are no longer entitled to claim any balance. It was further pleaded that a sum of Rs. 500 had been paid by the defendants as advance money for the oil contract and should be deducted.

The Court of first instance decreed the plaintiffs' claim for the recovery of Rs. 1,265-13-0 and disallowed the defendants' objection as to the payment of Rs. 500. There were two appeals filed before the learned District Judge who has affirmed the decree of the Court of first instance. The defendants have come up here in second appeal, and, on their behalf, it is contended that it is not now open to the plaintiffs to ignore the conditions under which the amount of Rs. 2,717 was paid under a cheque and to claim the balance.

It appears that the defendants sent a cheque for Rs. 2,717 with a condition that this sum was being paid in full discharge of the total amount due to the plaintiffs. The plaintiffs retained this cheque and

ultimately cashed it and two days after this they sent a letter to the defendants intimating that they had cashed the cheque but that they did not agree to receive the amount in full discharge of the payment of the sum due to them. The learned Advocate for the defendants contends that this is really a case of accord and satisfaction and he relies strongly on section 63 of the Indian Contract Act which embodies that principle. Now, if the plaintiffs had really agreed to accept a smaller sum in full payment of the amount due to them, then there can be no doubt that it would no longer be open to them to go behind that admission and claim the recovery of the balance. On the other hand, if they did not agree to accept that amount in full discharge of the payment of the amount due to them, section 63 of the Indian Contract Act would have no application, for that section would only apply where a promisee agrees to remit wholly or in part the performance of the promise made to him or accepts instead of it any satisfaction which he thinks fit. The main question, therefore, was whether the plaintiffs did, in fact, agree to accept the money sent in full satisfaction of their claim. The finding of the learned District Judge on this point is against the appellants and *prima facie* that finding is a finding of fact which cannot be interfered with in second appeal.

The learned Advocate for the defendants-appellants, however, contends that the plaintiffs took time in retaining the cheque which was sent under an express condition that the money was being paid in full discharge of the amount due to the plaintiffs and that this was a conclusive proof of their having agreed to accept that offer; and it is strongly contended that the sending of the money by the defendants must be deemed to be a conditional offer made by them and the retaining of the cheque by the plaintiffs was an acceptance of that offer, and it is, therefore, urged that the plaintiffs, having accepted the defendants' offer to pay the sum of Rs. 2,717 in full discharge of the amount due, are not entitled to go behind it. This contention, if well-founded, would convert the question into one of law. We are, however, of opinion that the mere fact that the plaintiffs retained the cheque and cashed it and at the same time refused to receive the amount in full discharge of the payment of their debt, does not raise any conclusive presumption that they had accepted it as a conditional offer made by the defendants. Every case is to be judged on its special circumstances, and in this particular case the lower Appellate Court has come to a finding that the plaintiffs did not really agree to accept the amount in full discharge of their debt. This is really a question of fact.

On behalf of the defendants reliance is placed on the analogy of section 83 of the Transfer of Property Act and it is contended that inasmuch as the sum was paid in full discharge of the amount due, the principle underlying that section applies. Reference was also made to the case of *Ram Chandra Marwari* v. *Rani Keshobati Kumari* (1). But the perusal of that judgment would make it clear that that case proceeded entirely on the provisions of section 83 of the Transfer of Property Act which distinctly provides that the money so deposited would have to be accepted in full discharge of the amount due. Their Lordships of the Privy Council in the case referred to above lay stress on the fact that the mortgagee was bound to comply with the requirements of the Statute under which the money was paid into Court and that there was no jurisdiction in the Court to permit the money deposited to be drawn out of Court on any terms other than those imposed by the Statute. That case is clearly distinguishable from the present case. The rule of English law undoubtedly seems to be in favour of the respondents' contention, and lays down that if the sum of money sent by a debtor to a creditor is less than the amount actually due, the creditor is not bound to refuse it and may accept the debtor's offer without prejudice to his claim such as it may be. The case of *Miller* v. *Davies* which is an unreported case but is referred to in the judgment in the case of *Day* v. *McLea* (2) is a case which is very much similar to the case before us. In that case a Solicitor was entitled to a sum of

(1) 2 Ind. Cas. 935; 6 A. L. J. 617; 10 C. L. J. 1; 6 M. L. T. 1; 11 Bom. L. R. 765; 13 C. W. N. 1102; 36 C. 840; 19 M. L. J. 419; 36 I. A. 85 (P. C.).

(2) (1889) 22 Q. B. D. 610; 58 L. J. Q. B. 293; 60 L. T. 947; 37 W. R. 483; 53 J. P. 532.

£50 as costs. The defendants, however, sent a cheque for £25 with a letter stating that in order to put an end to the matter he sent the cheque for £25 on the terms that the plaintiffs would receive it in full settlement. The plaintiff kept the cheque and cashed it but wrote to the defendant that he declined to accept it in full satisfaction of the payment of the amount due and that he required a cheque for the balance. The plaintiff then brought a suit to recover the balance and the defendant pleaded that there was an accord and satisfaction of the claim but it was held that it was a question of fact on what terms the cheque was kept. The verdict of the jury was that there was no accord and satisfaction, and that was held to be final in the matter. The same principle was accepted in the reported case of *Day* v. *McLea* (2) which also was a similar one. In that the plaintiffs were claiming damages, and the defendants sent a cheque to them for a sum less than the amount claimed which cheque the plaintiffs retained. Nevertheless it was held that this did not amount to full accord and satisfaction of the claim. It was further remarked that "If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim, and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact."

Both on authority and principle, therefore, it is clear to our minds that the mere fact that the plaintiffs retained the cheque and cashed it, cannot be a conclusive proof in law that they had agreed to accept the amount on the condition offered by the defendants. The question was primarily one of fact and the view taken by the District Judge is binding on us. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

N. K. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS PETITION No. 11 OF 1922.

(CIVIL APPEAL No. 2793 OF 1918.)

March 17, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

SAIF ALI, MINOR, THROUGH RAHMAT SHAH, HIS UNCLE—PLAINTIFF —PETITIONER

versus

CHIRAGH ALI SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19 —Appeal dismissed for default—Re-admission—Sufficient cause—Counsel engaged in other Court.

It is the duty of Counsel to see that their clients are properly represented when their cases are called on for hearing. If a Counsel is unable to appear himself he should arrange for another to take his brief for him when the case is called on for hearing. Courts cannot be expected to await the convenience of Counsel.

Miran Bakhsh v *Rattan Chand*, 71 P. R. 1890, *Manilal Dhunji* v. *Gulam Husein*, 13 B. 12; 7 Ind. Dec. (N. S.) 8, referred to.

An appeal was dismissed in default, and upon an application for its re-admission on the ground that when the appeal was called on for hearing Counsel for the appellant was engaged in arguing a case before another Court at the time and had sent word to the Reader of the Court asking to be allowed ten minutes' time:

Held, that this was not a sufficient cause within the meaning of r. 19 of O XLI of the Civil Procedure Code for re-admitting the appeal.

Petition, under O. XLI, r. 19, Civil Procedure Code, for restoration of the appeal noted above dismissed in default on the 28th November 1921.

Lala *Lachhmi Narain*, for Dr. *Nand Lal*, for the Petitioner.

Mr. *Ghulam Rasul* and Lala *Mul Chand*, R. S., for the Respondents.

ORDER.—The appeal was dismissed for default on the 28th November last. Application is made for its re-admission on the ground that Counsel for the appellant, Dr. Nand Lal, was engaged in arguing a case before the 3rd Bench at the time when the appeal before us was called on, and had sent word to the Reader of this Court asking to be allowed ten minutes' time.

The Court cannot, however, be expected to await the convenience of Counsel, and it is time that Counsel should understand that it is incumbent on them to see that their clients are properly represented when the case is

called on for hearing. It appears from an affidavit of the respondent, Hasan Din, that Dr. Nand Lal had specially arranged to have the appeal in question put higher up on the list, so that he knew that it was likely to be called on early in the day. If he was unable to appear himself he could have arranged for another Counsel to take his brief for him. The observations contained in *Miran Bakhsh* v. *Rattan Chand* (1) and *Manilal Dhunji* v. *Gulam Husein* (2) are pertinent to the present case.

In our opinion no sufficient cause is shown for re-admitting the appeal, and we dismiss this application with costs.

W. C. A.

Appeal dismissed.

(1) 71 P. R. 1890.
(2) 18 B. 12; 7 Ind. Dec. (N. S.) 8.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 334 OF 1921.

June 5, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

PUTTU LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

DAYA NAND—PLAINTIFF—RESPONDENT.

Trust—Right of founder to provide for management—Trustee, removal of—Civil Procedure Code (Act V of 1908), s. 92, applicability of, to suits between rival claimants.

The founder of a trust is entitled to provide for the management of the trust and to reserve to himself and his heirs the power to appoint trustees, and if, in the exercise of that power, he appoints a trustee, the latter cannot be removed except in the manner prescribed in section 92 of the Code of Civil Procedure.

Siddhan Lal v. *Gauri Shankar*, 40 Ind. Cas. 165, referred to.

Section 92 of the Code of Civil Procedure provides for the institution of a representative suit by beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme by which the object of the trust can be properly carried out. A trustee cannot be removed except on the ground of a breach of trust. The section does not apply to a suit between persons who individually claim a right to succeed to the office of trustee.

A suit by a person claiming to be the *mutwalli* of certain property against another who has taken possession of the same does not fall within the purview of section 92 of the Code of Civil Procedure.

Budree Das Mukim v. *Chooni Lal Johurry*, 33 C. 789; 10 C. W. N. 581, *Muhammad Abdul Majid Khan* v. *Ahmad Saeed Khan*, 20 Ind. Cas. 37; 35 A. 459; 11 A. L. J. 673, relied on.

Second appeal from a decree of the District Judge, Farrukhabad.

Mr. *M. L. Agarwala*, for the Appellants.

Dr. *Kailas Nath Katju*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for a declaration that the plaintiff was entitled to act as the *Sarbarahkar* of a certain temple and of the property appertaining thereto and for possession of the said property. The allegation of the plaintiff was that he had been appointed *Sarbarahkar* of the said property and temple by Ganga Prasad, the founder of the trust, by a deed executed by him and registered on the 27th February 1901. By virtue of that deed Ganga Prasad had dedicated certain property for the benefit of the temple which he had constructed in his lifetime and appointed himself a trustee for his life and nominated the plaintiff as his successor in that office. By a subsequent document, executed by him on the 22nd May 1919, he appointed his nephews as trustees after him. These nephews are the defendants to the present suit. They succeeded in getting mutation of names effected on the death of Gange Prasad in the revenue papers. The plaintiff contended that the defendants had obtained the deed from Ganga Prasad under undue influence, but they failed to prove that allegation. The Courts below, however, decreed the claim of the plaintiff on the ground that, by virtue of the deed of *waqf* of the 27th February 1901, Ganga Prasad had appointed the plaintiff as his successor in the office of trustee and that he had no power thereafter to appoint another man in his place. The view taken by the Courts below is supported by the decision in *Siddhan Lal* v. *Gauri Shankar* (1). Ordinarily, the founder of a trust is entitled to provide for the management of the trust and to reserve to himself and his heirs the power to

(1) 40 Ind. Cas. 165.

appoint trustees; but if he exercises that power and appoints a trustee, the trustee cannot be removed except in the manner laid down in section 92 of the Code of Civil Procedure.

The defendants entered into possession of the trust property under the subsequent deed executed by Ganga Prasad, by virtue of which they were appointed trustees in the place of the plaintiff. But Ganga Prasad had reserved no power to himself by the earlier deed to alter the scheme of management there laid down, and the subsequent appointment of other persons cannot, therefore, be upheld.

It is urged, on behalf of the defendants, that the suit ought to have been brought under section 92 of the Code of Civil Procedure, but that section provides for the institution of a representative suit by the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme by which the object of the trust can be properly carried out. The removal of the trustees can be claimed on the ground of an alleged breach of trust, but no such ground is alleged here in regard to the defendants. All that is stated is that Ganga Prasad had committed a breach of trust by appointing new trustees in the place of the plaintiff. It is not stated that the defendants had committed any breach of trust. On the other hand, the suit is, as the Courts below point out, between rival claimants to the office of trustee. The plaintiff claims that office in his own right by virtue of the earlier deed executed by Ganga Prasad. The defendants claim the same office by virtue of a later deed, which, so far as it is inconsistent with the earlier one, is not enforceable. As pointed out by Woodroffe, J., in the case of *Budree Das Mukim* v. *Chooni Lal Johurry* (2), in order to bring a case within the purview of section 539 of the Code of Civil Procedure the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust upon a cause of action, alleging a breach of trust or necessity for directions as to its administration against a trustee of such express or constructive trust Such trustee may be a trustee *de jure* or a trustee *de son tort*. But if the suit is between persons, who individually claim a right to succeed to the office of trustee, section 92 of the Code of Civil Procedure has no application. The right here set up is a personal right to act in a particular office. In *Muhammad Abdul Majid Khan* v. *Ahmad Saeed Khan* (3), it was held, in somewhat similar circumstances, that a suit by a person claiming to be a *mutwalli* of certain property against another who had taken possession of the same, did not fall within the purview of section 92.

We see no reason, therefore, to interfere with the decree passed by the Court below and dismiss the appeal with costs.

N. K.

Appeal dismissed.

(3) 20 Ind. Cas. 37; 35 A. 459; 11 A. L. J. 673.

(2) 32 C. 789; 10 C. W. N. 581.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1591 OF 1921.

April 11, 1922.

Present:—Justice Sir William Chevis, KT.

SURRENDRO AND COMPANY THROUGH NARINDRA NATH OF RAWALPINDI—CREDITOR—APPELLANT

versus

THE LIQUIDATOR, PUNJAB TANNERY COMPANY, LIMITED, IN LIQUIDATION —RESPONDENT.

Companies—Contract entered into on behalf of Company before incorporation—Company, ratification by—New contract.

A contract entered into by the promoters of a Company prior to its incorporation, is not binding on the Company; nor can a Company ratify or adopt such a contract: it may enter into a new contract embodying the terms of that contract or adopting it. [p. 788, col. 2.]

Ganesh Flour Mills Company Limited v. *Puran Mal*, 2 P. R 1905: 129 P. L. R, 1904: 7 P. W. R. 1905, distinguished.

The mere affixing of a copy of an agreement to the Articles of Association is not equivalent to effecting a new contract by the Company and would not estop the Official Liquidator from objecting to a claim on behalf of the persons with whom that contract was entered into. [p. 789, col. 2.]

Miscellaneous first appeal from the order of the District Judge, Rawalpindi, dated the 14th June 1921.

Maulvi *Ghulam Mohai-ud-Din* and Lala *Dharm Das Suri*, for the Appellant.

Sardar *Kharak Singh*, for Official Liquidator and Mr. *Sundar Das*, for the Lahore Bank, for the Respondent.

SURRENDRO AND COMPANY v. LIQUIDATOR, PUNJAB TANNERY CO. LTD.

JUDGMENT.—This is an appeal from the order of the learned District Judge of Rawalpindi passed in the matter of the winding-up of the Punjab Tannery Company.

A preliminary objection is raised that the appeal is barred, service not having been effected on the respondent within three weeks of the District Judge's order as required by section 169 of Act VI of 1882. The District Judge's judgment is dated the 14th June 1921. Copy was applied for on the 24th June 1921 and supplied on the 30th June 1921. The appeal was lodged on the 6th July 1921 along with an affidavit that delay was due to the fact that cholera had broken out in the appellant's family, his brother-in law having died and his sister-in-law being dangerously ill. Extension of time was, therefore, prayed for and granted subject to all just exceptions. In the absence of any counter-affidavit I take it that the statement as to cholera having broken out in the family was correct, and I think extension of time may be allowed in this case.

The question for decision in this case is whether a debt due to Surrendro and Company can be enforced against the Punjab Tannery Company. The firm of Surrendro and Company consisted of *Lala* Maya Das and Mr. Hans Raj Bhandari and these two persons were amongst the promoters of the Company. An agreement was drawn up on the 11th September 1908 between Maya Das and Hans Raj Bhandari on one side as proprietors of Surrendro and Company, and Harbhagwan and Beant Singh on the other side as promoters of the Punjab Tannery Company. According to this agreement, the Punjab Tannery Company was to buy up the stock and good-will of Surrendro and Company, though in the agreement the space for entering the amount of money, which the Punjab Tannery Company was to pay to Surrendro and Company, was left blank. The Company was registered on the 26th October 1908. A copy of the agreement of the 11th September 1908 was attached to the Articles of Association. On various meetings of the Directors the question of the amount due to Surrendro and Company and of the steps necessary for checking the stock in hand taken over or to be taken over from the Company was discussed. On the 4th April 1909 a general meeting was called at which the agreement with Surrendro and Company was approved and confirmed, but, as pointed out by the learned District Judge, this meeting was attended only by seven persons, two others also being present by proxy, and so there was no quorum, and the meeting was invalid according to paragraph 26 of the Articles of Association which lays down that no business excepting the declaration of a dividend can be transacted at any general meeting unless a quorum is present consisting of ten members of whom not less than five should be personally present. There was another general meeting on the 20th January 1910 when a bare quorum was present. At this meeting there was a further discussion as to the accounts and as to taking over the stock from Messrs. Surrendro and Company, but I agree with the learned District Judge in holding that nothing was done at this meeting which constituted an agreement between the Punjab Tannery Company and Surrendro and Company. The learned District Judge has held that any contract entered into before incorporation of the Company is not binding and that no new contract was entered into by the Company after its incorporation and that, therefore, the Company is not liable under the agreement, but that Surrendro and Company can, if they so wish, fall back upon the original promoters who signed the agreement.

Messrs. Surrendro and Company have appealed to this Court and Mr. Ghulam Mohai-ud-Din has taken me through the proceedings as recorded in the Minute Book, but he has nowhere succeeded in pointing out to me anything which I can possibly regard as amounting to an agreement subsequent to incorporation of the Company between the Company and Surrendro and Company. There is ample authority for holding that a Company cannot ratify or adopt a contract entered into by a person on its behalf before incorporation, though it may enter into a new contract embodying the terms of the old one or adopting the old one. The cases in question are all cited on pages 211 to 213 of T. A. Row's edition published in 1910 of the Indian Companies Act of 1882. Here, as I have stated, I can find nowhere any fresh contract entered into by the Company after its incorporation. All that seems to have happened is that the Directors and the body of share-holders generally, so far as the latter

took any interest in the proceedings, seems to have thought that the old contract entered into before the incorporation of the Company was binding and that no new contract was necessary. If the Directors after incorporation had entered into a new agreement and if the Company had acquiesced in the action of the Directors, then, I think, it might be right to say that the Company would be bound even if the Directors had acted beyond their legal powers; but, as I have already stated, I can find nothing on the record showing that the Directors ever entered into any fresh agreement with Surrendro and Co. after the incorporation of the Company. The Directors included Maya Das and Hans Raj, who were the proprietors of Surrendro and Co. so it would be difficult for them to enter into an agreement with themselves. The whole business of the Company seems to have been conducted in an utterly slipshod way, no notice being paid to the important fact that at the first general meeting the necessary quorum was not present. Even at the next general meeting a bare quorum was present, though I am informed that the number of share-holders was not far short of 100. In fact the share-holders seem to have taken very little interest in the proceedings and to have left matters entirely to the Directors. Had the Directors other than Maya Das and Hans Raj entered into a fresh agreement with Surrendro and Co. and had the share-holders agreed to such an agreement then, as I have already said, that agreement would probably have been binding on the Company; but there is no evidence of any new agreement and Mr. Ghulam Mohai-ud-Din has stated before me that he is unable to assert that the Directors entered into a new agreement. But he argues that the Directors took over the stock from Messrs. Surrendro and Co. and the Company ratified this action and is thus liable to pay to Surrendro and Co. the price of that stock. When the stock was actually taken over and by whom or whether it was really taken over at all are matters on which I am unable to come to any clear finding. If the stock was taken over by the promoters before the Company was incorporated then it seems to me that Surrendro and Co. have their claim not against the Company but against the promoters. In such a case as the present, where the promoters of Surrendro and Co. were two out of the five Directors it may well be that there was no formal taking over of the stock. As might have been expected, the Company soon came to grief and stopped work in March 1912. I need not, however, go into the question of the Company being liable, apart from any contract, to pay for the value of the stock taken over, as this was not raised in the grounds of appeal. The first ground of appeal is merely that the lower Court has erred in holding that the resolution passed at the meeting of the share-holders held on the 4th April 1909 is void in law. The decision of the lower Court on this point is undoubtedly correct.

The next ground of appeal is that the contract entered into by the Company with Surrendro and Co. was subsequently ratified and acted upon. But, as I have already stated, there was no contract between the Company but merely a contract entered into by the promoters prior to incorporation of the Company.

The third ground of appeal is that in the general meeting held on the 20th January 1910 certain persons were appointed to check the stock and the accounts were passed in which Surrendro and Co.'s debt was included. This, however, does not constitute any contract between the Company and Surrendro and Co. but is merely evidence that the persons attending that meeting were under the impression that there was a contract existing between the Company and Surrendro and Co.

The fourth ground of appeal is simply that the Official Liquidator is estopped from raising objection to the claim of Surrendro and Co., because a copy of the agreement was incorporated in the Articles of Association. But affixing a copy of the agreement to the Articles of Association is not equivalent to effecting a new contract between the Company and Surrendro and Co. and I fail to see how the respondent can be estopped from objecting to the claim on behalf of persons with whom the Company entered into no contract.

The fifth and last ground of appeal is that the Directors had legal authority which they rightly exercised. But, as I have pointed out already, the Directors did not enter into any contract with Surrendro and Co. They merely seem to have been under the mis-

taken idea that the agreement entered into prior to incorporation was sufficient and that no new contract was necessary.

In conclusion I note that Mr. Ghulam Mobai ud-Din in his arguments cited *Ganesh Flour Mills Company Limited* v. *Puran Mal* (1), a case referred to on page 211 of T. A. Row's Indian Companies Act (Edition of 1910) as laying down that a contract entered into prior to incorporation even though embodied in the Articles of Association cannot bind the Company when formed, *unless it has after its formation ratified and adopted it.* This ruling does not, however, lay down that such an agreement is binding if ratified by the Company. The fact is that this ruling was first published in the Punjab Record with an incorrect head-note, and this seems to have misled the author of the above book. Pages 11 and 12 of the Punjab Record for 1905 were subsequently re-printed with an amended head-note.

I uphold the order of the learned District Judge and dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

(1) 2 P. R. 1905; 129 P. L. R. 1904; 7 P. W. R. 1905.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 686 OF 1921

June 2, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Sulaiman.

ROSHAN LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LALLU AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—Auction sale—Notification of mortgage—Auction-purchaser, whether estopped from questioning validity of mortgage.

Under O. XXI, r. 66, of the Civil Procedure Code, if a mortgage-deed is notified, that notification is in no way conclusive as between the decree-holder or the purchaser on the one hand, and the holder of the encumbrance on the other, as to its validity, and where a sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale, the auction-purchaser is not estopped from questioning the validity of the mortgage. [p. 792, col. 1.]

Bhagwan Das v. *Ahmad Jan*, 36 Ind. Cas. 732 3 O. L. J. 422, referred to.

Second appeal from a decree of the District Judge, Cawnpore.

Dr. *Kailas Nath Katju*, for the Appellants.

Mr. *Peary Lal Banerji*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for foreclosure on the basis of a mortgage-deed dated the 30th of August 1907. It appears that the defendant held a simple-money decree in a suit No. 192 of 1898 which was in execution. On the 30th of July 1907 the property in dispute in this case was attached in execution of the simple money decree; while this attachment was subsisting, the judgment-debtor, on the 30th of August 1907, executed the mortgage-deed which is the subject-matter of dispute in this appeal. On the 20th of August 1908 the subsequent mortgagee seems to have made an application to the Execution Court praying that his mortgage should be notified. An order of the 14th of November 1908 passed by the Execution Court, shows that inasmuch as no objection was preferred, notification was ordered. The property was put up for sale on two occasions but those sales were set aside. On the 20th of August 1909 the property was again put up for sale and was ultimately sold to the attaching decree-holder himself for a sum of Rs. 1,800. The subsequent mortgagee has now brought a suit to enforce the mortgage of the 30th of August 1907 and, on behalf of the defendants, it was contended that inasmuch as this mortgage-deed had been executed at a time when the attachment of the decree in Suit No. 192 of 1898 was in force, the mortgage was invalid and unenforceable as against the defendants.

The Court of first instance held that the attaching decree holder had, in no way, been prejudiced by the execution of this mortgage-deed and that the attachment was no bar to the validity of this mortgage.

On appeal the learned District Judge was of opinion that the plaintiffs were not entitled to enforce their mortgage as against the defendants who have purchased this property in execution of a decree under which the property was under attachment at the time when the mortgage-deed was executed.

The plaintiffs have come up to this Court in second appeal, and, on their behalf, it is argued that the finding of the learned District Judge is not correct. It is contended on their behalf that, inasmuch as the defendants had full notice of the existence of the plaintiffs' mortgage, they are estopped now from saying that that mortgage is not valid. In the first place, there is nothing on the record to show that any notice was actually issued to the decree-holder on the application of the 20th of August 1908. In order to succeed on a plea of estoppel, it was obviously incumbent on the plaintiffs to prove this. In the second place, the proceeding relating to the notification of the mortgage-deed was merely a proceeding under O. XXI, r. 66 of the Code of Civil Procedure, and the order passed in that proceeding can in no way be conclusive as to the validity of the mortgage which was going to be announced.

It is next contended that under section 64 of the Code of Civil Procedure the mortgage is not absolutely void but that it is valid so long as the attaching decree-holder was not prejudiced. It is true that under the new Act this section has been slightly altered. In the old section 276, the words "during the continuance of the attachment" were too wide and might have made all transfers "during the pendency of the attachment" absolutely void. Under the new Code, however, that expression has been substituted by the expression "contrary to such attachment." It is clear, therefore, that a transfer during the pendency of the attachment would be void only as against all claims enforceable under the attachment. It cannot be disputed that it was open to the attaching decree-holder to ignore the subsequent mortgage and to proceed to sell the whole property and not only the equity of redemption, and that if he did so, the auction-purchaser would get the whole property free from the incumbrance, the mortgage not creating any lien on the property sold. There is nothing to show that the property sold was anything less than the absolute interest in it, and there is nothing to show that it was only the equity of redemption subject to the subsequent mortgage which was put up for sale and purchased by the defendants.

The learned Advocate for the appellants has strongly relied on the case of *Dinobundhu Shaw Chowdhry* v. *Jogmoya Dasi* (1). In that case there were, first of all, two previous mortgage-deeds and the equity of redemption was attached in execution of a money decree. While the property was in the course of being sold, a third mortgage was created by the mortgagor in lieu of the amount due under the previous mortgages. The auction purchaser, in execution of the mortgage-decree, claimed that the provisions of section 276 of the Code rendered the subsequent mortgage wholly void as against him. Their Lordships of the Privy Council, however, held that inasmuch as the intention of the parties was to keep alive the earlier mortgages, it was impossible to hold that the effect of that section was to give an execution creditor an unincumbered fee simple instead of an equity of redemption against the intention of the parties. In our opinion that case is clearly distinguishable from the present case. The case of *Abdul Rashid* v. *Gappo Lal* (2) is also clearly distinguishable, because in that case the subsequent mortgage was held to be valid only in respect of that excess share which was not legally saleable in execution of a prior decree. The case of *Bhagwan Das* v. *Ahmad Jan* (3) was a case where ultimately the subsequent mortgage was not

(1) 29 C. 154; 12 M. L. J. 73; 4 Bom. L. R. 238; 6 C. W. N. 209; 29 I. A. 9 (P. C.).

(2) 20 A. 421; A. W. N. (1898) 98; 9 Ind. Dec. (N. S.) 630.

(3) 36 Ind. Cas. 732; 3 O L. J. 422.

upheld. But it was clearly pointed out in that case that under O. XXI, r. 66, Civil Procedure Code, if a mortgage-deed is notified, that notification is in no way conclusive as between the decree holder or the purchaser on the one hand and the holder of the encumbrance on the other as to its validity, and it was pointed out that where a sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale, the auction purchaser is not estopped from questioning the validity of the mortgage.

It is next contended that the mortgage-deed in dispute was executed in order to pay off the money due to another attaching creditor, namely, Sheo Mukh Rai, and that, therefore, this mortgage was invalid. In the first place, this point was not taken before the learned District Judge, and we have no pronouncement of his opinion on this point. In the second place, Sheo Mukh Rai did not hold any decree for sale. He was a simple money decree-holder, and as soon as his amount was paid out of Court, the attachment ceased to exist, and we are of opinion, that that fact cannot in any way help the appellants. In our opinion the view taken by the learned District Judge on this point was correct. The appeal, therefore, fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 1581 OF 1921.

April 4, 1922.

Present:—Justice Sir William Chevis, KT.

Lala HEM RAJ AND OTHERS—

APPELLANTS

versus

Sardar BEANT SINGH, VAKIL, LIQUIDATOR, THE PUNJAB TANNERY CO. LTD., RAWALPINDI (IN LIQUIDATION)

— RESPONDENT.

Companies Act (VII of 1913), s. 284—Companies Act (VI of 1882), s. 169—Winding-up commenced under old Act—Appeal—Notice.

Under section 284 of the Companies Act, 1913, where proceedings for the winding-up of a Company have commenced before the commencement of the said Act, all subsequent proceedings connected with such winding-up, continue to be governed in all respects by the provisions of the Companies Act of 1882. Therefore where an appeal arises out of such proceedings notice of appeal must be served in accordance with the provisions of section 169 of the Companies Act of 1882. [p. 793, cols. 1 & 2.]

Thakar Das v. *Official Liquidator, Peshawar Bank Limited*, 28 Ind. Cas. 90; 40 P. L. R. 1915; 225 P. W. R. 1915, *Daulat Rai* v. *Wazir Chand* [*Liquidators, Hindustan Bank Limited*], 29 Ind. Cas. 272; 20 P. R. 1915; 55 P. L. R. 1916; 216 P. W. R. 1914, *Khiali Ram* v. *Official Liquidators of the Peoples' Bank of India Limited*, 28 Ind. Cas. 600; 43 P. W. R. 1915; 113 and 183 P. L. R. 1915, relied upon.

Miscellaneous first appeal from the order of the District Judge, Rawalpindi, dated the 14th June 1921.

Mr. *M. S. Bhagat*, for the Appellants.

Sardar *Kharak Singh*, (for Official Liquidator) and Mr. *Sundar Das*, (for Lahore Bank), for the Respondents.

JUDGMENT.—This judgment will cover the connected appeal filed by Gurdit Singh (Civil Appeal No. 1621 of 1921). These two cases are appeals from the order of the learned District Judge passed in the matter of the winding-up of the "Punjab Tannery Company, Limited, Rawalpindi."

A preliminary objection is lodged on behalf of the respondent that these appeals are barred under section 169 of the Indian Companies Act, VI of 1882, which lays down that appeals from any order or decision made or given in the matter of the winding-up of a company by the Court may be had, subject to the restriction that no such appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made in the manner in which notices of appeal are ordinarily given unless such time is extended by the Court of Appeal. On behalf of the appellants it is urged that the provisions of section 169 of the old Act have not been incorporated in the new Indian Companies Act, VII of 1913 and that in matters of procedure the new Act should be followed and not the old. But section 284 of the new Act lays down that the provisions of the new Act with respect to

winding-up shall not apply to any Company of which the winding up has commenced before the commencement of the Act, but that every such Company shall be wound-up in the same manner and with the same incidents as if the new Act had not been passed, and that for the purposes of the winding-up Act VI of 1882 shall be deemed to remain in full force. It is admitted that the winding up in this case commenced before the Act of 1913 came into force and I consider that the provisions of section 284 of the new Act clearly lay down that, for all purposes connected with the winding-up a Company, the old Act shall be regarded as still in force. The present appeal is one of the incidents connected with the winding-up of the Company and I hold that the law applicable is that contained in the old Act of 1882. The same was held in four Single Bench rulings of this Court, namely, *Thakar Das* v. *Official Liquidator, Peshawar Bank Limited* (1), *Daulat Rai* v *Wazir Chand* [*Liquidators, Hindustan Bank Limited*] (2), *Rhiali Ram* v *Official Liquidators of the Peoples' Bank of India Limited* (3), and Civil Appeal 1753 of 1918, and Counsel is unable to cite any authority to the contrary. I hold, therefore, that the provisions of section 169 of Act VI of 1882 are applicable to this case.

The order of the learned District Judge is dated the 14th June 1921. In the case of appeal filed by Lala Hem Raj and others copy was applied for on the 17th June 1921. The copy was supplied on the 24th of June 1921; the appeal was filed on the 11th July 1921. The Liquidator was not served till October 1921. The three weeks mentioned in section 169 of the Act expired on the 5th of July 1921 and the appeal was not filed by that date. No affidavit explaining cause of delay was put in with the appeal, but the order of the Judge of this Court admitting the appeal to a hearing directed that time for service on the respondent should be extended subject to all just exceptions. I am quite ready to allow extension of time in an appeal of this sort provided that it can be shown to my satisfaction that the appellant has throughout acted with due diligence. The appellant must be presumed to know all the provisions of law applicable to his case and so I shall presume that he knew that he should file his appeal with such promptness that the respondent could be served within the time prescribed by section 169. I am not prepared to say that there was any waste of time in applying for copy of the District Judge's order, seeing that the copy was applied for only three days after the order was passed, but when the copy was supplied on the 24th June the appellant should have realised that out of the 21 days 10 had already passed and only 11 days remained In spite of this, however, the appellant did not lodge his appeal till the 11th June *i. e.* 17 days after obtaining the copy. The consequence was that owing to this waste of 17 days the appeal was lodged after the period of three weeks mentioned in section 169 had expired. No explanation has been given of this waste of time. The journey from Rawalpindi to Lahore by train takes less than 12 hours and the appeal could have been filed the day after copy had been supplied. I can find no sufficient reason for allowing an extention of time and I dismiss the appeal of Hem Raj and others.

In the case of appeal by Gurdit Singh the copy was applied for on the 17th June 1921 and supplied on the 24th June 1921. This appeal was filed on the 4th July 1921. In this case too no affidavit explaining the delay was filed with the appeal, and no extension of time was asked for or given. Here 10 days were wasted after the copy had been supplied, though the appellant must be presumed to have known of the provisions of section 169. The consequence was that the appeal was lodged only one day before the expiry of the three weeks and it was then quite impossible to effect service of notice on the respondent within the prescribed period. The appellant is a legal practitioner and the only excuse that is offered in his case is that he was away at Karachi attending to some cases of his own. This I regard as quite insufficient to explain away the delay. The appellant was represented in Rawalpindi during his absence by a legal practitioner who, I am told, was a friend of his, If the appellant

(1) 28 Ind. Cas. 90; 40 P. L. R. 1915; 225 P. W. R. 1915.

(2) 29 Ind. Cas. 272; 20 P. R. 1915; 35 P. L. R. 1916; 216 P. W. R. 1914.

(3) 28 Ind. Cas. 600 43 P. W. R. 1915; 113 and 183 P. L. R. 1915,

chose to go away to Karachi leaving his case in charge of a friend any delay on the part of that friend must be regarded as having the same effect as if the appellant had himself delayed.

In both of these cases I consider that want of due diligence in presenting the appeals promptly to this Court has been shown and that no extension should be allowed. I dismiss both of these appeals as barred under the provisions of section 169 of Act VI of 1882, but as these provisions are undoubtedly strict I leave the parties to bear their own costs in this Court.

N. H.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL 890 OF 1921.

June 5, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Sulaiman.

KALYAN SINGH—DEFENDANT—APPELLANT

versus

DHARAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Debt—Father, decree against—Liability of father's interest in family property.

Under the Mitakshara Law a simple money-decree against a Hindu father which is not shown to have been on the basis of a debt which was tainted with immorality, can be executed against the ancestral property, and the father's interest therein can be attached and sold.

Second appeal from a decree of the District Judge, Moradabad.

Mr. *Raza Ali*, for the Appellant.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.—This is a defendant's appeal, arising out of a suit for a declaration that the order of the 14th of February 1920, disallowing the plaintiffs' objection to the attachment of the property in suit, was wrong and that the property, being the ancestral property of the family, was not liable to be attached and sold in execution of a decree, in suit No, 178 of 1918, passed against the plaintiffs' father. The Court of first instance dismissed the suit, but on appeal the learned District Judge has allowed the appeal and reversed the decree of the Court of first instance.

It appears that on the 18th of February 1914 Chhidu Singh, defendant No. 2, who is the father of the plaintiffs, executed a mortgage-deed, in respect of the ancestral property, in favour of Kalyan Singh, the present defendant-appellant. On the 11th August 1917 a suit was instituted on behalf of the sons for a declaration that the said mortgage-deed was not binding on them, inasmuch as the debt had not been contracted for any legal necessity. The suit was ultimately decreed. After this, Kalyan Singh brought a suit on the basis of this deed but only asked for a simple money decree against the father. That suit was decreed and when the decree was put in execution "the rights and interests of Chhidu Singh in the joint family property" were attached. An objection was filed, on behalf of the sons, that the attachment was invalid. This objection having been disallowed, the present suit was instituted.

The learned District Judge seems to be of opinion that inasmuch as it was found in the previous suit, that the debt had not been contracted for any valid family necessity and inasmuch as the father is still alive, it is not open to the simple money decree-holder to attach the family property, and he relies on the case of *Sahu Ram Chandra* v. *Bhup Singh* (1). But in our opinion now there is no question as to the Hindu father's authority to transfer any family property. There is a simple money decree against him, which is not shown to have been on the basis of a debt which was tainted with immorality. That being so, that decree can clearly be executed against the father, and the father's interests in the family property can be attached and sold. The case of *Sahu Ram Chandra* v. *Bhup Singh* (1) does not lay down any

(1) 39 Ind. Cas. 280; 15 A. L. J. 437; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 19 Bom. L. R 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I A. 126 (P. C.).

contrary rule. On the other hand, an earlier case of their Lordships of the Privy Council, *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (2), clearly laid down that where a simple money decree had been obtained against a father, that decree could be executed against the ancestral family property under the Mitakshara Law "unless it were shown that the debt was a debt incurred for illegal or immoral purposes." In our opinion the view taken by the learned District Judge was clearly wrong and is in no way supported by the authority quoted by him.

The result is that we allow this appeal, set aside the decree of the lower Appellate Court and dismiss the plaintiffs' suit.

W. C. A.

Appeal decreed.

(2) 39 Ind. Cas. 252; 15 A. L. J 147; 32 M. L. J. 133; (1917) M. W. N. 19; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 C. 524; 44 I. A. 1 (P C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 189 OF 1920.

July 19, 1921.

Present:— Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

HARIDASI DASI AND OTHERS— APPELLANTS

versus

BIDHUMUKHI DASI—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50— Hindu reversioner, whether entitled to be heard in Probate proceeding—Application for revocation of Probate—Immediate female reversioner not entitled to maintain application—Next reversioner, if can apply —Minor reversioners—Natural guardian omitting to apply for revocation—Reversioners, whether estopped.

Although a reversioner under the Hindu Law has no present interest in the property left by the deceased, yet the reversioner, whether male or female, is substantially interested in the protection or devolution of the estate, and, as such, is entitled to appear and be heard in a Probate proceeding. If the immediate reversioner is a female, the male reversioner in the second or third degree, as the case may be, (for instance, where the deceased has left a widow, daughter, mother and brother), is similarly entitled to be heard. [p. 797, cols 1 & 2.]

Where the immediate reversioner, a female, has rendered it impossible for himself by her own conduct to successfully maintain an application for revocation of a Probate, the application may be made by the next male reversioner who is unquestionably a proper party to the Probate proceedings. [p. 797, col. 2.]

Ram Gopal Das v. *Radhakrishna Das*, 3 C. L. J. 37*n*, *Abinash Chandra Mazumdar* v. *Harinath Shaha*, 32 C. 62 at p. 66; 9 C. W. N. 25, *Harek Chand Babu* v. *Bijoy Chand Mahatab*, 2 C. L. J. 87 at p. 95; 9 C. W. N. 795, *Srinibash Das* v. *Monmohini Dasi*, 3 C. L. J. 224, *Bepin Behari Kundu* v. *Durga Charan Banerji*, 35 C. 1086 at p. 1090; 12 C. W. N. 914; 8 C. L. J. 120, referred to.

Khettramoni Dasi v. *Shyama Churn Kundu*, 21 C. 539, 10 Ind Dec. (N. S.) 989 and *Shyama Charan* v. *Prafulla Sundari*, 30 Ind. Cas. 161; 21 C. L. J. 557; 19 C. W. N. 882, relied upon.

A reversioner who was a minor at the time of the grant of the Probate is not estopped from making an application for revocation by reason of the fact that his father who was his natural guardian did not intervene on his behalf at the time when the Probate was granted. [p. 797, col 2.]

Nistariny Dabya v. *Brahmomoyi Dabya*, 18 C. 45; 9 Ind. Dec. (N. S.) 31, distinguished.

Appeal against the decision of the District Judge, Hughli, dated the 9th July 1920.

Babus *Panna Lal Chatterjee* and *Manmatha Nath Mookherjee*, for the Appellants.

Dr. *Jadu Nath Kanjilal*, Babus *Durga Charan Mitter* and *Benode Lal Mukherjee*, for the Respondent.

JUDGMENT.—This appeal is directed against an order of dismissal made on an application to revoke a Probate under section 50 of the Probate and Administration Act. Priya Nath Ghose, the alleged testator, died on the 13th November, 1907. He left a widow, Bidhumukhi Dasi, a daughter, Haridasi Dasi, and two sons by her Pramatha Nath and Anadinath. On the 16th July 1908 the widow applied for Probate of a Will said to have been executed by the deceased on the 26th October 1907. The application, which was supported by the affidavits of two of the attesting witnesses, did not mention that the testator had left a daughter or two sons by her who would successively take the estate in the event of intestacy. A general citation was thereupon issued but no special citation was or could be served upon the relatives of the deceased. As there was no opposition, the Probate was granted on the affidavits on the 21st August 1908. On the 21st May 1919, the present application for revocation of the Probate was made by Haridasi and her two sons, Pramatha Nath and Anadinath, on the allegation that

the Will set up was not genuine. The application was opposed by the widow. The District Judge has refused the application of Haridasi on the ground that she was aware of the Probate proceedings, and that the fact that no special citation had been issued to her was in the circumstances not sufficient to justify the revocation of the Probate, on the principle explained by this Court in the case of *Prem Chand Das* v. *Surendra Nath Saha* (1). As regards the application by Pramatha Nath and Anadinath, the District Judge has held that they had no interest in the property during the lifetime of their mother and were not consequently necessary or proper parties to the Probate proceedings.

It is not necessary to consider whether in view of the decision in *Ramgopal Das* v. *Radhakrishna Das* (2), the Probate was properly granted on affidavits or whether the application made by Haridasi Dasi has been properly refused, because there is no room for serious controversy that the application made by Pramatha Nath and Anadinath should have been granted. It is plain that in the event of intestacy Pramatha Nath and Anadinath would be ultimately entitled to succeed to the estate of their maternal grandfather, Priya Nath Ghose, in their own right and not through their mother. Consequently, if the alleged testamentary instrument is not genuine, their position has been seriously affected by the grant of the Probate, inasmuch as the result of the Will is to alter the line of succession and to divert the estate into new channels. In such circumstances, the daughter's sons would *prima facie* be entitled to intervene in the Probate proceedings, on the well-established principle relating to the true position of reversioner of the second degree, as explained in the case of *Abinash Chandra Mozumdar* v. *Harinath Saha* (3) in the following terms:

"In the case in which, upon the death of a full owner, the estate successively passes through the hands of a series of female heirs, who take only a qualified estate, before the property vests in another full owner, they may rightly be regarded in the aggregate as the holder of a limited interest which intervenes between the full ownership of the original owner and the ultimate taker. Each of these recipients of the limited interest has three common characteristics, namely, first, each possesses only a qualified right of alienation; secondly, not one of them can transmit the property to her own heirs, but it passes upon her death to the heir for the time being of the last full owner, and, thirdly, not one of them can alienate the estate absolutely even with the consent of the next female reversionary heir, for where the next reversioner is herself a female who only takes a life-estate, her consent will not bind the next reversioner who takes an absolute estate: in other words, the assent of a female reversionary heir to an alienation made by a female heir cannot confer upon it a character of greater validity than it would have possessed if it had been made by herself. . . There is a substantial distinction between the case in which a remote reversioner who would take an absolute interest, sues for a declaratory decree in the presence of a nearer male reversionary heir and the case in which such a suit is brought in the presence of a nearer female reversionary heir. It follows consequently that a male reversionary heir who would be entitled to the property absolutely, if he succeeded to it, ought to be allowed to challenge an unauthorised alienation by the holder of a qualified estate, whether or not such female heir is his immediate predecessor or is separated from him by the interposition of other possible female heirs."

The view thus expounded has been adopted and applied in a variety of cases. As an example, reference may be made to the judgment of this Court in the case of *Harak Chand Babu* v. *Bijoy Chand Mahatab* (4) where the following observation was made: "where there are several reversioners entitled successively under the Hindu Law to an estate held by a Hindu widow, no one such reversioner can rightly be held to claim through or derive his title from another, but he derives his title from the last full owner, and, therefore, although the right of the nearest

(1) 9 C. W. N. 190.
(2) 3 C. L. J. 37*n*.
(3) 32 C. 62 at p. 66; 9 C. W. N. 25.

(4) 2 C. L. J. 87 at p. 95; 9 C. W. N. 795.

reversioner for the time being to contest an alienation or an adoption by the widow may have become barred by limitation against him, this will not bar the similar rights of the subsequent reversioner." This principle has been followed by the Madras High Court in *Gazzala Veerayya* v. *Gazzala Ganamma* (5) and *Narayana Aiyar* v. *Rama Aiyar* (6).

For other illustrations, reference may be made to the decisions in *Srinibash Das* v. *Monmohini Dasi* (7) and *Bepin Behari Kundu* v. *Durga Charan Banerji* (8). In the case last mentioned, Mr. Justice Doss stated the principle in these words: "if the widow had, with the concurrence of the daughters alienated the property in favour of a stranger, the alience would not have taken any larger estate than the limited and qualified estate of the widow or of the daughters, for the alienee cannot have a larger estate than that possessed by the alienor, and the coalition of the estate of the widow with that of the daughters not having the effect of amplifying the quantum of the resultant estate." This principle was applied in *Roja Dei* v. *Umed Singh* (9) and *Chidambara Reddiar* v. *Nallammal* (10).

In the case before us, there is no doubt that, apart from all questions of acquiescence, the application for revocation could have been made and was properly made by Haridasi Dasi, the immediate reversioner. The decisions in *Khettramoni Dasi* v. *Shyama Churn Kundu* (11), *Brindaban Chunder Shaha* v. *Sureshwar Saha* (12) and *Shyama Charan* v. *Prafulla Sundari* (13) show that although a reversioner under the Hindu Law has no present interest in the property left by the deceased, the reversioner, whether male or female, is substantially interested in the protection or devolution of the estate, and, as such, is entitled to appear and be heard in a Probate proceeding. If the immediate reversioner is a female, the male reversioner in the second or third degree, as the case may be (for instance where the deceased has left a widow, daughter, mother and brother), is similarly entitled to be heard. In the present case, the immediate reversioner, Haridasi, has rendered it impossible for herself by her own conduct, to maintain the application successfully; consequently, the application may be made by Pramatha Nath and Anadinath who, as the ultimate reversioners, were unquestionably proper parties to the Probate proceedings, this is clear from the decisions in *Brindaban Chunder Shaha* v. *Sureshwar Saha* (12) and *Shyama Churn* v. *Profulla Sundari* (13).

We have been pressed, however, to hold on the authority of the decisions in *Nistariny Dabyu* v. *Brahmomoyi Dabya* (14), *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (15), *Nalini Sundari Gupta* v. *Bejoy Kumar Roy Chowdhury* (16), *Prem Chand Das* v. *Surendra Nath Saha* (1) that Pramatha Nath and Anadinath should be held incompetent to maintain the present application in the same way as their mother, because the evidence indicates that their father who was their natural guardian was aware of the Probate proceedings. It is clear, that at the time of those proceedings, Anadinath and possibly Parmatha Nath also had not attained majority. Assuming that their father was aware of the Probate proceedings and yet did not intervene therein, on their behalf, we cannot hold that his omission can prejudice the position of the infants. The case of *Nistariny Dabya* v. *Brahmomoyi Dabya* (14) is clearly distinguishable. There a person professing to be the guardian of the infants had intervened for their protection. He succeeded in the Court of first instance, but upon appeal the decision of the primary Court was reversed. In these circumstances, this Court held that the infant could not be permitted to re open the proceedings through another guardian. No such consideration obviously arises in this case. Nor is there room for application of the theory, as there was in the case of

(5) 16 Ind. Cas. 839; 36 M. 570; 12 M. L. T. 188; 23 M. L. J. 269; (1912 M. W. N. 912.

(6 20 Ind. Cas. 625; 38 M. 396; (1913) M. W. N. 588; 14 M. L. T. 89; 25 M. L. J. 219.

(7) 3 C. L. J. 224.

(8) 35 C 1086 at p. 1090; 12 C. W. N. 914; 8 C. L . J. 120.

(9) 13 Ind. Cas. 632; 34 A. 207; 9 A. L. J. 158.

(10) 5 Ind. Cas. 164; 33 M. 410; 7 M. L. T. 44.

(11) 21 C. 539; 10 Ind. Dec. (N s.) 989.

(12) 3 Ind. Cas. 178; 10 C. L. J. 263.

(13) 30 Ind. Cas. 161; 21 C. L. J. 557; 19 C. W. N. 882.

(14) 18 C. 45; 9 Ind. Dec. (N. s.) 31.

(15) 7 Ind. Cas. 749; 14 C. W. N. 1063.

(16) 30 Ind. Cas. 12; 21 C. L. J, 555.

Prafullananda Goswami v. *Brojendra Nandan Goswami* (17); that there has been so great a lapse of time as to justify a refusal by the Court to re-open matters in controversy in exercise of its discretionary powers: *Brinda Chowdhrain* v. *Radhica Chowdhrain* (18).

The result is that this appeal is allowed, and the application for revocation is granted. The Probate will be re called, the original Probate proceedings will stand revived and the present respondent will be at liberty to prove the Will in solemn form. The costs of all the parties to the present proceedings, both in this Court and in the Court below, will come out of the estate. We assess the hearing fee in this Court at three gold *mohurs*.

N. H. & B. N.

Appeal allowed.

(17) 51 Ind. Cas. 593.
(18) 11 C. 492; 5 Ind. Dec. (N. s.) 1087.

ALLAHABAD HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEAL No. 369 OF 1920.
July 25, 1922.

Present :—Sir Grimwood Mears, KT., Chief Justice, Mr. Justice Piggott, Mr. Justice Gokul Prasad, Mr. Justice Kanhaiya Lal, and Mr. Justice Sulaiman.

LALLU SINGH—DEFENDANT—APPELLANT
versus
GUR NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Gift—Gift by Hindu lady with reservation of usufruct for her life, validity of—Transfer of Property Act (IV of 1882), s. 123, effect of, on gift by Hindu - Gift, how effectuated—Statutes, interpretation of—Long and established interpretation.

A Hindu lady who is the full proprietor of immoveable property can by a registered document, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her lifetime and without retaining power of alienation over it.

There is nothing in the Hindu Law which on principle would make a reservation of the usufruct of a part of the property for life by the donor, or the postponement of the enjoyment by the donee of a part of the profits till after the donor's death, a repugnant condition and render the gift invalid. [p. 801, col. 2.]

The effect of section 123 of the Transfer of Property Act is to supersede the rule of Hindu Law, if there was any, for making the delivery of possession absolutely essential for the completion of the gift, and a provision in a deed of gift that no such delivery is to take place during the lifetime of the donor would not necessarily invalidate it. [p. 800, col. 1.]

Dharmodas Das v. *Nistarini Dasi*, 14 C. 446; 7 Ind. Dec. (N. s.) 297, *Balbhadra* v. *Bhowani*, 34 C. 853; 11 C. W. N. 956; 6 C. L. J. 233, *Alabi Koya* v. *Mussa Koya*, 24 M. 513 at p. 522; 11 M. L. J. 227, *Madhabrao Moreshvar* v. *Kashibai Dattubhai*, 5 Ind. Cas. 599; 34 B. 287; 12 Bom. L. R. 9, *Man Bhari* v. *Naunidh*, 4 A. 40; A. W. N. (1881) 78; 6 Ind. Jur. 429; 2 Ind. Dec. (N. s) 512 (P. C.), *Balmakund* v. *Bhagwan Das*, 16 A. 185; A. W. N. (1894) 21; 8 Ind. Dec. (N. s.) 19, *Phul Chand* v. *Lakkhu*, 25 A. 358; A. W. N. (1903) 70, relied on.

The effect of section 123 of the Transfer of Property Act is that a gift of immoveable property even in the case of a Hindu can be validly effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses, and that such a gift cannot be effected in any other way. [p. 799, col. 2.]

Where the terms of a Statute or Ordinance are clear, a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the clear meaning of the enactment; but where such is not the case, it is the duty of a Judge to accept the interpretation so often and so long put upon the Statute by the Courts, and not to disturb those decisions. [p. 800, col. 1.]

Tricomdas Cooverji Bhoja v. *Sri Sri Gopinathji Thakur*, 39 Ind. Cas. 156; 25 C. L. J. 279 at p. 284; 1 P. L J. 262; 15 A. L. J. 217; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 654; 19 Bom. L. R. 450; 44 C. 759; 44 I. A. 65 (P. C.), relied upon.

First appeal from a decree of the Additional Subordinate Judge, Mainpuri.

Dr. *Kailas Nath Katju*, for the Appellant.

Mr. *Surendro Nath Sen*, for the Respondent.

JUDGMENT.—The only point referred to the Full Bench for consideration is the question of the validity or otherwise of a deed of gift, dated the 29th of January 1894, executed by *Musammat* Tulsha Kunwar, in favour of her only daughter, *Musammat* Naraini Kunwar. This document recites that *Musammat* Naraini Kunwar was her sole issue, and the donor wished to give the entire property in seven villages to her; but that, inasmuch as during her lifetime she had also to provide for her own maintenance and other necessary expenses, and it was reprehensive and forbidden for her to receive any benefit or to take anything from her daughter, she considered it proper to get the name of her daughter recorded over four villages at once, but to remain in possession of the other three villages for her life, meeting the expenses of her maintenance and other necessary

expenses from the profits thereof. But all the seven villages were comprised in the gift, and it was stated that she had no longer any claim or right left in respect of all the property gifted, and the donee would have all the powers of a proprietor, with this exception that the three villages last mentioned would remain in her possession during her life and she would bring the profits thereof into her use, but she would have no power of sale, mortgage, gift, or other transfer, and they would after her death come into the proprietary possession of her daughter.

It is an admitted fact that *Musammat* Tulsha Kunwar allowed *Musammat* Naraini Kunwar to obtain possession over the four villages first mentioned, and got her name recorded in respect of them in the revenue papers. There is thus no doubt as to the genuineness of her intention. It is assumed for the purpose of this reference that *Musammat* Tulsha Kunwar was the full proprietor, and the only question is as to the validity of the gift in respect of the three villages, over which she had retained the right of remaining in possession for life and did in fact retain possession. *Musammat* Naraini Kunwar died in the lifetime of *Musammat* Tulsha Kunwar, and the present dispute is between the respective heirs of the two ladies.

Reading the document as a whole, there can be no doubt that it was not a bequest of the three villages by *Musammat* Tulsha Kunwar in favour of her daughter, but that she did intend to effect a transfer *in presenti* of her proprietary interest in the three villages, though she stipulated that she would have the right to remain in effective possession of them by appropriation of their profits for her life.

The learned Counsel for the defendant-appellant has urged, (1) that under the Hindu Law delivery of possession was absolutely essential for the completion of the gift, (2) that that provision of the Hindu Law has in no way been affected by the passing of the Transfer of Property Act and (3) that in any case a provision, that the donor is not to deliver possession during her life-time to the donee, vitiates the gift altogether.

As to the first point it may be conceded at once that the general trend of the authorities prior to the passing of the Transfer of Property Act was to the effect that under the Hindu Law a gift, unaccompanied by delivery of possession, was invalid. A number of cases on this point have been cited on behalf of the appellant, but we consider it unnecessary to review them. It may be assumed for the purpose of this case that the defendant's contention is correct.

We are, however, of opinion that whatever might have been the strict Hindu Law prior to the passing of the Transfer of Property Act, it must now be held that a gift of immoveable property can be validly effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses, and that nothing further is necessary to effectuate a transfer. Section 129 of the Transfer of Property Act provides that nothing in Chapter 7 shall, save as provided by section 123, be deemed to affect any rule of Hindu Law. This clearly indicates that section 123 might supersede a rule of Hindu Law. Section 123 provides that for the purpose of making a gift of immoveable property, the transfer *must* be effected by a registered instrument duly signed and attested, whereas for the purpose of making a gift of moveable property the transfer *may* be effected by a registered instrument duly signed *or* by delivery. It is obvious that under the latter clause a gift of moveable property can be effected by a duly signed and registered instrument and without delivery. This does away with the provision of Hindu Law, requiring delivery of possession as regards moveable property. Now, the first clause uses the word "*must*" which is significant, and omits the words "or by delivery". A reasonable interpretation of section 123 would, therefore, be that a registered instrument duly signed and attested is quite sufficient to effect a gift of immoveable property, and that such a gift can be effected in no other way.

Dr. Katju, on behalf of the appellant, has strongly contended that by section 123 it was merely intended to add one more requirement of law, namely, that of attestation and registration, to those enjoined by the Hindu Law, and that the section did not mean that where there was a registered document duly signed and attested,

all the other requirements of Hindu Law were dispensed with. Section 123 has, however, been interpreted by all the High Courts continuously for a very long period in the way first indicated, and there is now a uniform consensus of opinion that the effect of section 123 is to supersede the rule of Hindu Law, if there was any, for making the delivery of possession absolutely essential for the completion of the gift. We may only refer to a few cases for the sake of reference, *Dharmodas* v. *Nistarini Dasi* (1), *Balbhadra* v. *Bhowani* (2), *Alabi Koya* v. *Musia Koya* (3), *Madhavrao Moreshvar* v. *Kashibai Dattubhai* (4), *Man Bhari* v. *Narindh* (5) *Balmakund* v. *Bhagwan Das* (6)and *Thul Chand* v. *Lakhhu* (7). Where the terms of a Statute or Ordinance are clear, then even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the clear meaning of the enactment; but where such is not the case, then it is our duty to accept the interpretation so often and so long put upon the Statute by the Courts, and not to disturb those decisions, *vide* the remarks of their Lordships of the Privy Council in the case of *Tricomdas Cooverji Bhoja* v. *Sri Sri Gopinath Thakur* (8). We are, therefore, clearly of opinion that it must now be accepted that the provisions of section 123 do away with the necessity for the delivery of possession, even if it was required by the strict Hindu Law.

The third point raised by the learned Advocate for the appellant requires a little consideration. It has been very strenuously contended that where the deed of gift itself provides that the donor is to retain possession over the property and appropriate the profits, the transaction is void *ab initio* and is not a valid gift under the Hindu Law at all. Reliance is strongly placed on a number of cases which were decided prior to the passing of the Transfer of Property Act, in which it was held that the delivery of possession was absolutely essential, and it is contended that when the delivery of possession was essential, then a provision in the deed that no delivery was to take place at all, invalidates the gift altogether.

In the first place, these earlier cases were decided prior to the passing of the Transfer of Property Act, and the provisions of section 123 of the Act were not applicable. Now that the delivery of possession is no longer necessary, it would follow that a provision in the deed of gift that no such delivery was to take place during the lifetime of the donor, would not necessarily invalidate it.

In the second place, the reservation of a temporary advantage or a limited benefit does not necessarily militate against a complete transfer of the title, and unless there is something in Hindu Law which is repugnant to it, it must be upheld. Now, according to our interpretation, the true intention of the donor was to effect a transfer *in presenti* of the proprietary interest in the three villages in dispute and to vest the same in the donee, with a reservation of the right to enjoy the usufruct during her own lifetime. We do not consider that she meant to create two distinct and separate estates; one, which she reserved for herself, and the other which she bestowed on the donee, providing that the estate which she had reserved for herself would also vest in the donee after her own death. On the other hand, we are distinctly of opinion that the whole interest in the three villages vested immediately in the donee, and the donor had no power of disposal left over it. The only right that was reserved to her was to enjoy the profits thereof. There was an immediate gift of all the seven villages, but the enjoyment by the donee of the profits of three villages was postponed till after the death of the donor.

Such a gift is not in any way opposed to Common Law or to public policy, nor is such a transfer invalid under the provisions of the Transfer of Property Act. We have, therefore, to see whether there is anything in the Hindu Law which is repugnant to it. No

(1) 14 C. 446; 7 Ind. Dec. (N. s.) 297.
(2) 34 C. 853; 11 C. W. N. 956; 6 C. L. J. 233.
(3) 24 M. 513 at p. 522; 11 M L. J. 227.
(4) 5 Ind. Cas. 599; 34 B. 287; 12 Bom. L. R. 9.
(5) 4 A. 40; A. W. N. (1881) 78; 6 Ind. Jur. 429; 2 Ind. Dec. (N. s.) 512 (P. C.).
(6) 16 A. 185; A. W. N. (1894) 21; 8 Ind. Dec. (N. s.) 119.
(7) 25 A. 358; A. W. N. (1903) 70.
(8) 39 Ind. Cas. 156; 25 C. L. J. 279 at p. 284; 1 P. L. J. 262; 15 A. L J. 217; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M.W. N. 363; 5 L. W. 654; 19 Bom. L. R. 450; 44 C. 759; 44 I. A. 65 (P. C.).

authority which is exactly in point has been cited before us on either side. The learned Advocate for the appellant has however, referred to us the case of *Dagri Dabe* v. *Mothura Nath Chattopadhya* (9). There the gift was not governed by the Transfer of Property Act. The view then expressed was that the gift of a house, in a case where the donor reserved to himself the right of remaining in the house for the term of his life and which was unaccompanied by physical delivery, or any symbolical act by which physical delivery could be held to be implied, was invalid. The decision was based entirely on the supposed rule of Hindu Law that delivery of complete possession was absolutely essential. That ruling is hardly in consonance with the opinion expressed by the Calcutta High Court in subsequent cases. The case cited in Macnaghten's Hindu Law, Volume II, at page 207, is not in point, because there the competition was between a gift, unaccompanied by the delivary of possession, which was to take effect after the death of the donor, and a subsequent gift by which the donor delivered possession to another donee. That was strictly not the case of a gift *in præsenti*, but something in the nature of a bequest. At that time testamentary dispositions not having been separately recognized, the case was treated as falling under the heading of gifts

Lastly, the case of *Harjivan Anandram* v. *Naran Haribhai* (10) has been cited, and our attention is particularly drawn to the texts quoted at page 34. But there, too, the possibility of the donor retaining possession of the property with the consent of the donee is recognised. We cannot take these texts necessarily to imply that the donor cannot gift away the property with a condition attached, reserving the usufruct of a part of the property to himself for life. The other cases cited are not directly in point.

A reference has also been made to a passage in *Ram Lal Sett* v. *Kanai Lal Sett* (11) to the effect that "gifts are of three kinds—those which convey a present title and interest, and a present right of enjoyment; those which are vested, that is, present in interest, but in which the enjoyment is deferred; and those which are contingent, that is to say, in which neither title nor right of enjoyment is given at present, but both depend upon future and certain events. All these kinds of gifts are admissible among Hindus, all are recognized by the Succession Act, the Hindu Wills Act, and the Transfer of Property Act. All these kinds of gifts may among Hindus be given subject to various restrictions, either *inter vivos* or by Will, and, speaking generally, the same law applies in either case." But this remark is certainly an *obiter dictum*.

In West and Buhler's Digest of Hindu Law, 4th Edition, at page 188, it is stated that the grantor may stipulate or provide for various advantages to himself or to others arising out of the property, and so far diminish the advantages of the proprietor in it, and then on page 190 it is said on the authority of Jagannath that the gift of property is valid though it be accompanied by the donor's retention of a life-interest. No distinction was, however, made by Jagannath between a gift and a testamentary disposition. The case of *Kasim Husain* v. *Sharif-un-nissa* (12), where a gift of a Muafi Estate with a reservation of the income of that share without power of alienation for life was held to be valid, was a case under the Muhammadan Law and is not applicable to the present case.

In the absence of any clear authority restricting the power of the donor, we are of opinion that there is nothing in the Hindu Law which on principle would make a reservation of the usufruct of a part of the property for life by the donor, or the postponement of the enjoyment by the donee of a part of the profits till after the donor's death, a repugnant condition and render the gift invalid. Furthermore, we are of opinion that, inasmuch as the Legislature has now dispensed with the necessity of delivery of possession in the case of gifts by Hindu donors, a reservation of the kind indicated above would now much less affect the validity of such gifts. Under the Hindu Law gift and its acceptance by donee are essential. Here both these elements exist.

Our answer to the reference, therefore, is that a Hindu lady who is the full proprietor

(9) 9 C. 854; 12 C. L. R. 530; 4 Ind. Dec. (N. S.) 1219.

(10) 4 B. H. C. R. (A. C. J.) 31.

(11) 12 C. 663 at p. 668; 6 Ind. Dec. (N. S.) 450.

(12) 5 A. 285 A. W. N. (1883) 31; 3 Ind. Dec. (N. S.) 267.

of immoveable property, can by a registered document, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her life-time and without retaining any power of alienation over it.

The appeal will now be restored to the Division Bench for disposal.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1638 OF 1917.

February 1, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

SAWAN MAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAUNAQ MAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 75, O. XXVI—Commission, issue of—Court delegating functions to Commissioner.

Section 75 of the Civil Procedure Code defines clearly the circumstances under which a commission may be issued, and does not authorise a Court to delegate to a Commissioner the trial of any material issue which it is itself bound to try. [p. 803, col. 2.]

Sangili v. *Mookan*, 16 M. 350; 3 M. L. J. 187; 5 Ind. Dec. (N. S.) 951, relied upon.

Second appeal from a decree of the District Judge, Hissar, dated the 17th April 1917, reversing that of the Subordinate Judge, Second Class, Hissar, dated the 4th March 1915.

Mr. *Philip Morton*, for the Appellants.

Mr. *N. C. Pandit* and Lala *Hargopal*, for the Respondents.

JUDGMENT.—In this case the plaintiff firm sued the defendants alleging them to be a Hindu joint family and claiming to recover from them as such Rs. 1,217-10-3. The case was carefully tried by the Subordinate Judge and a lucid and well-expressed judgment was written by him, disposing of all the points in dispute and dismissing the suit. On appeal the District Judge first heard the arguments, and then apparently on his own motion referred every question arising in the case, and in fact one question which had not arisen at that stage, to Lala Sheo Narain and issued a most comprehensive commission to him. This gentleman died before he was able to do anything, and his son, Lala Joti Parshad, was appointed in his place. A full report was submitted, but apparently no evidence was taken, though the statements of the parties were recorded. The District Judge then pronounced judgment and accepted the findings of the Commissioner throughout.

On appeal it is urged that the only possible point on which the District Judge could have been justified in issuing a commission was the examination of accounts, and that in this case he was not justified in doing so, as the question of the correctness of the accounts had not only not been challenged but had not even arisen, the defence having been that the defendants had no sort of dealings with the plaintiff firm and the finding being that this was so. Until, therefore, the District Judge reversed the decision of the lower Court and found that there had been dealings, the question of the amount due on those dealings did not arise, and when it did the usual and natural procedure would have been to remand the case for a decision. Not content with issuing a commission which might be necessary at some later stage, the District Judge directed the Commissioner to decide every single material issue whether of law or fact and, in a word, to do his work for him. Counsel for the respondents urges that, even so, there are findings of fact and, in the words of *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) that there was evidence before the Court. The very form of the judgment shows that the way in which the District Judge approached the case was to accept the opinion of the Commissioner as final and conclusive unless the plaintiff could show how and where it was wrong. He made no reference to the evidence on the record nor to the

(1) 18 C. 23 (P. C.); 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16.

well-expressed judgment of the Trial Court, and we are satisfied that, in the sense of being considered by him, the evidence was not before him, though he had the knowledge that ample evidence had been given.

As to the scope of the commission, Counsel for the respondents urges that O. XXVI amplifies and explains section 75 and that the Court is at liberty to issue a commission on any subject whatsoever and not merely on the subjects given in heads (*a*), (*b*), (*c*), and (*d*) of section 75 and dealt with in the first four branches of O. XXVI, the headings of which repeat the wording of that section. With this contention we cannot agree. Section 75 runs:—"Subject to such conditions and limitations as may be prescribed," those conditions and limitations being contained in the subsequent Orders. The words on which Counsel relies are to be found in r. 9 of O. XXVI—"In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any *matter in dispute*"—and these come immediately under the heading "commissions for local investigations." Here there was no question of a local investigation and no such investigation was made, and all that the Commissioner did, and apparently all that he understood he was required to do, was to give an opinion on the case generally and on each of the issues of law and fact.

Counsel for the respondents further urges that the commission having been accepted by the defendants-appellants they cannot now question it. There is nothing whatever to show that they accepted the commission or agreed to having one issued. All that they did was to accept Lala Joti Parshad after the death of his father as a suitable person to do the work which the Court had decided to entrust to a Commissioner.

The most material point in the case was, whether a certain document had been signed by Sawan Mal, defendant. On this the Commissioner gave an opinion as an expert witness which may be good or bad, and this opinion was accepted by the District Judge. The finding as to the amount shown to be due in the accounts is given by the District Judge in the following words:—"The Commissioner's calculation is not shown by the respondents' Pleader to be erroneous in any way." We are of opinion that section 75 defines clearly the circumstances under which a commission may be issued, and *Sangili* v. *Mookan* (2) explains that it does not authorise a Court to delegate to a Commissioner the trial of any material issue which it is bound to try. We find, therefore, that there has been a grave irregularity in the issuing of a commission at all, that the District Judge has not done his duty, inasmuch as he has not come to an independent finding on the material issues in the case, that the findings, such as they are, are not based on the evidence on the record and that, so far as the District Court is concerned, the case has not been tried at all. Counsel for the appellants states that his clients never questioned the correctness of the accounts and do not question them now, and that if their liability be held to be proved a decree should be passed against them for the total amount claimed. The necessity, therefore, for examining the accounts in order to see what amount is due wholly disappears, even if the defendants, or any of them, be held to be liable, and what is required is a clear finding on the various material issues.

We remand the case to the District Judge for a decision on the merits wholly independent of the Commissioner's report which should be entirely ignored. It is unnecessary for us to frame any fresh issues as those framed by the Trial Court are correct and exhaustive.

Z. K.

Case remanded.

(2) 16 M. 350; 3 M. L. J. 137; 5 Ind. Dec. (N. S.) 951.

NANDKESHWAR MISRA v. SUDARSHAN RAM TEWARI.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 706 OF 1921.

June 28, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

NANDKESHWAR MISRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUDARSHAN RAM TEWARI—PLAINTIFF AND SEVARAM TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Parties—Co-sharers—Partition suit by transferee of one co-sharer—Transferor, whether necessary party.

Where the interest of one of several co-sharers has been transferred to a third person and has property vested in him, he can bring a suit for partition without joining his transferor, for the latter, although a proper party to the suit, is not a necessary party. [p. 804, col. 2]

Second appeal.

Mr. *Shiveshwar Dayal*, for the Appellants.

Mr. *Lakshmi Narayan Singh*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of a suit for partition instituted by the plaintiff-respondent, Sudarshan Ram Tewari, against the appellants The plaintiff on the 10th February 1914 obtained a conveyance from one Palta Kuer and her son Ram Surat Sukul. Palta Kuer, according to the case of the plaintiff, inherited the share which was of Ram Yad. According to the case of the plaintiff Ram Yad was separate from the predecessors in-title of the defendants. The defendants resisted the suit on the ground that Ram Yad was joint with their predecessors-in-title and that on Ram Yad's death, the interest which was of Ram Yad survived to them and did not vest in Palta Kuer, the predecessor-in-title of the plaintiff. The Courts below have concurrently held that Ram Yad was separate from the predecessors-in-title of the defendants, and that his share vested on his death in his widow, Sheo Tabla Kuer, and that on her death it vested in her daughter Palta Kuer. On this finding the plaintiff was entitled to a decree for partition if in fact he had obtained joint possession of the property on the execution of the conveyance in his favour by Palta Kuer and Ram Surat Sukul.

In this Court it has been ingeniously argued by Mr Shiveshwar Dayal on behalf on the defendants appellants that Palta Kuer not being cited in the action as a defendant, the plaintiff is not entitled to a decree for partition. The argument of Mr. Shiveshwar Dayal is this: that upon the finding of the Court that Ram Yad was separate from the defendants' predecessors-in-title, it is open now to Palta Kuer and to her son Ram Surat Sukul to institute a suit for partition as against them and he says that in order to prevent Palta Kuer and her son Ram Surat Sukul from harassing them, the Court should have insisted upon the plaintiff bringing Palta Kuer and her son in the record as parties defendants. I quite agree that Palta Kuer and Ram Surat Sukul would be proper parties to an action for partition, but I am not prepared to say that they were necessary parties to the action. In my opinion, the appellants would be entitled to succeed on this point only if it could be shown that on the judgments of the Courts below or on the admission of the plaintiff there was an interest which was outstanding in somebody else and was not represented in the action. Now, that is not the conclusion at which the Courts below have arrived. Their conclusion is that the interest of Palta Kuer has properly vested in the plaintiff; there is, therefore, no interest according to the decision of the Courts below outstanding in any body who is not a party to the suit. The Courts cannot possibly prevent Palta Kuer from instituting a suit if she likes against the parties to the suit.

The only question which we have to decide is this: is Palta Kuer a necessary party to the suit? In my opinion she is not, and the argument of Mr. Shiveshwar Dayal on this point must fail.

It was then argued that the plaintiffs are not entitled to a decree for possession since the Court of first instance has come to the conclusion that Palta Kuer is in possession of some of the properties in suit. It has been argued that in order to succeed in a suit for partition there must not only be the unity of title but that there must be unity of possession and that if, on the

finding of the Court below, the plaintiff is not in possession of the properties he is not entitled to a decree for partition. That is true, but still the plaintiff would be entitled to a decree for joint possession and for partition. That argument is really an argument on Court fees and does not affect the merits of the case. If, indeed, Palta Kuer is still in possession of the property, the plaintiff may have some difficulty in enforcing the decree which he has obtained, but we have nothing to do with that question. The question is one of technicality without any merit to recommend it.

I would dismiss this appeal with costs.

COUTTS, J.—I agree.

N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No 15 OF 1920.

June 14 1922

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

PEARE LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUNDER SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mortgage of family property—Onus of necessity on creditor, when shifted—Question of onus mixed question of fact and law—Antecedent debt what is—Joint Hindu family—Debt incurred by karta—Presumption.

The onus of proof to support a mortgage of family property lies upon a creditor. [p. 807, col. 2]

Chandradeo Singh v *Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263, followed.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), referred to

In the absence, however, of evidence tending to shake confidence in the transactions themselves or in the conduct and care of a manager or a creditor, the onus is shifted back on to the sons or members of the family who desire to repudiate the transactions. [p. 807, col. 1]

The question of onus is not a mere question of law. Once the principle of onus has been settled, the question still remains in the decision of each particular case as to whether, having regard to the transactions which have been established by evidence, the onus still remains where it was or whether, on the other hand, it has been made to shift So that in each particular case whether the onus has been shifted or not becomes a mixed question of fact and law [p. 807, col. 1.]

The onus may be totally shifted without any express evidence beyond what may be afforded by documents or the admitted circumstances of a case. [p. 806, col]

Nanda Lal Dhur Biswas v. *Jagat Kishore Acharjya*, 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 869; 14 A. L. J. 1103; 24 C. L. J. 497; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.), followed.

In order to validate a transaction of mortgage of family property by a father or manager on the ground that it was entered into to pay off an antecedent debt, there must be shown not only formal antecedency but antecedency in date combined with real dissociation in fact. Mortgages brought into existence merely to cover a breach of trust and what is called an unreal antecedency should not be given effect to by Courts [p. 806, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), followed.

There is no presumption that fathers of joint Hindu families or managers or *kartas* necessarily go out of their way to borrow money for purposes which they know to be unlawful and which can confer no benefit upon the general body of the family to which they belong [p. 806, col. 2; p. 807, col 1.]

First appeal from a decree of the Subordinate Judge, Budaun.

Dr. *Surendro Nath Sen*, for the Appellants.

Mr. *Raza Ali*, for the Respondents.

JUDGMENT.—In our view this appeal fails. It raises in form a nice question of onus in a case where the law has uncontrovertibly placed the onus of proof to support a mortgage of family property upon the shoulders of the creditor. It is sufficient, for the purpose of the preceding statement, to refer to the judgment of Sir John Stanley in the case of *Chandradeo Singh* v. *Mata Prasad* (1) which has received the expressed approval and adoption, if one may use the term, of the Privy Council, more than once and particularly in the case of *Sahu Ram Chandra* v. *Bhup Singh* (2), and we, of course, faithfully adhere to

(1) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263 (F. B.).

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.),

that decision which may be said to have a force in India equivalent to Statute Law.

We adopt also the principle laid down by the Privy Council, as expressed in the concluding words of the opinion of their Lordships delivered by Lord Shaw in the case of *Sahu Ram Chandra* v. *Bhup Singh* (2), where he says that in order to validate a transaction of mortgage of family property by the father or manager there must be not only formal antecedency, but antecedency in date combined with real dissociation in fact. The Courts in India are warned not to give effect to mortgages brought into existence merely to cover a breach of trust and what is called an unreal antecedency.

But the question of onus is not a mere question of law. Once the principle of onus has been settled, the question still remains in the decision of each particular case, as to whether, having regard to the transactions which have been established by evidence, the onus still remains where it was, or whether, on the other hand, it has been made to shift, and one might cite, if any useful purpose would be served by citing them, cases in which the onus has been shifted several times during the process of elucidating a case in consonance throughout with the general principle of law governing the question of onus in such circumstances. So that in each particular case, whether the onus has been shifted or not, it becomes a mixed question of fact and law, or rather a question of the due application of a recognized principle to the shifting scenes and circumstances of the countless varieties of human life in business. An illustration of the way in which the onus may be totally shifted without any express evidence beyond what may be afforded by the documents or the admitted circumstances of the case, which are common ground to both parties, is to be found in the case of *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya* (3) where ancient documents affecting an alienation by Hindu widows, which would *a priori* be totally contrary to law and which contain mere recitals of necessity which prove nothing except that the parties to the deeds were anxious to make other people believe that there had been necessity, and the admitted circumstances in which such deeds had been entered into, were held sufficient as a matter of fact and common sense to shift the onus, and in the absence of anything to the contrary, to justify the findings of fact sufficient to support the documents. In this case we have (we do not propose to enter into a detailed history of the transaction), broadly speaking, a document which is sued upon in 1918 dated 1906 in respect of which the creditor has succeeded in showing a sum roughly of Rs. 3,071 to have been made up of various liabilites, not in themselves open to objection, except two earlier mortgage-bond liabilities dated respectively 1898 and 1899. It is in respect of these two mortgage bond liabilities that Dr. Sen in his able argument has seriously challenged the view taken by the learned Judge. On the question of legal necessity these two documents are silent. They do no more than re-open previous liabilities traceable to four prior transactions, two of which had occurred in 1892 and two in 1897, which are brought forward, and re-affirmed as existing liabilities and discharged by the fresh contracts made in 1897 and 1899. These prior transactions are not on the record. Both parties were either content, or compelled, to rest upon the state of the evidence without the assistance of these documents, and to rely upon such inferences as the Court could legitimately draw from the evidence in such condition. There is nothing to show us, and it by no means follows from one's experience of these and other instances, that, if these documents had been brought upon the record, they would not again have opened out a fresh vista of prior transactions of business loans brought forward, and re affirmed by them, and throwing the parties back another stage in the history of this family's borrowings. As a matter of business and common sense, which are really matters of fact, we decline to take judicial notice of the fact that fathers of joint Hindu families, or managers or *kartas*, as the

(3) 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 668; (1916) 2 M. W. N. 386; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1108; 24 C. L. J. 487; 1 P L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.).

case may be, where the father is dead, are necessarily and chiefly occupied in going out of their way to borrow money for purposes which they know to be unlawful and which can confer no benefit upon the general body of the family to which they belong and of which they are the respected heads. On the contrary, the presumption must be in their favour, *viz.*, that inasmuch as their own interests are indissolubly interwoven with the interests, and, one may say, also the affections of the other members of the family, it is after all not paying a very high compliment to their character and natural inclination to presume, unless there is something to arouse suspicion in the evidence of the case, that the object of going through all this trouble of raising loans is to assist and benefit the joint family. The learned Judge in this case has contented himself with finding that the Rs. 3,000 was borrowed for legal necessity to pay antecedent debts and for family expenses and that, therefore, to that extent the sons were bound by the mortgage, and nobody can doubt, to apply Lord Shaw's language, that the transactions of 1898 and 1899 were really antecedent and dissociated in fact. The opinion of the Privy Council, as expressed by Lord Buckmaster in the case of *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya* (3), seems to us to be peculiarly appropriate. To hold otherwise, that is to say, to hold in cases of transactions which go back beyond the stage at which direct evidence can possibly be expected from the creditor, and to destroy the liability if such evidence is not forthcoming, would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time.

We are prepared to hold in this and similar cases that, in the absence of evidence tending to shake confidence in the transactions themselves, or in the conduct and care of the manager, or of the creditor, the onus is shifted back on to the sons or members of the family who desire to repudiate the transactions. We might add to the observations of Lord Buckmaster that to hold otherwise is to hold out to litigants the deliberate invitation, one might use the word temptation, to attempt to conform to an impossible standard of evidence by calling direct testimony which must of necessity be valueless and frequently deliberately perjured. There is enough of this sort of thing in the Trial Courts as it is without any further encouragement being given to it by us. Taking a broad view, although there are exceptions to every rule, we ourselves are not prepared to call upon the creditor to trace every rupee in a transaction which, broadly speaking, is obviously honest and properly entered into. We think that the creditor has done all that he was required to do by the decisions of the Privy Council in this matter, that the learned Judge has come to a right conclusion and that this appeal must be dismissed with costs.

N. K.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 151 OF 1920.

May 25, 1920.

Present:—Mr. Justice Shadi Lal, Chief Justice.

CHHABER SINGH—DEFENDANT—APPELLANT

versus

RADHU RAM—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144, object of—Loss caused independently of execution of decree reversed, whether recoverable.

Under section 144 of the Civil Procedure Code a decree-holder can claim compensation only for the loss caused to him by reason of the *execution* of the decree reversed on appeal and not for any loss caused independently of the same.

A entered into possession of certain land in execution of a decree obtained against *B*, but was again dispossessed by the latter. By and by *B*

got the decree set aside but it was sometime before he entered into possession under the same formally. *A* eventually got the decree restored in second appeal and claimed mesne profits under section 144 beginning from the time when *B* got the decree of the first Court set aside :

Held, that mesne profits could be claimed under that section only from the time when *B* entered into possession in pursuance of his decree formally and not from the date when he got the decree of the First Court set aside, as *A*, even though dispossessed by *B*, must be deemed to have been in possession in execution of the decree passed in his favour by the Court of first instance until he was formally evicted therefrom by the process of law.

Miscellaneous second appeal from the order of the District Judge, Jhang at Sargodha, dated the 19th November 1919, modifying that of the Senior Subordinate Judge, First Class, Jhang, dated the 1st May 1919.

Mr. *M. S. Bhagat*, for the Appellant.
Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree for possession of land, and the dispute between the parties relates to the amount of compensation which the decree-holder is entitled to claim on account of the loss suffered by him by reason of the judgment-debtors having realised the produce of the land for which he has obtained a decree from the Court of final appeal. The relevant facts are as follows:—The respondent, Radhu Ram, whose land had been sold during his minority by his two brothers, obtained from the Trial Court a decree for possession of the land on 24th August 1911, and got possession in execution of the decree on 5th March 1912. The decree in his favour was, however, reversed by the Divisional Judge on 3rd January 1913, with the result that the possession of the land was taken back from him on 3rd July 1914. Radhu Ram appealed to the Chief Court of the Punjab, which reversed the decree of the Divisional Judge and restored that of the Court of first instance. This final decree was passed on the 11th March 1915*, but Radhu did not recover possession until the 16th October 1916.

He now claims *mesne* profits for seven harvests, and his claim for three harvests, namely, *Kharif* 1914 *Rabi* 1915, and *Kharif* 1915, is admitted. The dispute in the Court of the District Judge was consequently narrowed down to the following four harvests, namely, *Kharif* 1911, *Kharif* 1913, *Rabi* 1914 and *Rabi* 1916, and with respect to all these harvests the learned Judge finds that the judgment-debtors realised the produce to which the decree-holder was entitled. In view of this finding of fact Mr. M. S. Bhagat for the appellant does not dispute the liability of his client in respect of *mesne* profit for *Rabi* 1916.

As regards *Kharif* 1911, the learned Counsel contends that though the decree-holder got his decree in the original Court on 24th August 1911, he did not obtain possession in pursuance of that decree until the 5th of March 1912 and that as the crop in question relates to a period prior to the latter date, the decree holder cannot ask the Court of Execution to award him *mesne* profits with respect to that harvest. Now, it is clear that section 144, Civil Procedure Code, under which the decree-holder applied to the Court of Execution, empowers that Court only to order restitution, that is to say, to restore to the party what he has lost in execution of an erroneous decree passed against him which decree has been reversed on appeal. The provisions of the aforesaid section would help the decree-holder in getting compensation for any loss caused to him by reason of the execution of the decree of the Divisional Judge, but do not entitle him to recover *mesne* profits for a period which had elapsed before he executed the decree passed in his favour by the Court of first instance. It was open to him to include in his plaint a claim for *mesne* profits and the Court could then have awarded him *mesne* profits for a period not exceeding three years subsequent to the date of the decree, *vide*, O XX, r. 12, Civil Procedure Code. No such claim was, however, made, and the decree, as it stands, does not grant him any relief with respect to *mesne* profits.

Mr. Fakir Chand for the decree-holder is unable to cite any law which would justify the award of *mesne* profits for *Kharif* 1911 by the Court of Execution. Accordingly I hold that *mesne* profits for that harvest cannot be allowed to the decree-holder.

*See *Radhu Ram* v. *Mohan Singh*, 29 Ind. Cas. 199. —[*Ed.*]

With respect to the remaining two harvests, namely, *Kharif* 1913 and *Rabi* 1914 it is contended that, though the judgment-debtors got the decree of the Court of first instance set aside on 3rd of January 1913, they did not recover possession of the land in pursuance of that decree until the 3rd of July 914, and that, so far as the Court is concerned, the decree holder must be deemed to have been in possession of the property from the 5th March 1912, the date on which he obtained possession in execution of the decree passed in his favour by the original Court, until he was evicted on 3rd July 1914 by the process of law. This contention is, in my opinion, correct. If the judgment-debtors wrongfully realised the produce of the land for a period during which the decree-holder was in possession, he cannot ask the Court of Execution to help him. The object of section 144 is that anything done in execution of a decree reversed on appeal should, so far as possible, be undone; and that the party, who has been finally victorious, should be placed in the position which he would have occupied, if the erroneous decree had not been carried out. Now, as pointed out above that decree was carried out only on 3rd July 1914; and section 144 has, therefore, no bearing upon any act done by the judgment-debtors prior to that date.

Here again Mr. Faqir Chand expresses his inability to invite my attention to any provision of law which would help his client. I must accordingly hold that the decree-holder is entitled to *mesne* profits for four harvests only; and the District Judge has, after a consideration of the evidence, found that the price of the produce for three harvests amounts to Rs. 268.

As regards interest on the produce, it is sufficient to say that the definition of *mesne* profits as contained in section 2, sub section (12) of the Civil Procedure Code, includes not only the profits of immoveable property but also interest on such profits. The rate of interest may be such as the Court deems reasonable, and the Courts below have given good reasons for awarding interest at 12 per cent. per annum. The learned Counsel for the appellant has not been able to satisfy me that the rate is, in the circumstances mentioned by the Courts below, excessive, and should be reduced.

The result is that I accept the appeal and setting aside the orders of the Courts below remit the case to the Court of first instance, and direct it to ascertain the total amount due to the decree holder in respect of *mesne* profits for four harvests. The value of the produce should be calculated at the rate of Rs. 268/3=89⅓ per harvest. To the amount thus determined interest must be added at the rate of 2 per cent. per annum from the date on which the sum on account of each harvest became due, up to the date of realisation. The decree-holder shall be entitled to proportionate costs on the amount found due to him.

N. H.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 90 OF 1920

April 27, 1922

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

PIRBHU DAYAL—PLAINTIFF—APPELLANT

versus

TULA RAM—DEFENDANT—RESPONDENT.

Burden of proof—Execution of document, proof of—Admission of signature by other party—Onus, whether shifted.

An admission by a defendant regarding the putting of a signature or a thumb-mark on a document while he maintains that the paper when he signed it was blank is not such an admission of the execution of the document as to thrust the burden of proving his case upon him. It is for the plaintiff to prove due execution of the document. [p. 810, col. 2.]

First appeal from a decree of the Subordinate Judge, Agra.

Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *Shiv Prasad Sinha* for Messrs. *A. Sanyal* and *Sarkar Bahadur Johri*, for the Respondent.

PIRBHU DAYAL *v.* TULA RAM.

JUDGMENT.—This appeal arises out of a suit brought for specific performance of an agreement to sell property the case for the plaintiff being that on the 20th of January 1919 the defendant had executed a written agreement undertaking to convey certain immoveable property to him. The story was that on the day aforesaid, the property of the defendant, Tula Ram, was up for sale in execution of a decree and that this agreement was entered into in order to enable Tula Ram to avoid a public sale of his property and to enable him to satisfy the decree.

The document upon which the plaintiff sued was brought into Court. The defendant, Tula Ram, filed a written statement on the 15th July 1919, in which he denied that he had entered into any agreement with the plaintiff, Pirbhu Dayal. In substance his story was that he had come to some arrangement with his decree-holders and that any agreement relating to the sale of the property was with them and not with the plaintiff. It further appears from an extract from the order-sheet on the record that Tula Ram was brought into Court on the 19th January 1920, the date fixed for hearing, and was examined as a party. The document upon which the plaintiff sued was shown to him and he admitted that the paper on which the document was written bore both his signature and his thumb impression but he declared that when he put his signature and thumb-impression on this piece of paper, it was blank, and consequently, he denied that he was responsible for the agreement to sell which the plaintiff had produced in Court. On this statement being made, it appears from the order-sheet that the Pleader for the plaintiff informed the Court that inasmuch as the burden of proof lay upon the defendant, he (plaintiff's Pleader) was not willing to open the case and to call evidence. He informed the Court that he had already filed such documentary evidence as he had to rely on.

The Pleader for the defendant called no evidence, and, in this state of things, the learned Judge came to the conclusion that the suit must fail inasmuch as that the plaintiff had failed to prove his case. It has been argued, before us, that the Court below was wrong in holding, in the circumstances above indicated, that the burden of proof lay on the plaintiff. This argument, however, does not commend itself to us. It is obvious, in any case, that the burden of proving the case lay upon the plaintiff, Pirbhu Dayal. We cannot concede in favour of the appellant that any admission which was made by the defendant regarding the putting of a signature or a thumb-mark on the document in question, amounted to such an admission of execution as to thrust the burden of proving the case upon him. Obviously, there was no admission of execution of the document upon which the plaintiff relied when the defendant stated that he had put his signature and his thumb-mark on a blank piece of paper.

We have no doubt at all that in view of the pleadings, it was for the plaintiff to prove the due execution of the document upon which he was suing. We may further observe, and it is apparent from the printed record, that the plaintiff had filed a list of no less than ten witnesses on whose evidence, no doubt, he relied for the purpose of showing that an agreement had been executed in his favour by the defendant.

In spite of this we find the Pleader taking his stand upon the legal point and assuming in his own favour that no burden of proof lay upon the plaintiff but that it was for the defendant to open the case. The result is unfortunate for the plaintiff, but we cannot allow the appeal to prevail notwithstanding. There cannot be the slightest doubt that, on the facts which were before the Court, it was for the plaintiff to make out his case and he could only do that by proving due execution of the agreement itself on the part of the defendant. We affirm the judgment of the Court below and dismiss this appeal with costs including in this Court fees on the higher scale, if any.

N. K.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2007 OF 1921.

February 16, 1922.

Present:—Mr Justice Scott-Smith.

HAIDER ALI SHAH—PLAINTIFF —APPELLANT

versus

BHIKHE SHAH AND OTHERS—DEFENDANTS —RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 30—Pre-emption suit—Limitation—Physical possession—Land in possession of tenants.

The term "physical possession" used in section 30 of the Punjab Pre-emption Act means personal and immediate possession and not merely proprietary possession.

Land which is in possession of tenants is not capable of physical possession within the meaning of section 30 of the Punjab Pre-emption Act of 1913.

Ghulam Mustafa v. *Sahab-ud-din Khan*, 49 P. R. 1908; 63 P. L. R. 1908; 1 P. W. R, 1908, (F. B.) followed.

Second appeal from the decree of the District Judge, Ferozepore, dated the 7th June 1920, affirming that of the Munsif, First Class, Zira, District Ferozepore, dated the 28th July 1920.

Mr. *B. D. Qureshi*, for the Appellant.

Mr. *Sagar Chand*, for the Respondents.

JUDGMENT.—The plaintiff's suit for pre-emption of land sold by defendant No. 1 to defendants Nos. 2 and 3 having been dismissed as barred by time by the lower Courts, he has filed a second appeal to this Court. The sale was an oral one. Mutation having been attested on the 6th May 1919, the suit was instituted on the 6th May 1920. The Courts below have held that the vendees obtained physical possession of part of the land sold in *Kharif* of 1918. When the appeal first came up before Mr. Bhide, District Judge, he pointed out that the entries in the *girdawari* papers had been altered and were not altogether free from suspicion. He remanded the case and ordered that further enquiry should be made as to whether the vendees had paid the land revenue of *Kharif* 1918. Mr. Kennaway, before whom the appeal came, after the return to the order of remand, held that the vendees had paid the land revenue of *Kharif* 1918 and that the *fard ahal bachh* for *Kharif* 1918 and *Rabi* 1919 also showed that the vendees held possession. It is urged, however, by Counsel in this Court, that mere payment of land revenue does not of itself prove or even indicate physical possession and all that it indicates is ownership. It appears to me that the learned District Judge has confused proprietary with physical possession. Under section 30 of the Punjab Pre-emption Act the limitation is one year from the date on which the vendee takes under the sale physical possession of any part of such land or property, or from the date of attestation in the mutation register, whichever date shall be the earlier. Now, the land sold consists of five *khasra* numbers of which three were, in *Kharif* 1918, in the possession of tenants-at-will. When land in possession of tenants at-will is sold it is not capable of physical possession, and under the old law it was held by the Full Bench in *Ghulam Mustafa* v. *Sahab-ud din Khan* (1), that the limitation applicable to a suit for pre emption of such land is that provided by clause (2) of Art. 10 of the Second Schedule to the Indian Limitation Act. The Full Bench held that the term "physical possession" in Art. 10 of the Limitation Act means personal and immediate possession. In my opinion, the words "physical possession" in the Punjab Pre-emption Act of 1913 have the same meaning. Counsel for the respondents frankly admits that the land was in possession of tenants and that, therefore, actual possession was not taken by the vendees. Under these circumstances the date of mutation is the date from which the period of limitation has to be calculated, and the plaintiff's suit is, therefore, within time.

I, therefore, accept the appeal and setting aside the order of the lower Courts remand the case to the Court of first instance for decision on the merits. Stamps in this Court and the lower Appellate Court will be refunded and other costs will be costs in the case.

Z. K. *Appeal accepted.*

(1) 49 P. R. 1908; 63 P. L. R. 1908; 1 P. W. R. 1908 (F. B.).

SHIB DAYAL V. JAGANNATH PRASAD.

ALLAHABAD HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEALS NOS. 742 AND 743 OF 921.

February 27, 1922.

Present:—Sir Grimwood Meare, KT., Chief Justice, Justice Sir P. C. Banerji, KT., and Mr. Justice Stuart.

SHIB DAYAL AND ANOTHER—PLAINTIFFS —APPELLANTS

versus

JAGANNATH PRASAD—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5—"Sufficient cause," what constitutes—Litigant acting on Counsel's incorrect advice—Time, extension of.

The English rule, that a mistake made by a Solicitor of a party, who is applying for an extension of time, is not a sufficient ground for extending it, is a salutary one and the Courts should ordinarily insist upon legal practitioners giving correct advice. But considering the present state of the profession, an honest mistake, even though a negligent one, ought not to be allowed to operate to the prejudice of clients. [p. 814, col. 2; p. 815, col. 1.]

What constitutes "sufficient cause" within the meaning of section 5 of the Limitation Act cannot be laid down by hard and fast rules, and must be determined on a reference to the circumstances of each case. The expression "sufficient cause" should be liberally construed, so as to advance substantial justice. An honest mistake made by a litigant upon incorrect advice given to him by his lawyer is a sufficient cause within the meaning of section 5 of the Act. [p. 814, col. 1.]

Where an appellant is advised by his Vakil that copies of the judgment and decree of lower Appellate Court are sufficient for the purposes of his appeal to the High Court and he honestly believes that the advice given to him is correct and, consequently, makes a delay in the presentation of the copy of the judgment of the Court of first instance and asks that his appeal be admitted although the period of limitation has expired, such an honest mistake made by a litigant upon incorrect advice given to him by his lawyer is a sufficient cause within the meaning of section 5 of the Limitation Act and entitles him to have his appeal admitted. [p. 814, cols. 1 & 2.]

Wazir Ali Khan v. *Zainab*, A. W. N. (1903) 32, *Kura Mal* v. *Ram Nath* 28 A. 414; 3 A. L. J. 218; A. W. N. (1906) 67, *Anjora Kunwar* v. *Babu*, 29 A. 648; 4 A. L. J. 515; A. W. N. (1907) 219 and *Brij Mohan Das* v. *Mannu Bibi*, 19 A. 348; A. W. N. (1897) 86; 9 Ind. Dec, (N. S.) 228, followed.

Dewa v. *Buddhu*, 25 Ind. Cas. 30; 12 A. L. J. 837, distinguished.

Coles and Ravenshear, In re, (1907) 1 K. B. 1; 73 L. J. K. B. 27; 95 L. T. 760; 23 T. L. R. 32, *Helsby, In re, Trustee, Ex parte*, (1894) 1 Q. B. D. 742 at p. 746; 63 L. J. Q. B. 265; 9 R. 139; 70 L. T. 144; 42 W. R. 218; 1 Manson 4 and *International Financial Society* v. *City of Moscow Gas Co.*, (1878) 7 Ch. D. 241; 47 L. J. Ch. 268; 37 L. T. 736; 26 W. R. 272, not followed.

Application for leave to appeal.

Mr. *Sital Prasad Ghosh*, for the Appellants.

Mr. *Hirnandan Prasad* for Mr. *N. N. Banerji*, for the Respondent.

JUDGMENT.

MEARE, C. J.—In this case the appellant applied under section 5 of the Limitation Act and asked that a time barred appeal might be heard on the ground that there was 'sufficient cause' for his having failed to comply with the rules. When a second appeal is presented to this Court, there is no doubt that the copy of the First Court's judgment and a copy of the judgment and decree of the lower Appellate Court must be filed. The appellant waited until almost the last day for the admission of his appeal, and then, on May 2nd, 1921, filed the judgment and decree only of the lower Appellate Court. The last day of limitation expired on May 3rd, 1921. The appellant having learnt that the appeal could not be admitted without the judgment of the First Court subsequently obtained it and then asked that time should be extended and the appeal admitted. It is stated that his failure to comply with the rules was due to the error of the Vakil, in the district, who had informed him that the judgment and decree of the lower Appellate Court were alone necessary.

We believe that this is what actually happened, and, therefore, the question arises whether that explanation can in the year 1922 be accepted as sufficient cause. There is no doubt it was the practice in past years to allow applications of this kind and between 1903 and 907 distinguished Judges of this Court did absolve the applicant from the consequences of an error on the part of his legal practitioner. See *Wazir Ali Khan* v. *Zainab* (1), *Kura Mal* v. *Ram Nath* (2) and *Anjora Kunwar* v. *Babu* (3).

In 1914 the case of *Dewan* v. *Buddhu* (4) came before Sir Sunder Lal on appeal from the District Judge who had admitted a time barred appeal. The circumstances under

(1) A. W. N. (1903) 32.
(2) 28 A. 414; 3 A. L. J. 218; A. W. N. (1903) 67.
(3) 29 A. 648; 4 A. L. J. 515; A. W. N. (1907) 219.
(4) 25 Ind. Cas. 30; 12 A. L. J. 837.

which the omission to file the appeal within time took place, were not very clearly put forward by the applicant but it "was not suggested that there was any misapprehension on the part of Mr. Weston (the Counsel employed to file the appeal, as to the time within which the appeal ought to have been lodged." Sir Sunder Lal thinking that the explanation of the delay was "utterly inadequate," overruled the decision of the District Judge. That case is, therefore, clearly distinguishable from the present one, and notably from the decision of Stanley, C. J. and Banerji, J., in *Kura Mal* v. *Ram Nath* (2). On appeal a Bench of this Court upheld the decision of Sir Sunder Lal on the ground that the lower Appellate Court had no materials upon which a discretion could be exercised, *Buthu* v. *Dewan* (5).

During the hearing of this application it was suggested, by Mr. Justice Stuart, that the more correct principle was that laid down in the English decisions by which a default by the legal practitioner is not held to be a sufficient cause for extending the time for an appeal. Except for expressions of regret on the part of Collins, M.R., and Cozens Hardy, L. J., in the case of *Coles and Ravenshear, In re* (6), the current of English decisions is consistent and the result may be summarised in the words of Davey, L. J., who in *Helsby, In re, Trustee, Ex parte* (7), concluded his judgment by saying "I cannot see that a mistake made by a solicitor of the party who is applying for an extension of time is a sufficient ground for extending it"

The English Courts have laid stress upon the fact that the proposed respondent to an appeal has a right to hold his judgment and that such right ought not to be interfered with after the lapse of the prescribed time, unless there are special circumstances.

The question which is to be decided is one of policy. If this Court decides to break away from its decisions, pronounced during the period 1903 to 1907, it will not mean that these cases were wrongly decided at the time that they were so decided. In the past 15 years, legal education has progressed in this country and Courts are right in demanding in the public interest increasing competence in legal practitioners. Whilst I am of opinion that the English rule is a salutary one, and the Courts should ordinarily insist upon legal practitioners giving correct advice, it may nevertheless be that to demand at the present time a normal standard of efficiency would impose hardship upon litigants.

In this aspect of the case the decision must turn upon the question whether the profession in the *Muffasil* is in such a state of efficiency as to make it expedient to depart from the rule which has hitherto prevailed in this Court. Mr. Sital Prasad Ghosh laid emphasis on the disadvantages of practitioners in places remote from libraries, and I give weight also to the argument used by him that there is in the *Muffassil* some want of knowledge of the procedure of the High Court. My opinion as to the general average of efficiency must necessarily be based upon the quality of work as disclosed in the printed records which come up here on appeal. The work, no doubt, has been done with increasing care and discrimination, and, therefore, the records of 1917, 1918 and 1919 now coming before us in appeal do not, I believe, present a fair picture of the standard of the records in current cases in the lower Courts. Every one who practises in this Court will agree that throughout the last two years there has never been one week in which Counsel on one aside or the other, has not admitted himself to be in difficulty, by reason of the way in which the case was launched or conducted in the Court below, and the complaint is always based, not upon some mere technicality but upon a matter of real importance and substance, such as some grave defect of pleading, failure to obtain essential particulars under O. VI, rr. 4 and 5, the omission to call the plaintiff or defendant or some necessary witness or the deliberate withholding of documents or books of account. I am, therefore, of opinion that, at the present, we ought to maintain our existing practice, namely, that mistakes of the kind, into which we are enquiring, should not bar appeals. An honest mistake, even though

(5) 28 Ind. Cas. 265; 13 A. L. J. 286; 37 A. 267.
(6) (1907) 1 K. B. 1; 76 L. J. K. B. 27; 95 L. T. 759; 23 T. L. R. 32.
(7) (1894) Q. B. D. 742 at p. 746; 63 L. J. Q. B. 285; 9 R. 139, 70 L. T. 144; 42 W. R. 218; 1 Manson 4.

a negligent one, ought not, in the present state of the profession in the District be allowed to operate to the prejudice of clients. I would, therefore, admit the application.

BANERJI, J.—I, also, am of opinion that the application should be granted and the appeal admitted. The petition of appeal was presented one day before the expiry of the prescribed period of limitation, but on that date a copy of the judgment of the Court of first instance was not filed with the memorandum of appeal, as required by the rules of this Court. When the copy was subsequently produced, the period of limitation had expired. For this reason the appellant has now applied under section 5 of the Limitation Act for the admission of his appeal after the expiry of the period of limitation. Under section 5 of the Limitation Act, a petition of appeal may be admitted after the expiry of limitation, if sufficient cause is established to the satisfaction of the Court. What constitutes sufficient cause, cannot be laid down by hard and fast rules. The sufficient cause must be determined on a reference to the circumstances of each case. In my opinion the expression "sufficient cause" should be liberally construed so as to advance substantial justice. In the present case the sufficient cause alleged is that the appellant was advised, by his Vakil in the lower Court, that copies of the judgment and the decree of the lower Appellate Court would be sufficient for the purposes of his appeal. He honestly believed that the advice given to him was correct, and in this honest belief he made a delay in the presentation of the copy of the judgment of the Court of first instance, and, therefore, asks that his appeal should be admitted, although the period of limitation has expired.

It has been held in this Court in the cases to which the learned Chief Justice has referred, that an honest mistake made by a litigant upon incorrect advice given to him by his lawyer is a sufficient cause within the meaning of section 5 of the Limitation Act. These are the cases of *Wazir Ali Khan* v. *Zainab* (1), *Kura Mal* v. *Ram Nath* (2), *Anjora Kunwar* v. *Babu* (3). A similar view was also held by the High Courts of Calcutta and Madras in the cases to which Mr. Sital Prasad Ghosh invited our attention in the course of his argument. The same principle was affirmed by a Full Bench of this Court in the case of *Brij Mohan Das* v. *Mannu Bibi* (8). In all these cases it was held that if there has been an honest mistake on the part of the litigant, and this mistake has been caused by reason of an incorrect advice given to him by his Counsel, he is entitled to have his appeal admitted under section 5 of the Limitation Act. The case of *Budhu* v. *Dewan* (5) was referred to as laying down a different proposition. I do not think that this is so. The question which arises in this case was not the question which was considered and decided in that case. There the Counsel for the appellant had omitted to present his petition of appeal in due time although he had been furnished with the necessary papers and the necessary costs. That was a case in which there was culpable negligence on the part of the Counsel, and for this reason it was held that no sufficient cause had been established for the admission of the appeal after time. I was a party to one of the cases cited above, and I see no reason to alter the opinion which was expressed in that case.

A contrary view was held in the case of *Coles and Ravenshear, In re* (6 . But two of the learned Judges felt themselves bound by a recent authority in that Court Collins, M. R , said : "I confess that, if the case were free from authority, and I felt myself at liberty to follow my own judgment in the matter, I should unhesitatingly allow the time to be extended." Cozens-Hardy, L. J., observed : "If the matter had been free from authority, I should have preferred, in a case where there has been an honest mistake by the legal adviser of a party,.....to hold that the Court would be justified in giving special leave." He also added that the course of authority on the subject in England had been "far from uniform".

In this Court, as I have pointed out above there is a consensus of authorities and, I think, upon those authorities, from which I see no reason to depart, we should be

(8). 19 A. 343; A. W. N. (1897) 86; 9 Ind. Dec. (N. S.) 228.

justified in admitting the appeal, which must be taken to have been filed after the period of limitation.

The remarks which the learned Chief Justice has made as to the duty of practitioners in the Districts have my full concurrence, and I hope that those practitioners will bear them in mind.

STUART, J.—While I am still of opinion that the rule as laid down by James, L. J., in the *International Financial Society* v. *City of Moscow Gas Company* (9) and again in *Helsby, In re, Trustee, Ex parte* (7) is the rule which I should like to see enforced in this Court, I am convinced upon the reasoning of the Chief Justice that the time has not yet come when it would be wise to enforce this rule. I, therefore, concur in the order passed.

BY THE COURT.—Our order, therefore, is that we extend the time for the filing of these two appeals and declare the appeals admitted. Let a date be fixed under O. XLI, r. 11, of the Code of Civil Procedure for hearing.

N. K.

Appeal admitted.

(9) (1878) 7 Ch. D. 241; 47 L. J. Ch. 258; 37 L. T. 736; 26 W. R. 272.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 484 OF 1918.

March 2, 1922.

Present:—Mr. Justice Le-Rossignol and Mr. Justice Abdul Qadir.

THE FIRM GURDAS RAM-KOTU RAM OF MAGHIANA THROUGH KOTU RAM AND UTTAM CHAND—PLAINTIFFS—APPELLANTS

versus

BHAGWAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 57, 64, 85—Suit to recover money from agent after balance struck—Limitation—Civil Procedure Code (Act V of 1908), O XXII, r. 4—Joint contract—Appeal—Death of respondent—Abatement.

Plaintiffs alleging that the defendants were their *gumashtas* set forth in their plaint that by agreement between the parties the plaintiffs financed the defendants and took with them an equal share in profit and loss on the defendants' transactions. On the other hand, inasmuch as the plaintiffs financed the defendants, defendants undertook to pay interest. The plaint further recited a series of transactions terminating in the striking of a balance by the defendants in the plaintiffs' favour. Plaintiffs brought a suit upon the account supported by the acknowledgment:

Held, (1) that although there had been a mutual and current account between the parties, it was not open and current at the time of the suit, and that, therefore, the suit was not governed by Art. 85 of Sch. I to the Limitation Act; [p. 816, col. 1.]

(2) that if the suit was regarded as one for money payable for money found to be due on an account stated, it was governed by Art. 64 of Sch. I to the Limitation Act; [p. 816, col. 2.]

(3) that if it was regarded as a suit for money payable for money lent, or as a suit for the re-payment of principal and interest less any credit due to the defendants in respect of profit on transactions effected by the defendants, then Art. 57 of Sch. I of the Limitation Act would be applicable. [p. 816, col. 2.]

A contract entered into by one or more promisors can be enforced as against all or any of them. [p. 816, col. 2.]

Therefore, where one of several promisors who are respondents in an appeal dies and his legal representatives are not brought on the record, the appeal does not abate as a whole the right to prosecute it survives as against the surviving respondents. [p. 816, col. 2.]

Second appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 15th November 1917, reversing that of the Subordinate Judge, Second Class, Shahpur at Sargodha, dated the 31st January 1917.

Lala *Tirath Ram*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

FIRM GURDAS RAM-KOTU RAM v. BHAGWAN DAS.

JUDGMENT.—In this case the plaintiffs, alleging that the defendants were their *gumashtas*, set forth in their plaint that by agreement between the parties the plaintiffs financed the defendants and took with them an equal share in profit and loss on the defendants' transaction. On the other hand, inasmuch as the plaintiffs financed the defendants, defendants undertook to pay interest. The plaint further recited a series of transactions between May 1905 and August 1907 and the final striking of a balance of Rs 1,531-6-0 by the defendants in the plaintiffs' favour. The suit was brought upon the account supported by the acknowledgment and was decreed by the Trial Court. On appeal the learned District Judge accepted the plea of limitation which was raised only in argument and regarding Art. 85 of the Limitation Act as applicable to the suit, dismissed the suit as having been brought out of time.

The plaintiffs have come to this Court in second appeal and a preliminary objection is raised by the respondent that inasmuch as out of the four original defendants three have died and are unrepresented before this Court, the appeal must fail as a whole. For the appellant it is retorted that he is quite content with a decree against Bhagwan Das only, for the acknowledgment signed by the defendants was signed by Soman Ram, Hanun Ram and Bhagwan Das jointly and Ram Das was a mere *pro forma* defendant inasmuch as he was alleged to be a co-parcener by the other defendants. In our opinion the appeal does not fail as a whole but the right to prosecute it survives as against Bhagwan Das alone, for a contract entered upon by one or more promisors can be enforced against all or any of them.

With regard to the point of limitation which is the only one argued before us, we cannot agree with the Court below that Art. 85 of the Second Schedule of the Limitation Act is applicable, for that Article deals with a suit for the balance due on a mutual, open and current account. In the present case there was, no doubt, a current account and a mutual one. The plaintiffs had claims against the defendants for money advanced *plus* interest. The defendants could set against those claims their share of any profits made in the transactions in which the parties had a common interest but the account was not open and current at the time of the suit. The account had been closed and had been settled by the striking of a balance. In our opinion the Article applicable is Art. 64 which applies to a suit for money payable for money found to be due on accounts stated. Having regard to the nature of the contract between the parties we hold that the balance struck by the defendants was a balance on accounts stated, and inasmuch as the period of limitation for suits falling under this Article has been enlarged by the Punjab Limitation Act of 1904 the suit is within time.

If the suit be regarded, as it might well be one for money payable for money lent, Art. 57 would be applicable and the suit would be within time; if the suit be regarded as a suit for the re-payment of principal and interest less any credit due to the defendants in respect of profit on transaction effected by the defendants, then Art. 57 would seem to be applicable.

On the merits there is nothing to be said for the defendants nor has anything been said on their behalf. The appeal is accepted and the decree of the First Court is restored with costs throughout.

Z. K.

Appeal accepted.

DANGAR KHAN v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 142 OF 1922.

May 6, 1922

Present :—Mr. Justice Brasher.

DANGAR KHAN AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 73, 395, 397—Dacoity—Use of deadly weapons—Conviction—Separate sentences—Solitary confinement—Period spent in lock-up.

Where several persons join in committing a dacoity and some of them use deadly weapons, all of them are liable to be punished under section 397 of the Penal Code. The provisions of section 34 of the Penal Code are applicable to such a case. [p. 817, col 2.]

Crown v *Mohna*, 16 P. R. 1901 Cr., *Queen-Empress* v. *Mahabir Tiwari*, 2 A. 263; A. W. N. (1899) 76; 9 Ind. Dec (N s.) 876, relied upon.

Where a person is convicted of separate offences, separate sentences of solitary confinement are not illegal, but as a matter of practice a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more offences than one. [p. 818 col. 1.]

Ibrahim v. *Queen-Empress*, 7 P. R. 1897 Cr., relied upon.

A Magistrate in awarding a sentence has no jurisdiction to direct that any portion of the period during which the accused has been detained in custody as an under-trial prisoner should count as part of the sentence.

Appeal from an order of the Magistrate First Class, exercising enhanced powers under section 30 of the Criminal Procedure Code, Mianwali, dated the 24th January 1922.

Mr. *Alim Khan*, for the Appellants.

Mr. *Sularia*, for the Respondent.

JUDGMENT.—There is no doubt that on the night of January 24th, 1921 a dacoity was committed at the house of Dalil Khan. Dalil Khan after being prodded with knives was taken away by the dacoits and was kept by them for four days and then effected his escape. Four persons *viz*, Dangar, Khalaq Din, Zarin and Mohammad Jan, have been held by the Magistrate to have taken part in the dacoity and they have been convicted under sections 397 and 365, Indian Penal Code. A joint appeal has been filed an behalf of Dangar, Khalak Din and Zarin and a separate appeal has been filed an behalf of Muhammad Jan. This judgment will dispose of both these appeals.

The conviction of the first three appellants rests solely upon their identification by Dalil Khan. Muhammad Jan has been identified by Dalil Khan and there is against this appellant the additional evidence that his house is said to be one of the places to which Dalil Khan was taken by the dacoits, and that a *lungi* which has been identified by Dalil Khan as part of the property stolen from him was recovered from another house belonging to Muhammad Jan. The evidence shows that Dangar was identified in the Mianwali Jail on May 7th 1921, Khalaq Din in the Bannu Jail on May 11th 1921, Zarin at Isa Khel on August 3rd, 1921, and Muhammad Jan at the Isa Khel *Thana* on June 9th of 1921. In each case precautions were taken and the accused were placed with other persons. Dalil Khan had his eyes bandaged most of the time that he remained with the dacoits but he states that the bandage was removed on two occasions and there is no reason why he should not have been able to identify his captors. No enmity of any kind between him and the appellants has been established.

In the case of Muhammad Jan there is the additional evidence referred to above which appears to be reliable. Muhammad Jan does not claim the *lungi* as his own and admits that it was found in his house, but states that it was placed there by an enemy. There is, however, nothing to support this allegation. The defence evidence produced to show that the appellants were in different places at the time of the dacoity is obviously of no value. I see no reason to doubt that all the appellants took part in the dacoity and abduction of Dalil Khan.

The convictions under section 397, Indian Penal Code, are obviously wrong. The convictions should be under section 395, Indian Penal Code, and section 397, Indian Penal Code, should be applied in awarding the sentences.

The appellants are liable to the minimum punishment provided by section 397, Indian Penal Code, because though it is not proved that they were among the persons who used deadly weapons at the time of the dacoity it has been held in *Crown* v. *Mohna* (1) following *Queen-Empress* v. *Mahabir Tiwari* (2) that section 34, Indian Penal Code would apply.

(1) 16 P. R 1901 Cr.

(2) 2 A. 263; A. W. N. (1899) 76; 9 Ind. Dec, (N. S.) 876.

PO ME v. EMPEROR.

The separate convictions under section 365, Indian Penal Code, appear to be justified. The two offences, though committed in the course of the same transaction, were quite distinct.

The separate sentences of solitary confinement are not illegal, but as a matter of practice a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more than one offence. (See *Ibrahim* v. *Queen Empress* (3).

The Magistrate has directed in the case of each appellant that half of the period during which he was detained in custody as an under-trial prisoner shall count as part of the sentence. This order is quite wrong. If the Magistrate considered that the appellants were entitled to leniency on account of their having remained a long time in custody he should have passed a a smaller sentence. To set aside this order would have the effect of enhancing the sentences, unless the sentences are also reduced. The sentences passed under section 364, Indian Penal Code, are therefore, reduced in each case to six years' rigorous imprisonment (without solitary confinement.) The convictions under section 397, Indian Penal Code, are altered to section 395, Indian Penal Code, and under that section taken with section 397, Indian Penal Code, the sentences will be seven years' rigorous imprisonment including three months' solitary confinement. The order directing that half the period spent as an under-trial prisoner will count towards completion of the sentence is set aside.

Z. K. *Order set aside.*

(3) 7 P R. 1897 Cr.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 114 B OF 1922

February 23, 1922.

Present:—Mr. Justice Duckworth.

PO ME—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), s. 4—Arms—Dah—*Criterion for determining whether* dah *an arm.*

In determining whether any given *dah* is an arm within the meaning of that term in section 4 of the Arms Act, the true criterion is the intention of the maker as regards its purpose. A *dah* having a blade $22\frac{3}{4}$ inches long, not intended for domestic purposes, is an arm.

Reference, under section 438, Criminal Procedure Code, by the Sessions Judge, Prome, to set aside the sentence passed on the accused by the Second Additional Magistrate, Paungde.

JUDGMENT.—Read Reference by the learned Session Judge, Prome. The weapon referred to in *Emperor* v. *Hamyit* (1) was held 'to be intended primarily for domestic and agricultural purposes. It was called a "*dashe-u-pyat*' and was said to be of the usual type. Exhibit B is clearly intended to be used as a sword or *dahlwe* and is sheathed as such. It also has a grip bound with cane to give the hand a secure hold. I consider it to be an arm as defined in the Arms Act.

Next, I will deal with *dahs*, Exhibits A and D. Exhibits A and D are "*dashe-u-pyat*" in the sense that the point (if any was ever there) has been cut off. But they are both of very great length, and Exhibit A has decorations and a "*thwe chaung*" which, apart from its length, tend to show that it was not intended primarily for domestic purposes. Exhibit B has no such decorations or "*thwe chaung*" but its extreme length and handiness serve to show that it was intended primarily for a weapon of offence.

It is my opinion that these two *dahs*, of which the blades are $22\frac{3}{4}$ inches long, are arms, and that the true criterion is not whether any given *dah* is an "*u-pyat*" but what was the intention of the maker as regards its purpose.

As regards Exhibit C this is, in my opinion the ordinary village *dashe-u-pyat*. The blade is only $16\frac{1}{4}$ inches long and it is adapted more clearly to domestic and agricultural needs.

I would remark that Exhibits A and D appear to be the usual kind of *dashe* which is carried in Lower Burma by persons who commit dacoity. They are indescriminately known "*Lingin*" *dahs*, "*Hngetiyidaung*" *dahs*, or "*dashe u-pyat*" and I have no doubt that they are intended to be weapons. I see no reason, therefore, to set

(1) 8 Ind. Cas. 972; 5 L. B. R. 207; 3 Bur. L. T. 91; 11 Cr. L. J. 744.

aside the conviction in the case in question, in which Exhibit A was the exhibit. The proceedings may be returned

W. C. A. *Proceedings returned.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1219 OF 1921.

February 13, 1922.

Present:—Mr. Justice Campbell.

JANKI DAS—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal proceedings, stay of—Civil suit—Subject-matter of both identical—Cheating—Charge, contents of.

Where the subject-matter in both a criminal proceeding and a civil suit is identical, and the main questions for decision are the same, the criminal proceedings should be stayed, pending the decision of the civil suit, if the same was brought without undue delay.

Bhoja Ram v. *Emperor*, 13 Ind. Cas. 927; 21 P. W. R. 1912 Cr; 115 P. L. R. 1912: 13 Cr. L. J. 175, followed.

Emperor v. *Bishen Das*, 8 Ind. Cas. 1161, 33 P. R. 1910 Cr.; 12 Cr. L. J. 50; 57 P. L. R. 1911; 50 P. W. R. 1910 Cr. and *Paras Ram* v. *Emperor*, 12 Ind. Cas. 991; 44 P. W. R. 1911 Cr; 12 Cr. L. J. 615, referred to

Obiter.—In framing a charge for cheating, the manner in which the alleged cheating was committed should be set out.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Hissar, dated the 12th August 1921, affirming that of the Magistrate, First Class, Gurgaon, dated the 15th July 1921.

Mr. *Shamair Chand*, for the Petitioner.

JUDGMENT.—This is an application for the stay of criminal proceedings pending decision of a civil suit in regard to the same matter.

On the 13th May 1921 one Ram Kanwar executed four sale-deeds, one of them in favour of Janki Das and the other three in favour of the father and sons of Janki Das. On the 21st May 1921 Ram Kanwar made a report to the Police that he had been cheated. On the 26th May 1921 Janki Das filed a civil suit for possession of the property purporting to have been conveyed to him by one of the sale-deeds. On the 9th July 1921 the Police *challaned* Janki Das and another under section 420, Indian Penal Code, as the result of Ram Kanwar's report of the 21st May 1921. On the 15th of July the Magistrate framed a charge and filed without orders an application by the two accused for stay of proceedings. On the 12th August the Sessions Judge rejected a petition by the accused for revision of the order framing the charge remarking that he saw no good reason to interfere with an interim order in criminal proceedings, although probably it would have been better for the Magistrate to await the result of the civil suit before framing the charge.'

I have seen the records of the criminal case and of the civil suit. The second accused in the criminal case, Hardwari, is not directly involved in the civil case, but in both cases the main questions for decision are the same, namely, whether Ram Kanwar was deceived when he executed the sale-deed and whether or not he received consideration. The civil suit, although instituted after the Police report, was brought without undue delay, and the same reasons for staying the criminal case appears to apply in the present instance, as were held valid in *Bhoja Ram* v. *Emperor* (1). Other authorities which support the petitioner are *Emperor* v. *Bishen Das* (2) and *Paras Ram* v. *Emperor* (3).

I order that proceedings on the charge under section 420, Indian Penal Code, framed against Janki Das, and Hardwari, be stayed until the civil suit, *Janki Das* v. *Ram Kanwar*, filed on the 26th May 1921 shall be decided by the Munsif, Gurgaon. The Magistrate should note that, if the criminal proceedings should be revived, the charge framed by him requires amendment, since it does not set out the manner in which the alleged cheating was committed.

W. C. A. *Criminal proceedings stayed.*

(1) 13 Ind. Cas. 927; 21 P. W. R. 1912 Cr.; 115 P. L. R. 1912; 13 Cr. L. J. 175.

(2) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 12 Cr. L. J. 50; 57 P. L. R. 1911; 50 P. W. R. 1910 Cr.

(3) 12 Ind. Cas. 991; 44 P. W. R. 1911 Cr.; 12 Cr. L. J. 615.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 185 OF 1922.

May 18, 1922.

Present:—Mr. Justice Ryves.

FATEH CHAND AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 34—Isolated assaults—No common object—Joint trial, legality of.

During a trial, for a political offence a crowd gathered with a view to make a demonstration and as a result a number of Policemen posted to keep order received injuries and the assailants were tried together under section 332/34 of the Penal Code and convicted:

Held, that their joint trial was illegal and section 34 of the Code did not apply, because the assaults on individual members of the Police force were isolated and the accused were not actuated by any common object. [p. 821, col. 1.]

Criminal appeal from an order of the Officiating Fourth Additional Sessions, Judge, Aligrah.

Messrs. *Nehal Chand*, *S. Zafar Mehdi* and *M. A. Aziz*, for the Appellants.

Mr. *Sanker Saran* (Government Pleader), for the Crown.

JUDGMENT.—During the forenoon of the 5th of July 1921, a large crowed gathered in front of the District Magistrate's Court during the trial of one Malkhan Singh for some alleged political offence. The trial created a good deal of excitement and, it appears, that, in the light of previous disturbances, the Police authorities gathered an unusually large number of Policemen to keep order. Apparently, it was feared, rightly or wrongly, that an attempt might be made by the crowd to rescue Malkhan Singh. During the course of the morning there was some sort of a *melee*, and nine individual Policemen were hurt, although with the exception of one man, who had his lip cut, none of the others received more than the most trivial injuries. The result was a magisterial enquiry, and 27 men were committed to the Court of Session charged under sections 147 and 332/149 of Indian Penal Code. Now, that was a perfectly intelligible charge and implied that the 27 men committed were actuated by a common object, and in pursuance of that common object, assaulted the Police in the discharge of their duties. At the trial the learned Sessions Judge found that there was no common object and that the accused were not acting in concert. He, therefore, held that the charge under section 147 could not be maintained. After discussing the evidence, he says:—

"This leads to the inference that the whole crowd did not collect with an unlawful object nor was it excited in the manner stated by the prosecution. On the other hand, these circumstances show that only those men who wanted to follow Mr. Sherwani offered resistance to the Police when the latter wanted to push them back and very likely those who were in the front joined them. Such being the case, only those men who committed the act can be held liable."

I entirely agree with this observation of the learned Judge. He goes on to say:—

"In this case all the circumstances lead me to think that the crowd had collected with a view to make a demonstration at the trial of Malkhan Singh. That object was not unlawful nor was it considered objectionable by the authorities as not only such crowds had assembled on previous occasions but the authorities had been watching the gradual increase in the crowd without ever thinking of dispersing it. It was certainly wrong on the part of some men to go to the Court-room after Sherwani did. There can be no doubt that they knew very well that only the persons who had permission could go there. The order passed by the authorities to prevent people in general going to the Court-room was a lawful one. The Policemen posted on the drive, to see that the order was carried out, were undoubtedly engaged in the discharge of their duty, and if they were assaulted or resisted by the men, whom the Policemen wanted to prevent from going, they certainly committed the offence under section 332 of the Indian Penal Code, and every man who joined in the assault can also be held guilty of that offence under the provisions of section 34 of the Indian Penal Code; but I do not think the offence of riot was committed nor can every man who happened to be present in the crowd be held guilty under section 332 of the Indian Penal Code. I, therefore, find that the offence of riot was not committed but an offence under section 332 of the Indian Penal Code was, of course, committed but only those men who

took part or joined those assaulting men, can be held guilty."

He then goes on to consider the evidence against each one of the accused, and in the end he convicted 11 and acquitted the rest. These 11 accused have appealed. It seems to me that on the finding that these accused persons were not actuated by any common object, it must be taken that there were merely a number of isolated assaults on individual members of the Police force, and, in the absence of any common intention, the provisions of section 34 of the Indian Penal Code cannot be called in aid. Nine Policemen are said to have been assaulted in different parts of the *maidan* and apparently by different people acting quite independently of each other. The Court has made no attempt to find out who were the particular individuals who assaulted a particular Policeman but has held that any one who was seen assaulting any Policeman during that morning in front of the District Magistrate's Court, must be held to be guilty of the offence, not of assaulting the particular Policeman but of what he considers to be an assault on the Police, under section 34 of the Indian Penal Code, and that any one who assaulted the Police on that morning must be held guilty. I cannot agree with this view. If there was no common intention or concert between the accused persons, they cannot, in my opinion, be tried together. There were so many isolated assaults and there should have been as many separate trials. I do not think it necessary in this case to order a re-trial. On the findings, I think, the accused are entitled to an acquittal. They were only sentenced to four months' rigorous imprisonment of which many have served more than half, and before this they were eight months in Police custody. Under these circumstances, specially as the hurt inflicted was of the very slightest, I think it unnecessary to order a re trial.

I allow the appeal and, so far as this charge is concerned, they will be released, and, such as are on bail, need not surrender.

N. K. *Appeal allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 90 OF 1922.

April 18, 1922.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Abdul Qadir.

AHMAD NUR AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Approver—Corroboration.

Evidence that is itself tainted cannot be useful for purposes of corroboration of tainted evidence. [p. 823, col. 2.]

Mamun v. *Queen-Empress*, 14 P. R. 1894 Cr., relied upon.

Lad Khan v. *Emperor*, 13 Ind. Cas. 998; 19 P. W. R. 1912 Cr; 11 P. L. R. 1912; 13 Cr. L. J. 182, referred to.

A wife who knows all about a proposal to murder her husband. and is a consenting party to the commission of the crime, is in the position of an accomplice and her evidence should not ordinarily be accepted either as corroborative of the evidence of an approver or as sufficient, apart from independent corroboration, to justify the conviction of the accused [p 823, col. 2.]

Shahrah v. *Emperor*, 49 Ind. Cas. 607; 20 Cr. L. J. 191; 20 P. R. 1919 Cr.; 14 P. W. R. 1919 Cr, relied upon.

Appeal from an order of the Sessions Judge, Jhelum, dated the 9th December 1921.

Mr. *Philip Morton*, for the Appellants.

Mr *C. H. Carden Noad*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Ahmad Nur, son of Karam, and Feroz, son of Buta, have been convicted of the murder of Feroz, son of Ghulam Muhammad, and of a young lad named Anwar, and sentenced to death. Buta father of Feroz, convict, who was co accused with them, has been acquitted. Both the convicts have appealed to this Court and their case is also before us for confirmation of the sentences of death. Their appeal has been argued by Mr. Philip Morton, while Mr. Carden Noad has argued the case on behalf of the Crown.

The only direct evidence in this case is given by one Khan Bahadur, son of Samond, who has received a pardon and who gives evidence as an approver. The story as narrated by him is that he was on friendly terms with Feroz and Ahmad Nur and was asked by them to join them in murdering Feroz, deceased. He was also told that Buta would take part in the proposed murder. He was promised a payment of Rs. 100.

AHMAD NUR *v.* EMPEROR.

On the evening of the 18th April 1921 Buta came to his house with an axe under his arm. The witness accompanied him and armed himself with another axe. They went towards Chak Naurang and found Ahmad Nur and Feroz waiting for them, both the latter also being armed with axes. Ahmad Nur said that he had ascertained that the deceased had gone to the threshing floor and there would be no one with him except a relative named, Anwar, a lad of about 14. The four men then went to the threshing floor and Feroz deceased was given blows with axes by Ferez, appellant, and the approver, while Anwar was similarly injured by Ahmad Nur and Buta. After committing this double murder, the four men went away and no body saw them or met them in the way. The murders were discovered next morning, when the report (P. A.) was made to the Police at Chakwal, on the 19th of April 1921, at 10 A. M. by Allah Yar, father of Anwar deceased.

The report stated that the suspicion about these murders was against Buta, his son Ferez and Ahmad Nur, and also added the names of Laru and Nabhu, as the possible co-adjutors of the three men named above. The reason for this suspicion, as given in the report, was that Feroz, appellant, had an illegal intimacy with *Musammat* Bahishtan, wife of Ferez deceased, and that it was the desire of the former that the latter should divorce her and thus enable Ferez, appellant, to marry her. It was further stated that Ahmad Nur had been promised by Ferez, appellant, the hand of an unmarried sister of the latter, named *Musammat* Nekan. Thus it was shown how the three persons, named as the principal accused, were interested in doing away with Ferez, deceased. It is not seriously disputed that the murder of the young lad Anwar was not really intended by anybody but was committed simply to avoid his becoming an eye witness in the case.

Musammat Bahishtan, widow of Feroz deceased, and *Musammat* Bakhat Nur, sister of Ahmad Nur, appellant, were cited by the prosecution as witnesses, who were in a position to give evidence against the appellants. In their depositions before the Committing Magistrate they stated that Buta and the appellants had expressed a desire to get rid of Feroz, deceased, and that they were taken into confidence by them and asked to give information when the said Feroz should go out alone. *Musammat* Bakhat Nur admitted that she gave information on the evening in question and *Musammat* Bahishtan deposed that she was told by *Musammat* Bakhat Nur that she had done so. She also admitted the existence of an intimacy between herself and Feroz, appellant. These two women, however, retracted their statments in the Sessions Court and said that the evidence that they had given before the Committing Magistrate was induced by Police pressure and was not true. They denied the existence of any connection between *Musammat* Bahishtan and Ferez, appellant, as well as any intended marriage between Ahmad Nur and *Musammat* Nekan. They also said that they gave no information on the evening in question to any one. The learned Sessions Judge brought on the record the previous statements of these two women under section 288, Criminal Procedure Code, and being of opinion that the statement first made by them, during the committal stage of the case, were true and that they had gone back on their statements owing to close relationship between them and the appellants, he held that their original statements furnished material corroboration of the evidence of the approver.

There is some other evidence in this case by which it has been sought to corroborate the statement of the approver but that does not require very serious notice, because it is admitted by the learned Counsel for the Crown that if the corroboration furnished by the statements of *Musammat* Bahishtan and *Musammat* Bakhat Nur fails, then there is no corroboration worth the name on the record. Certain witnesses have been produced, for instance, to say that the appellants and the approver were seen together at a fair before this occurrence. A cobbler has been produced to state that Feroz, appellant, got his shoes mended by him and this evidence is introduced to corroborate the introductory part of the statement of the approver, who says that Ferez asked him to wait while he got his shoes mended. It need hardly be remarked that evidence of this kind is in the nature of padding. There is some other evidence showing that the

reasons for implicating the appellants, as given in the first report, had some foundation. We need not detail that evidence, because we are prepared to agree with the learned Sessions Judge in holding that the evidence on the record does show that there was an intimacy between *Musammat* Bahishtan and Feroz, appellant, and that Ahmad Nur probably wanted to get the hand of *Musammat* Nekan in return for getting *Musammat* Bahishtan divorced by Feroz, deceased, this evidence certainly supplies the motive for the murder of Feroz, deceased, but the main question in this case is whether the story of the approver is corroborated in material particulars by the evidence of the two women or can be so corroborated, when the evidence of the latter is itself tainted. Mr. Morton contends, in the first place, that the statements of these women, as made at the trial, must be taken to be correct and that it is not unlikely that pressure may have been brought to bear upon them to state what they did against their own near relatives. We are not impressed, however, by this argument, because we think that in all probability the earlier statements of the two female witnesses were more reliable than their depositions in the Trial Court. It is in evidence that shortly after the double murder in question another murder took place in the family, when a young man named, Muhammad Sharif, brother of *Musammat* Bahishtan, was murdered by one Muhammad Khan, nephew of Ahmad Nur. Muhammad Khan was convicted of that murder and his conviction was maintained up to the High Court, and it was alleged in that case that one reason why Muhammad Sharif was killed was that his sister insisted on giving evidence against Ahmad Nur and Feroz in the Court of the Committing Magistrate. It is not to be wondered at that after such a terrible incident she should make a complete change of front, but even taking her previous statement to be correct, on the whole, the question remains whether it is of any use as corroborative evidence as far as the evidence of the approver is concerned. We think Mr. Morton is on much surer ground on this point than he was on the point referred to before. He contends that the evidence given by *Musammat* Bahishtan and by *Musammat* Bakhat Nur does not go beyond stating that the appellants and Buta wanted to kill Feroz and with that object got information from them of his movements on the night in question. This is not inconsistent with the possibility that they might depute the approver only to do the foul deed. There is nothing in the statements of the women which would throw light on what actually happened at the scene of the murder. In the second place, he urges that even if these statements did furnish any kind of corroboration they cannot be used for that purpose, because the women are accomplices, according to their own showing, and their evidence would require corroboration before it could be relied upon. He adds that the statements brought on the record under section 288, Criminal Procedure Code, though admissible in evidence, are to be taken with great caution and that, therefore, their value as corroborative evidence is next to nothing. He refers to *Shahrah* v. *Emperor* (1), where a Division Bench of this Court held that a wife, who knew all about the proposal to murder her husband and was a consenting party to the commission of the crime, was in the position of an accomplice and her evidence should not ordinarily be accepted either as corroborative of the evidence of an approver or as sufficient, apart from independent corroboration, to justify the conviction of the accused. He also cites *Lad Khan* v. *Emperor* (2), to show that the approver's evidence must be corroborated in material particulars by other independent evidence, which he says is not the case here. He also relies on *Mamun* v. *Queen-Empress* (3) to show that the evidence that is itself tainted cannot be useful for purposes of corroboration of tainted evidence. We think there is force in these contentions of Mr. Morton. Khan Bahadur, the approver, was a hired assassin according to his own admission. He asked for money as soon as the proposal for murder was mentioned to him. There is no doubt that there is sufficient evidence on the record to show that, whoever else may have taken part in the double murder, the approver, Khan Bahadur, was

(1) 49 Ind. Cas. 607; 20 Cr. L. J. 191; 20 P. R. 1919 Cr.; 4 P. W. R. 1919 Cr.

(2) 13 Ind. Cas. 998; 19 P. W. R. 1912 Cr.; 11 P. L. R. 1912; 13 Cr. L. J. 182.

(3) 14 P. R. 1894 Cr.

certainly in it, as certain blood stained things have come out from his possession. He is not a man, however, whose uncorroborated word can be trusted as sufficient for the condemnation of any one for murder and that corroboration is unfortunately not forthcoming in this case. There is certainly serious reason to suspect the appellants of having taken part in the crime, but on the grounds given above, we do not think it safe to uphold their convictions in the absence of any corroboration of the approver's statement. The appellants must be given the benefit of doubt owing to the evidence on the record being insufficient to warrant their conviction. We, therefore, accept their appeal and acquit them. They will be released forthwith.

Z. K.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 802 OF 1221 (CRIMINAL REVISION PETITION No. 656 OF 1921).

July 17, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

In re KRISHNA PILLAI AND OTHERS—ACCUSED NOS. 1, 3, 4 AND 5—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 437—Order of discharge—Further inquiry, direction of, when justified—Improper direction—Revision.

The essential matter for consideration in setting aside an order of discharge and directing a further inquiry under section 437, Criminal Procedure Code, is the prospect of any public advantage from the case being re-opened. Where there is no such prospect, by reason of the comparatively insignificant character of the offence, of the considerable time which has elapsed since its commission and of the evidence being of no special strength, an order directing further inquiry would be without jurisdiction and liable to be set aside by the High Court in revision.

Petition, under sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise an order of the Court of the District Magistrate, Ramnad at Madura, in Criminal Revision Case No. 39 of 1921 presented against the judgment of the Court of the Hazur Sheristadar, and First Class Magistrate, Ramnad at Madura, in Calendar Case No. 1 of 1921.

Dr. *Swaminadhan* for Messrs. *T. Rangachariar*, *S. Subramania Iyar* and *A. N. Krishnaswami Iyengar*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—The order before us is one passed by the District Magistrate under section 437, Criminal Procedure Code ordering further enquiry into a case, in which the petitioners were discharged. The occurrence in question in that case took place on 23th July 1920. It is unnecessary to go in detail into the subsequent progress of the proceedings. The petitioners were once convicted and on their conviction being set aside by the Sessions Judge, were re-tried. That re-trial ended in an order of discharge, which the District Magistrate has set aside in the order before us.

The facts for investiga ion amounted to a petty riot between the members of two factions in a village in the Madura District. In the course thereof a certain amount of violence seems to have been used and stones were thrown; but no injuries of any gravity were inflicted and, so far as appears, there is no question of any loss of valuable property. The evidence, so for as we can judge of it from the records before us, was of the kind usual in such cases and of no special strength. The District Magistrate's order is based on criticisms of the reasoning in the order of discharge, which are very possibly well-founded. But he has entirely failed to consider the essential matter; the prospect of any public advantage from the case being re opened. That prospect, in our opinion, is exceedingly small. In view of the period of two years, which has elapsed since the occurrence, its comparatively insignificant character, and the nature of evidence available, we think that the order of the District Magistrate passed, without regard to what is really the material consideration in cases of this kind, was passed without jurisdiction. We, therefore, set it aside in the exercise of our powers of revision,

V. N. V.

W. O. A. *Order set aside.*

AHMAD v. EMPEROR.

LAHORE HIGH COURT.
CRIMINAL REVISION PETITION No. 151 OF 1922.
March 22, 1922.
Present:—Mr. Justice Martineau.
AHMAD AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 209—Case triable by Sessions Court—Inquiry—Committing Magistrate, power of, to discharge.

Where in the course of an inquiry held by a Magistrate into a case triable by the Court of Session he finds that the evidence tendered by the prosecution is totally unworthy of credit, it is his duty, under section 209 of the Criminal Procedure Code, to discharge the accused

Sultani v *Emperor*, 4 Ind Cas 612; 10 P R. 1909 Cr.; 155 P. L. R. 1909; 11 Cr. L. J 18; 32 P. W. R. 1909 Cr., *Bai Parvati, In re*, 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L R 923; 11 Cr. L. J 692, *Dharam Singh* v. *Joti Prasad*, 28 Ind Cas. 005; 37 A. 355; 13 A. L. J. 497; 16 Cr. L. J. 429, relied upon.

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the Sessions Judge, Attock, at Campbellpur, dated the 16th January 1922, reversing that of the Magistrate, First Class, Attock, at Campbellpur, dated the 24th October 1921.

Mr. *M. S. Bhagat*, for the Petitioners.

Lala *Lachhmi Narain* for Said, Complainant, Respondent.

JUDGMENT.—This is an application for revision of an order of the Sessions Judge of Attock directing that the petitioners, who were prosecuted for the murder of one Ali Akbar *alias* Barra and were discharged by the Magistrate, be committed to the Sessions Court for trial. The application has not been opposed by the Crown, but has been opposed by the deceased's father, Said, who had lodged a complaint of murder against the petitioners.

The case for the prosecution rests on the evidence of the four alleged eye witnesses, Waris son of Ibrahim, Waris son of Baloch, Ahmad son of Mahbub, and Mir Baz, who were not examined in the first instance, but whose evidence has been taken in accordance with my order of the 20th May 1921, in Criminal Revision No. 207 of 1921.

In *Sultani* v. *Emperor* (1) it was held that a Committing Magistrate was entitled, at any rate to some extent, to weigh the evidence of direct witnesses and to pronounce as to their credibility, and that, as in that particular case the evidence for the Crown was of a kind on which no Court would convict, the Magistrate had exercised a sound discretion in discharging the accused men.

In *Bai Parvati, In re* (2) it was held that where a Committing Magistrate finds that the evidence tendered for the prosecution is totally unworthy of credit it is his duty under section 209 of the Criminal Procedure Code to discharge the accused.

Similarly, in *Dharam Singh* v. *Joti Prasad* (3) it was held that when a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when after examining certain witnesses named on behalf of the accused he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution, he is well within his discretion in discharging the accused.

Now, in the present case the Magistrate gave detailed reasons for his conclusion that a *prima facie* case had not been made out against any of the accused and that the evidence of the witnesses mentioned above was unworthy of credit, and he held further that the *alibi* of two of the five accused had been established. The learned Sessions Judge has not dealt with any of the points discussed by the Magistrate and has given no reasons for his opinion that the accused persons should be committed for trial.

Three of the four alleged eye-witnesses of the murder were the deceased's brothers in-law and it is a curious coincidence that they should have happened to assemble at the deceased's *hujra* at the time when he was killed. The story is that the five accused came to the *hujra*, Qalander being armed with a knife and the other four men with spears, and attacked Barra without any provocation, Gulab holding him, while Waris son of

(1) 4 Ind. Cas. 612; 10 P. R. 1909 Cr.; 155 P. L. R. 1909; 11 Cr. L. J. 18; 32 P. W. R. 1909 Cr.

(2) 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 923 11 Cr. L. J. 692.

(3) 28 Ind. Cas. 1005; 37 A. 355; 13 A. L. J. 497 16 Cr. L. J. 429.

VARADARAJULU PILLAI, *In re.*

Nawab struck him on the neck with his spear and then Qalandar struck him with the knife on the head. This story does not appear to be consistent with the medical evidence, which shows that the wound on the neck, which was just above the middle of the right clavicle, had cut the right pleura and lung. As the Magistrate observes such injury could not have resulted from a horizontal thrust with a spear, but must have been the result of a downward blow, which could hardly have been dealt with a spear while Burra was standing up, as the witnesses say he was. Moreover, the Assistant Surgeon has stated positively that the wound could not have been caused with a spear.

Next it is to be noted that in the report made by Said at the *Thana* the names of the accused Ahmad and Azim were not mentioned. Said says he was informed of the occurrence by Waris son of Baloch, and if the latter had witnessed the murder, and had named all five accused to Said as having taken part in the murder, Said would certainly have mentioned the names of all in his report.

Then the statements of the four witnesses mentioned above do not account for the injuries sustained by the accused Ahmad and the witness Abdul Majid. The latter says that on hearing the noise coming from the deceased's *hujra* he went there and saw Ahmad and Azim (not the accused Azim) and Shah Afzal struggling with one another, and that on trying to separate them he was hit on the head by some one. He also says that he saw Burra in a sitting posture twelve paces off and saw him fall, but did not see any one striking him. The eye-witnesses of the murder make no mention of any fight between Ahmad, Azim and Shah Afzal, and according to them Abdul Majid did not come to the spot at all. There appears, however, to be no reason for disbelieving Abdul Majid, who was the Imam of both parties and is corroborated by the witness Bostan.

Without going into other matters of minor importance referred to by the Magistrate, I think that for the reasons above mentioned the evidence of the four alleged eye-witnesses of the murder must be rejected as untrustworthy and that the order of the Magistrate discharging the petitioners was a proper one.

I accordingly accept this application; set aside the order of the Sessions Judge directing the committment of the petitioners to the Sessions Court, and maintain the order of the Magistrate discharging them.

Z. K. *Application accepted.*

MADRAS HIGH COURT.

CRIMINAL REVSION CASE No. 122 OF 1922.
(CRIMINAL REVISION PETITION No. 113 OF 1922).

May 5, 1922.

Present :—Mr. Justice Ramesam.

In re VARADARAJULU PILLAI AND ANOTHER—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 370 (1)—Judgment not stating reasons for finding.

A Criminal Court should, in its judgment, state reasons for its finding as required by section 370 (1), Criminal Procedure Code.

Shankar Ramdas v. *Emperor*, 31 Ind. Cas. 371; 17 Bom. L. R. 890; 16 Cr. L. J. 771, *Maqsodd Alam* v. *Emperor*, 57 Ind. Cas. 672; 21 Cr. L. J. 656; 1 P. L. T. 716, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Fourth Presidency Magistrate, Egmore, Madras, in Calendar Case No. 329 of 1922.

Mr. *T. Sundara Rao Naidu*, for the Accused.

ORDER.—In this case Mr. T. Sandara Rao Naidu, the learned Vakil who appeared for the accused before the Magistrate, states before me that he offered to examine some more witnesses for the defence and produce some documents; but the Magistrate would not allow the examination.

No reasons are given by the Magistrate for the finding as required by section 370, cl. (1). [See *Shankar Ramdas* v *Emperor* (1), *Maqsodd Alam* v. *Emperor* (2)]. Prosecution witnesses Nos. 3 and 4 contradict each other as to the dress of the accused. It is possible that prosecution witnesses Nos. 1

(1) 31 Ind. Cas. 371; 17 Bom. L. R. 890; 16 Cr. L. J. 771.
(2) 57 Ind. Cas. 672; 21 Cr. L. J. 656; 1 P. L. T. 716.

and 2 are mistaken as to the identity of the accused. Prosecution witness 1 contradicts himself in cross-examination. There is no doubt about the occurrence but I am not satisfied that the accused were properly identified. The soldiers who arrested the accused are not examined. I set aside the conviction and direct the accused to be set at liberty. The bail bonds will be cancelled.

Conviction set aside.

M. C. P.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 112 OF 1922.
April 5, 1922.
Present:—Mr. Justice Stuart.
SUNDAR LAL—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Jurisdiction of Court to investigate offence committed before it, after transfer of case—Revision—High Court, duty of.

If a Court is of opinion that there is ground for enquiry into any offence referred to in section 195 of the Criminal Procedure Code committed before it in the course of a judicial proceeding, it can proceed under section 476 of the Code even though the case has passed out of its hands and been decided by another Court which has arrived at a different conclusion on the merits. [p. 828, col. 1.]

King-Emperor v. *Zalim Singh*, A. W N. (1901) 177, *Girwar Prashad* v. *Emperor*, 1 Ind. Cas. 706; 6 A. L. J. 392 at p. 398; 9 Cr L. J. 219, *Rahimadulla Sahib* v. *Emperor*, 31 M. 140; 7 Cr. L J. 54; 17 M. L. J. 584; 3 M. L. T. 79, *Aiyakannu Pillai* v. *Emperor*, 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41, followed.

In such a case, however, when the matter is brought to the notice of the High Court in revision it is its duty to satisfy itself that there has been no unreasonable delay, that the order passed under section 476 is not vexatious and that the charges are not of a flimsy character. [p. 828, col. 2.]

Criminal revision from an order of the District Magistrate, Basti.

Mr. *Satya Chandra Mukerji*, for the Petitioner.

Mr. *K. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The facts out of which this application for revision has arisen, are as follows:—Mr. Parmanad Singh, Tahsildar of Basti, as Magistrate of the Third Class, tried in 1921 a Criminal case in which Adhar Singh made a complaint against Devi Bakhsh Singh under the provisions of sections 352 447 of the Indian Penal Code. In the course of the trial, Sundar Lal Patwari gave evidence. As a result of the examination of this evidence, Mr. Parmanand Singh came to the conclusion, that Sundar Lal was not telling the truth in his evidence, and that he had falsified certain of his records. Mr. Parmanand Singh did not complete the decision of the case, for, after he had heard practically all the evidence, the case was transferred for decision to the Court of Mr. Sarju Prasad, Honorary Magistrate, by an order of the District Magistrate of Basti. There is nothing before me to show why the order of transfer was passed. Such order was, however, passed and the case left Mr. Parmanand on the 3rd of September 1921. Mr. Sarju Prasad decided it on the 7th of October 1921. He acquitted the accused persons and found that the Patwari, Sundar Lal, was telling the truth, and that the entries in his records were correct. Mr. Parmanand then proceeded to make a preliminary enquiry into the truth of the Patwari's statements in the case in question, and into the nature of the entries in the Patwari's records to which I have already referred. He appears to have lost no time in sending for the Patwari and to have made a careful enquiry, in which the Patwari was given every opportunity of meeting the charges. He finally passed an order under section 476 of the Code of Criminal Procedure and sent Sundar Lal Patwari, to the District Magistrate to be tried on certain charges. This order is dated the 25th of January 1922. Sundar Lal applies in revision to have the order set aside.

The points taken by the learned Counsel, who represents Sundar Lal, are:—That Mr. Parmanand Singh having ceased to be seised of the case on the 3rd of September 1921, had no jurisdiction to pass the order which he passed, and that on the merits, the offences suggested have clearly not been committed upon the finding of Mr. Sarju Prasad,

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The plea raises a question which, as far as I know, has not been decided by any Court so far. If a Court is of opinion that there is ground for enquiry into any offence referred to in section 195 of the Code of Criminal Procedure committed before it in the course of a judicial proceeding, even if the case has passed out of the hands of that Court and been decided by another Court, it cannot be held that the First Court's powers under section 476 of the Criminal Procedure Code came to an end.

The circumstance that a case has passed out of the hands of a Court, in so far as an effective order regarding its disposal is concerned, does not deprive the Court of its jurisdiction under section 476 of the Code of Criminal Procedure according to the view taken in this Court. In *King-Emperor* v. *Zalim Singh* (1), Knox, A. C. J., decided that a Subordinate Judge was competent to take proceedings under section 476 of the Code of Criminal Procedure after another Court had finally decided the case. In a decision of a Bench in *Girwar Prashad* v. *Emperor* (2), an order under section 476 of the Code of Criminal Procedure passed considerably after the matter had left the hands of the Court passing the order, in so far as its final determination of the matter before it was concerned, was upheld. The views enunciated by the Madras High Court in *Rahimadulla Sahib* v. *Emperor* (3) and *Aiyakannu Pillai* v. *Emperor* (4) were not accepted in their entirety by that Bench. The view which I take is that under the provisions of section 476 of the Code of Criminal Procedure proceedings can undoubtedly be taken by a Court after the decision in the substantive case has been delivered and the Court is *functus officio* in respect of the decision of the substantive case. There can, I think, be no doubt on this point on the plain reading of the section. The further point remains: does the circumstance that another Court has arrived at a different conclusion on the merits, take away this jurisdiction? I do not see how any finding by another Court can take away this jurisdiction; so my opinion is that Mr. Parmanand had jurisdiction to pass this order.

I would not, however, leave the matter there. This Court has decided that it is the duty of the High Court, when matters such as these are brought to its notice, to satisfy itself that there has been no unreasonable delay, that the orders are not vexatious and that the charges are not of a flimsy nature, and, I consider it necessary to examine the order of Mr Parmanand Singh from these points of view. There has certainly been no unnecessary delay in this matter. Mr. Parmanand Singh was well advised in awaiting the decision of the case before he proceeded with the 476, Criminal Procedure Code proceeding, and it appears that, once the case had been decided, he put the enquiry through as expeditiously as he could. I am perfectly ready to examine the matter upon its merits. For obvious reasons—largely in the interest of the applicant himself—I do not propose to arrive at a definite conclusion. If I were satisfied with Mr Sarju Prasad's reason for believing the Patwari to be telling the truth and for believing the entries made in the Patwari's records to be correct and genuine entries or considered his reasons of such weight as practically to conclude the matter, I should have had no hesitation in setting aside this order, and if I were satisfied that Mr. Parmanand Singh had passed the order under section 476 of the Code of Criminal Procedure for insufficient reasons, I should have been ready, apart from anything which Mr. Sarju Prasad has said, to set aside that order. But upon the merits I do not find Mr. Sarju Prasad's reasons convincing, and I find Mr. Parmanand Singh's proceedings to have been most careful and his order to have been well thought out. It would be unfair to the applicant to carry the matter further. For the above reasons, I dismiss this application.

N. K.

Application dismissed.

(1) A. W. N. (1901) 177.

(2) 1 Ind. Cas. 306; 6 A. L. J. 392 at p. 398; 9 Cr. L. J. 219.

(3) 31 M. 140; 7 Cr. L. J. 54; 17 M. L. J. 584, 3 M. L. T. 79.

(4) 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 191 OF 1922.
August 31, 1922.
Present :— Mr. Hallifax, A. J. C.
TULSIRAM—APPLICANT
versus
TILOKCHAND *alias* DAYARAM—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 195 476—Grounds of inquiry—Duty of Court.

If a Court believes that a false charge has been made in proceedings before it and there is a fair possibility that enquiry will lead to the discovery of evidence sufficient to make a conviction highly probable these are grounds for an enquiry of which section 476 of the Criminal Procedure Code speaks, and the Court fails in its duty if it does not hold an enquiry of its own motion under that section and leaves it to be taken by a party under section 195 of the Criminal Procedure Code. [p. 829, col 2; 830, col. 1.]

Criminal revision against the order of the Additional Sessions Judge, Nagpur, dated the 10th June 1922 in Criminal Case No. 1 of 1922.

Mr. *Gangadhar Sitaram*, for the Applicant.

Mr. *M. Gupta*, for the Non-Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The applicant, Tulsiram, was prosecuted by the Police on the complaint of the opposite party, Tilokchand, for an offence punishable under section 406 of the Indian Penal Code. The Magistrate found reason to believe that three documents produced by Tilokchand were forgeries and ultimately discharged Tulsiram. The latter then applied for sanction to prosecute Tilokchand for offences punishable under sections 193 and 211 of the Indian Penal Code. This was refused on the ground that the evidence on the record of the trial of Tulsiram did not give rise to a reasonable probability that a prosecution would result in a conviction. An application to the Sessions Court under section 195 (6) of the Criminal Procedure Code was also rejected and Tulsiram has now applied to the Court for revision. All the parties to these proceedings including the Crown represented by the learned Standing Counsel, are agreed that the proper order to be passed in it is an order that the Magistrate shall himself make a proper enquiry into the offences against public justice of the commission of which there are at least strong indications, and shall thereafter either refuse sanction or grant it or else, if it should seem proper, should take action himself under sanction 476 of the Criminal Procedure Code.

(2) The existence in section 195 of the Criminal Procedure Code, which it is to be hoped is not to be continued much longer, of an alternative procedure for the prosecution of offences against public justice appears to have led to nearly complete oblivion of the obvious duty of every Court to deal with every instance in which there is even a suspicion that such an offence has been committed. In many such cases a very little thought will show that no amount of enquiry will procure sufficient evidence for a conviction or that the offence is too trivial, having regard to the lamentable frequency of such offences, to make it worthwhile instituting a prosecution. The Court is none the less bound to take such action as is involved in giving that much thought to the matter. But where further action may possibly result in a conviction, that action must be taken and it must not be left to the public spirit or private spite of some injured party to initiate it. It is for the Court to strive for the conviction and punishment of every person that it even suspects of having committed such an offence, and if this very elementary truth were not so consistently forgotten there would never be such a thing as an application for sanction to prosecute by a private person, or at least never a successful one.

(3) In both the Courts below the matter has been examined solely with a view to ascertaining whether a conviction would probably result if the evidence given in the case already tried were laid before the Court. The answer to that is naturally in the negative. But it is abundantly clear that there is a strong probability that forgery has been committed and a false charge made and that there is nothing trivial about them and also a fair possibility that enquiry will lead to the discovery of evidence sufficient to make a conviction highly probable. These are the grounds for an enquiry of which section 476 of the Criminal Pro-

sedure Code speaks, and when they exist the Court fails in its duty if it does not hold an enquiry of its own motion. An application for sanction under section 195 is in most cases a reminder to the Court of a very important duty that it has omitted to perform, and ought to be so treated. The spirit in which it is almost invariably treated in practice is illustrated in the concluding words of the Magistrate's order, which are: "The parties are on bad terms and I do not consider that I shall be justified in giving one party a handle to harass the other party."

(4) Section 195 of the Criminal Procedure Code does not mention the making of an enquiry, but it is manifest that such enquiry as may be necessary must be made before any final order can be passed on any application. And in the view of the matter set out above I am distinctly of opinion that the Court, in deciding whether there should or should not be a prosecution, ought not to be satisfied with examining such evidence, as the applicant is not in a position to produce all the available evidence. Still less ought the Court to rest content with examining such evidence as there may be in the record of the original case for the reason that the burden of proof in regard to the matters in question are on opposite sides in the original case and the subsequent prosecution. The Court must itself be astute to discover any evidence that may bear on the matter either way, and use its best endeavours to ensure that the person who appears to have committed an offence against itself does not escape punishment if he is guilty and is not unduly harassed if he is innocent.

(5) The proper attitude of the Court and the principles that should guide it are exactly the same as those of a Police Officer who actually sees the commission of what appears to be a cognisable offence. He must make full enquiry and can then refrain from arresting the person suspected only if he is satisfied that he is innocent or only technically guilty, or that the available evidence would not lead to his conviction though he is convinced himself of his guilt or that the offence is so trivial that no more than a nominal sentence would be passed on his conviction; he fails in his duty if he takes no action at all but merely waits for some aggrieved party to complain and also if, when such a complaint has been made, he does no more than scrutinise the evidence put before him by that party or that of the facts he happens to have seen himself.

(6) It has always appeared to me that the granting of sanction under section 195 is an admission that the Court has failed to carry out its duty of initiating a prosecution itself and that logically any Court that is about to grant a sanction ought to refrain from doing so and to make a complaint itself under section 476. The two sections of the Criminal Procedure Code are really parts of the same section, as was explained in *Abdul Husen* v. *Emperor* (1) and the only practical difference between the two procedures is that when the Court makes the complaint the prosecution is conducted by the Government and in the case of a sanction the fate of the trial is left largely in the hands of a private person who has less resources at his command, and may possibly ruin it from overzeal or excess of vindictiveness combined with lack of scruple. It is perhaps not necessary to push matters to the logical conclusion of initiating a prosecution under section 476 on most applications for sanction under section 195, or in the present case, but that is still the logical conclusion and the matter should be kept in mind. The orders of the Magistrate and of the Additional Sessions Judge are set aside. The former will now take up the case again, with advertence to the principles set out in this order.

G. R. D. *Order set aside.*

(1) 22 Ind. Cas. 177; 9 N. L. R. 184; 15 Cr. L. J. 33.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1429 OF 1921.

May 17, 1922.

Present:—Mr. Justice Harrison.

MURAD—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Conviction—Proof.

An accused person must be convicted upon evidence which is on the record and on nothing else.

A conviction cannot be based upon evidence which it is believed the witnesses might have given but have not in fact given.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the

ATHI IYER, *In re.*

Sessions Judge, Amritsar, dated the 20th October 1921, modifying that of the Magistrate, First Class, Amritsar, dated the 20th August 1921.

Mr. *Des Raj Sawhney*, for the Petitioner.

JUDGMENT.—One Murad has been convicted under section 379, Indian Penal Code and sentenced to 18 months' rigorous imprisonment which has been reduced by the learned Sessions Judge to 8 months and a fine of Rs. 20, the finding being that he stole two goats from the herd of one Mangu on the 14th of April. I find on going through the record that the only evidence against this man is the statement of Mangu complainant and that what he says is that either Murad or Khuda Bakhsh was in possession of this goat on the following morning. Khuda Bakhsh has been made a witness for the prosecution and does not say anything against Murad. Neither of the witnesses who stated that they caught Murad saw any goat. At the best, therefore, the only case against him is that either he or Khuda Bakhsh is guilty and under these circumstances his conviction cannot stand. In the judgment of the Trial Court the following passage occurs: "The witnesses for the prosecution, as far as Murad is concerned, seem to have been won over. Anyhow they were convinced of the guilt of Murad and Khuda Bakhsh at the time and, as deposed to by Ali Gauhar and Roshan Singh, P. Ws. Nos. 3 and 10, brought them to the village." It appears to me that Murad has been convicted on evidence which it is believed the witnesses might have given, had they not been won over, which is wholly impossible position, for an accused person must be convicted upon evidence which is on the record and on nothing else.

I accept the application for revision and acquit Murad.

Z. K. *Application accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No 55[illegible] OF 1920.
(CRIMINAL REVISION PETITION No 468 OF 1920.)

December 20, 1920.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Coutts, Trotter.

In re ATHI IYER—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), ss. 23, 425—Mischief—Wrongful loss—Causing injury to neighbour's wall by digging one's own land, whether mischief.

The essential element of the offence of mischief in section 425, Indian Penal Code, is the causing of "wrongful loss" to another's property, which is defined in section 23 of the same Code as being loss caused by "unlawful means".

The right to lateral support from an adjacent land belonging to others is a right which can only be acquired by prescription.

Therefore where a person by digging his own land causes injury to the wall of his neighbour provided the latter has not acquired by prescription the right to lateral support from that land, his action, however malicious, does not amount to mischief within the true construction of section 425 of the Penal Code.

Dalton v. *Angus*, (1881) 6 A. C. 740 at p. 804; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Tirdivanam, in Criminal Appeal No. 39 of 1920, preferred against the judgment of the Court of the Stationary Second Class Magistrate, Tindivanam, in Calendar Case No. 422 of 1919.

Mr. *K. S. Krishnaswami Aiyangar* for Mr. *P. S. Ramaswami Aiyangar*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—This case raises rather an interesting question as regards the true meaning of section 425 of the Indian Penal Code. What happened was, that the complainant had a wall on the boundary of the accused's land. They had some dispute, because the complainant would not let the accused lean the rafters of a building which he desired to to erect on the complainant's wall and thereupon the accused dug a trench along his own land in places going down to lower levels than the foundations of the complainant's wall. The Magistrate took the view, which is doubtless right, that this was done deliberately in order to annoy the complainant and the probable effect of it will be that the complainant's wall in course of time will tumble down. It is clear, ever since the decision in *Dalton* v. *Angus* (1), that the right to lateral support from an adjacent land belonging to others is a right which can only be acquired by prescription and by prescription for the required number of 20 years in this country in respect of land

(1) (1881) 6 A. C. 740 at p. 804; 50 L. J. Q. B. 689; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132.

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in the state in which it has been throughout the period, so that if you put an additional burden on land by a superstructure, you can have prescriptive rights for the land so burdened, only if you have had 20 years' enjoyment of the land in that condition without any interruption. Mischief is defined in section 425 as follows:—"Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property,...or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits 'mischief'." "Wrongful loss" is defined by section 23 as being "the loss by unlawful means of property to which the person losing it is legally entitled." Therefore, in order that what happened may come within this section, we must find that what was contemplated and caused was by unlawful means. The question then is, is it unlawful to do something on your own land without trespassing on your neighbour's land which something necessarily causes injurious effects to the property of your neighbour. In *Dalton* v. *Angus* (1) occurs this passage: "It is the law, I believe I may say without question, that at any time within 20 years after the house is built the owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground." That passage appears to us completely to cover the present case and to make it clear that what the accused did, however malicious, was not mischief within the true construction of section 425 of the Indian Penal Code.

We, therefore, think that the conviction must be set aside and that the fine, if paid, must be refunded.

M. C. P.
N. H. *Conviction quashed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 42 OF 1922.

May 6, 1922.

Present:—Mr. Kotval, A. J. C.

CHATURBHUJ—ACCUSED—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Public Gambling Act (III of 1867), ss. 5, 8—Seizure of money found upon search of persons—Forfeiture, whether legal.

Section 5 of the Public Gambling Act merely authorises, among other things, the search of a common gaming house, and the seizure, among other things, of all monies found therein It does not authorise the seizing and forfeiture of money found on the persons of individuals in the house at the time of the search

Tulla v. *Emperor*, 54 Ind. Cas, 250; 17 A. L. J. 368; 41 A. 366; 1 U. P. L. R. (A.) 16; 21 Cr. L. J. 42, followed.

Criminal revision against the decision of the Magistrate, First Class, Mandla, dated the 24th November 1921, in Criminal Case No. 152 of 1921.

Mr. *G. P. Pichi*, Standing Counsel, for the Crown.

JUDGMENT.—The applicant was convicted under section 4 of the Public Gambling Act III of 1867 and sentenced to fine. In addition, a sum of Rs. 130-0-3 which was seized from his person was ordered to be forfeited and credited to the Government. The applicant prays that conviction be set aside and the fine and the money seized from his person be refunded. I see no ground to interfere so far as the conviction is concerned but the order of forfeiture seems to be wrong. Section 8 of the Act provides that on conviction of any person for keeping or using a common gaming house or being present therein for the purpose of gaming, the Committing Magistrate may order, among other things, all monies seized therein to be forfeited. Section 5 authorizes, subject to certain conditions, entry into the common gaming house and the seizure of, among other things, monies found therein. It also authorizes a search of all parts of the common gaming house when there is any reason to believe that any instruments of gaming are concealed therein and of the persons of those who have been taken into custody and the seizure of instruments of gaming found upon such search. It is clear from this section that money can be seized only when found in the common gaming house. Money found upon search of persons is not authorized to be seized and cannot be forfeited. This view finds support in *Tulla* v. *Emperor* (1). I, therefore, hold that the sum of Rs. 130-0-3 which was seized from the appellant's person is not liable to be forfeited and direct that it be returned to the applicant.

W. C. A. *Order accordingly*

(1) 54 Ind. Cas. 250; 17 A. L. J. 368; 41 A. 366; 1 U. P. L. R. (A.) 161; 21 Cr. L. J. 42.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 201 OF 1922.

May 1, 1922.

Present :—Mr. Justice Abdul Qadir.

SHER ALI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss. 19, 20—Possession of arms without license—Concealment—Conviction.

Each case of concealment of arms must be decided on its own facts, and in each case the Court must decide on the evidence whether a particular act of concealment falls under section 19 or section 20 of the Arms Act.[p. 834, col. 1.]

Ibrahim v. *Emperor*, 18 Ind. Cas. 265; 9 P. R. 1912 Cr.; 14 Cr. L. J. 41; 44 P. W. R. 1912 Cr.; 128 P. L. R. 1913, not followed.

Khem Singh v. *Emperor*, 28 Ind. Cas. 786; 8 P. R. 1915 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412, followed.

Appeal from an order of the Magistrate, First Class, exercising enhanced powers under section 30, Criminal Procedure Code, Mianwali, dated the 13th February 1922.

Lala *Nawal Kishore*, for the Appellant.

Sheikh *Niaz Ali*, for the Government Advocate, for the Respondent.

JUDGMENT.—One Sher Ali was *chalanned* under section 20 of the Arms Act for having in his possession a gun without a license and for concealing it from the Police. He has been convicted by a Magistrate exercising enhanced powers under section 30, Criminal Procedure Code, and has been sentenced to rigorous imprisonment for five years. He has appealed to this Court through Lala Nawal Kishore, whom I have heard and I have also heard Mr. Niaz Ali for the Crown.

The facts of the case are briefly as follows:—The Police were informed by one Sanjar that two outlaws had taken shelter in the house of the appellant. They went in search of the outlaws to the hut of the appellant, but found no outlaws there. In the course of the search of the house in that connection, however, they found a gun concealed in a corn bin. A list of this recovery was prepared and was signed by the Head Constable, who conducted the search and by some other persons who had accompanied him. Allah Bakhsh Head Constable (P. W. No. 2) states that before looking into the corn bin he questioned the appellant if there was anything in it and the reply was in the negative and that when the gun was discovered the convict said he had purchased it. This recovery is further proved by the evidence of Muhammad Khan, Constable (P. W. No. 3), Sanjar (P. W. No. 4) and Fateh Khan (P. W. No. 5). The appellant admits that his house was searched on the suspicion that he had harboured some outlaws, but denies that he had the gun concealed in his house or that he was ever in possession of it. The defence theory is that this discovery has either been manufactured by some one importing the gun into the house or is without foundation.

Lala Nawal Kishore argues that the search was defective, as the provisions of section 103, Criminal Procedure Code, requiring the presence of respectable citizens from the neighbourhood were not duly observed. I do not think there is much force in his criticism, as, besides the evidence of the Policemen and Sanjar, there is the statement of Fateh Khan (P. W. No. 5) that he was present at the search and this technically satisfies the essential requirements of section 103, Criminal Procedure Code, that is, the presence of some independent witnesses of the search. The hut seems to be in a comparatively isolated place and the Police having gone there originally in search of some outlaws and the firearm in question having been accidentally discoverd, I do not think the Police could have done better under the circumstances as far as the presence of outsiders to witness the search was concerned. I, therefore, agree with the Trial Court in holding that the gun was found in the house of Sher Ali when it was searched and that the evidence given by the prosecution on this point is reliable.

Lala Nawal Kishore next comes to a question of law. He says that section 20 of the Arms Act is not applicable to this case, because, as held by the Punjab Chief Court in *Ibrahim* v. *Emperor* (1), every case of concealment of arms does not come under section 20 and that the section applies to cases where import or export of arms is intended. He argues further that if, on the authority above referred to, it is

(1) 18 Ind. Cas. 265; 9 P. R. 1912 Cr.; 14 Cr. L. J. 41; 44 P. W. R. 1912 Cr.; 128 P. L. R. 1913.

held that section 20 is not applicable to the present case, then the conviction must be set aside as there can be no prosecution under section 19 (*f*) for a mere possession of arms without a license, unless the sanction of the District Magistrate is previously obtained, which has not been done in this case. Mr. Niaz Ali, in reply to this part of the argument relies on a Division Bench ruling of the Punjab Chief Court, *Khem Singh* v. *Emperor* (2), in which a man who had a *chhavi* blade concealed in his loin cloth was convicted under section 20 of the Arms Act by a Bench consisting of the late Mr. Justice Rattigan and Mr. Justice Scott-Smith. The learned Judges remarked in that case that each case of concealment of arms must be decided on its own facts and they found, on the circumstances of the case before them, that it was shown that the concealment was made so that the possession of the weapon should not be known to the Police. I think this last ruling is entitled to greater weight than *Ibrahim* v. *Emperor* (1) and furnishes better guidance in cases where the question is whether a particular act of concealment falls under section 20 or under section 19. I am of opinion, in the light of the observation made in *Khem Singh* v. *Emperor* (2) that on the facts proved in the present case the gun appears to have been placed in the corn bin in order to conceal it from the Police. I hold, therefore, that section 20 is applicable and that the appellant has been rightly convicted of an offence under section 20.

The last question argued before me is that of the sentence. Lala Nawal Kishore says that a very heavy sentence has been awarded by the learned Magistrate, who has taken into consideration the insecurity of the tract to which the appellant belongs. He says this is an extraneous circumstance which should not have been imported into the case. Though this is a circumstance which may be taken into account to a certain extent, yet it seems to me that the sentence awarded is too severe in a case, which, in spite of what I have said above, might possibly have been originally *chalanned* under section 19 (*f*) as a case of simple possession, and it does not seem to be necessary to award in this case a punishment heavier than the maximum punishment which the appellant could have got under the latter section.

I, therefore, reduce the sentence to one of three years' rigorous imprisonment and to this extent only, this appeal is accepted.

Z. K.

Sentence reduced.

(2) 28 Ind. Cas. 796; 8 P. R. 1915 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412.

ALLAHABAD HIGH COURT.

CRIMINAL APPEALS NOS. 354 AND 355 OF 1922.

June 16, 1922.

Present :—Mr. Justice Gokul Prasad.

SHUJA-UD DIN AHMAD—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 408, 477A—Forgery—False entries made to cover defalcation—Offence.

Where an accused person makes false entries in an account with the object of covering a defalcation made by himself, his conviction for forgery is not sustainable. [p 835, cols. & 2.]

Empress of India v. *Jiwanand*, 5 A. 221; A. W. N. (1882) 236; 3 Ind Dec. (N. S.) 191, *Empress* v. *Mazhar Husain*, 5 A. 553; A. W. N. (1883) 133 3 Ind. Dec. (N. S.) 502, *Queen-Empress* v. *Nand Kishore*, 19 A. 305; A. W. N. (1897) 64; 9 Ind Dec (N. S.) 199, *Queen-Empress* v. *Girdhari Lal*, 8 A. 653; A. W. N. (1886) 264; 5 Ind. Dec. (N. S.) 396, followed.

Criminal appeal from an order of the Sessions Judge, Benares.

Mr. *Kumuda Prasad* (with him Mr. *Iqbal Ahmad*), for the Appellant.

Mr. *Sankar Saran* (Government Pleader), for the Crown.

JUDGMENT.—These two appeals arise out of the convictions in two trials of the appellant under sections 408 and 477A, respectively, of the Indian Penal Code. The accused was, at first, tried in a single trial under both these sections and was sentenced to two years' rigorous imprisonment. That trial was set aside by this Court on the ground that a joint trial like that was illegal. The Sessions Judge thereupon tried the accused separately under each of the

two sections aforesaid and has convicted him as stated above. The accused comes up here in appeal and one of the points raised by him here, which was raised before Mr. Pullan, is that he has, as the result of the separation of the trials under the two different sections, been sentenced to a heavier sentence than he was sentenced before. As to this aspect of the case, the learned Sessions Judge observes as follows:—"I have been asked to recommend the Local Government to order that the sentences in this case should run concurrently with those in the connected case under section 408 of the Indian Penal Code. As, however, the question of sentence will, no doubt, be brought before the Hon'ble High Court in appeal, I see no reason to take the unusual course proposed by the defence."

I take up first Criminal Appeal No. 355 of 1922 in which he has been convicted under section 477A of the Indian Penal Code. The argument advanced before me is that, on the finding of the learned Sessions Judge, the entries in question were made to cover defalcations for which he was convicted under section 477A, was illegal inasmuch as the object was not to defraud any one by making the false entries but it was in the main to save himself from the consequences of defalcations. Reliance is placed on the rulings of *Empress of India* v. *Jiwanand* (1), *Empress* v. *Mazhar Husain* (2), *Queen-Empress* v. *Nand Kishore* (3) and *Queen-Empress* v. *Girdhari Lal* (4). There are some cases of other High Courts which take a different view but I am bound by the view taken by our own High Court as to the main ingredient which constitutes an offence under section 463 of the Indian Penal Code, the section which defines what forgery is. Section 477A deals only with a special class of forgeries. As found by the learned Sessions Judge, the object of making the false entries in the present case was to cover defalcation made by the accused. His conviction, therefore, for forgery is not sustainable. There is no other section of the Code under which his conviction can be upheld.

I, therefore, acquit him of the offence charged and set aside his conviction and sentence in this case.

W. C. A.

Conviction set aside.

(1) 5 A. 221; A. W. N. (1882) 236; 3 Ind. Dec. (N. S.) 181.

(2) 5 A. 553; A. W. N. (1883) 183; 3 Ind. Dec. (N. S.) 502.

(3) 19 A. 305; A. W. N. (1897) 64; 9 Ind Dec. (N. S.) 199.

(4) 8 A. 653; A. W. N. (1886) 264; 5 Ind. Dec. (N. S.) 396.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 124 OF 1921.

December 12, 1921.

Present:—Mr. Raymond, A. J. C.

EMPEROR—COMPLAINANT

versus

HAJI JIAND—ACCUSED.

Approver—Criminal proceedings before conclusion of principal trial—Illegality.

It is illegal to start Criminal proceedings against an approver for not having complied with the condition on which a pardon was tendered to him, before the conclusion of the principal trial. [p. 836, col. 2.]

Report by the Sessions Judge, Hyderabad, for the quashing of the committal proceedings.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—This is a report under section 438, Criminal Procedure Code, by the Sessions Judge, Hyderabad, recommending the quashing of committal proceedings in the case of *Crown* v. *Haji Jiand* who had been tendered a pardon in a dacoity case, but whose evidence was considered false by the Committing Magistrate when examined as a witness before him and who, after holding a preliminary enquiry, directed his committal to the Sessions Court to be tried with the co-accused who had been previously committed for an offence under section 395, Indian Penal Code. Now, under section 215, Criminal Procedure Code, a commitment once made can be quashed only on a point of law, and the question that has arisen is, whether Criminal proceedings against the approver can be taken

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before the termination of the principal trial.

According to sub-sections (2) and (3) of section 337 of the Criminal Procedure Code every person accepting a pardon under this section must be examined as a witness in the case and if not on bail shall be detained in custody until the termination of the trial of the other accused by the High Court or the Court of Session, as the case may be. If the approver fails to comply with the conditions on which the tender was made either by wilfully concealing anything essential or by giving false evidence, he forfeits his pardon and may, in terms of section 339, Criminal Procedure Code, be tried for the offence in respect of which the pardon is tendered. As the word "forfeit" has been substituted for the word "withdrawn" in the Code it is not necessary for the pardon to be withdrawn by the Magistrate before the trial of the approver, the only point is whether the approver by any act of his own has forfeited the pardon that was tendered to him and the pardon stands forfeited if the approver refrains from making a full and true disclosure. Under the law, therefore, as it stands, at present there is no necessity for any formal withdrawal of the pardon or its cancellation. But was the Committing Magistrate justified in holding that the approver had forfeited his pardon, and in commencing proceedings against him before the termination of the main trial? Sub-section (3) of section 337, Criminal Procedure Code, states that the approver after his examination shall be detained in custody till the termination of the trial by the Sessions Court and it would be the Sessions Court, therefore, that would have to determine on the evidence before it whether the pardon has been forfeited. And this could only be done after the termination of the trial. Therefore, no action is to be taken against an approver till after the conclusion of the case in the Court of Session, and if it be desired to proceed against him, his trial should commence *de novo*. This would give effect to clause (3) of section 337 that the approver shall be detained until the termination of the trial by the Sessions Court, and when the trial is concluded in the Sessions Court it is not within the power of the Sessions Judge to direct the prosecution or committal of the approver I incline to the view of Beaman, J., in the case of *Emperor* v. *Kothia* (1) that "at the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then, if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon."

I am, therefore, of opinion that the committal proceedings are bad in law and should be quashed. If any action is proposed to be taken against the approver in the present case for not having complied with the conditions on which a pardon was tendered to him, it should be after the conclusion of the principal trial in the Sessions Court, and it should not be overlooked that in proceedings against the approver for the offence in respect of which a pardon was tendered to him, he is entitled to plead his pardon in bar and the issue whether this pardon has been forfeited should be tried before the Court proceeds with the trial of the offence charged.

W. C. A.

Committal proceeding quashed.

(1) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 187 OF 1922.

May 17, 1922.

Present:—Mr. Justice Rafiq.

MAQBUL AHMAD AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, dispute relating to claim to weigh grain and realise weighment dues, whether covered by.

A claim to weigh grain in a market and realise the weighment dues is not covered by section 145 of the Criminal Procedure Code. [p. 837, col. 1]

Criminal revision from an order of the District Magistrate, Hamirpur.

Mr. *O. Ross Alston*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

WALIA v. EMPEROR.

JUDGMENT.—This is a revision from an order purporting to have been passed under section 145 of the Criminal Procedure Code. It appears that one Maqbul Ahmad is the proprietor of a market-place where there are grain shops. One set of persons claims to have the right of weighing grain in that market. Maqbul Ahmad asked the said men to give him a certain percentage on the earnings on the weighing as his dues as a Zamindar. They objected and would not pay him. Thereupon Maqbul Ahmad permitted the applicants to weigh the grain in the market and the applicants agreed to pay Maqbul Ahmad his Zamindari dues.

The Police reported that there was a likelihood of a breach of the peace between the old weighmen and the applicants. The learned Magistrate thereupon issued a notice to the applicants under section 145 of the Criminal Procedure Code calling upon them to show cause. The notice that was issued by the learned Magistrate stated that

"Whereas on the report of the Police it had come to his notice that there was a dispute between the two parties, with regard to the right of weighing and with regard to the possession of the right of weighing, the notice is, therefore, issued to show cause."

The applicants appeared and showed cause. The learned Magistrate passed an order, to the effect, that the weighmen are entitled to possession of the weighing dues until evicted therefrom in due course of law. In revision, to this Court, it is contended, on behalf of the applicants, that section 145 of the Criminal Procedure Code, is not applicable to them. There is no dispute between the applicants and the old weighmen about possession of land or water. I think the contention for the applicants is correct. The dispute between the old and the new weighmen could have been decided by the learned Magistrate, if he was of opinion that the said dispute was likely to cause a breach of the peace, under section 107 of the Criminal Procedure Code. The claim to weigh grain in a market and realize the weighment dues is not, in my opinion, covered by section 145 of the Criminal Procedure Code. I, therefore, allow the application and set aside the order of the Magistrate.

N. K.

Application allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 167 OF 1922.

March 31, 1922.

Present :—Justice Sir William Chevis, Kt.

WALIA—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Husband minor—Complaint by father-in-law.

Except where the husband of a woman is absent and she is left in the care of her father-in-law, the latter cannot lodge a complaint under section 498 of the Penal Code in respect of enticing the woman away, even though the husband may be a minor.

There is nothing to prevent a minor husband from lodging a complaint under section 495 of the Penal Code.

Petition for revision of an order of the District Magistrate, Montgomery, dated the 21st November 1921, affirming that of the Magistrate, Second Class, Okara, District Montgomery, dated the 8th October 1921.

JUDGMENT.—The petitioner Walia has been convicted under section 498, Indian Penal Code, and sentenced to six months' rigorous imprisonment for enticing or taking away *Musammat* Fatteh, wife of Chiragh Din, a boy of about 15 years of age. The facts found are that Kullu, maternal uncle of *Musammat* Fatteh, went with others to the house of Muhammad, father of Chiragh Din, to pay a visit of condolence, and at the end of the visit took his niece away with him to his own home with the consent of Muhammad. While the woman was on this visit to her uncle she contracted an intrigue with Walia, who eloped with her.

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The complaint was lodged by Muhammad, father of Chiragh Din. Section 199, Criminal Procedure Code, lays down that no Court shall take cognizance of an offence under section 497 or 498 of the Indian Penal Code except upon a complaint made by the husband of the woman, or in his absence by some person who had care of such woman on his behalf at the time when such offence was committed.

Now, in this case the husband was living with his father at Gugera in the Montgomery district. The abduction took place from the house of the uncle who lives in Montgomery town. I doubt if it can be said that Chiragh Din was absent, within the meaning of section 199, Criminal Procedure Code. If he was absent, it was merely absence from the town where the abduction took place, and in that case the complaint might be lodged by the person who had charge of the woman on his behalf, but that person was the uncle and not the father, so it would be only the uncle who could lodge the complaint and not the father. (I note here that the uncle is one of the persons against whom the complaint was made, though all but Walia were acquitted).

Taking it that Chiragh Din was not absent within the meaning of section 199, then I am of opinion that no body could lodge a complaint on his behalf. There is a reference on page 424 of the 8th Edition of Handerson's Criminal Procedure Code to Madras High Court proceedings of 7th February 1871. I have not been able to trace the proceedings referred to, but apparently it was held that a minor husband cannot be represented by another for the purpose of instituting a prosecution. In Sohoni's Criminal Procedure Code, 10th Edition, page 566, I see that it is doubted whether this is now good law, but I note that whereas in some cases the Code does provide for representation of a minor, [see, for instance, section 345 (4)], there is no such provision in section 199. There is nothing to prevent a husband under the age of 18 from lodging a complaint so far as I can see and so I imagine it was not considered necessary to provide for representation except in the case of his absence. In case of absence representation might be highly necessary, take for instance the case of a soldier going on active duty out of India and leaving his wife in care of his father or elder brother. I am of opinion that, except where the husband is absent, the father in-law cannot lodge a complaint even though the husband be a minor. And as I have already said, if the husband is to be regarded as absent because the wife was not living under the same roof when the offence was committed, then the only person who can be regarded as having charge of the woman on the husband's behalf was the uncle of the woman, and he alone could represent the minor.

I hold, therefore, that the Courts had no jurisdiction to enquire into the complaint preferred by the father of Chiragh Din, and I reverse the conviction and sentence and acquit the petitioner and release him from his bail. This, however, will apparently be no bar to fresh proceedings being taken if Chiragh Din himself lodges a complaint. See *Umer uddin* v. *Emperor* (1).

Z. K. *Accused acquitted.*

(1) 2 Ind. Cas. 219; 31 A. 317; 6 A. L. J. 262; 9 Cr. L. J. 5.6.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 51 OF 1922.

May 4, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

In re ERADA PADINHAREDIL GOVINDAN NAIR AND ANOTHER—ACCUSED—PETITIONERS.

Ordinance II of 1921, *ss.* 6, 7—*Offence, commission of, in Martial Law area—Trial by Summary Magistrate outside area, legality of*—Habeas corpus, *writ of, issue of, to jailor of prison where prisoner confined, validity of —Jurisdiction.*

The trial of a person for an offence committed in the Martial Law area proclaimed under Ordinance II of 1921 by a Summary Magistrate holding his Court outside such area is illegal and a conviction following thereon is liable to be set aside. [p. 839, col. 2.]

ERADA PADINHAREDIL GOVINDAN NAIR, *In re.*

Kochunni Elaya Nair, In re, 68 Ind. Cas. 26; 45 M. 14; 41 M. L J. 441; 14 L. W. 465; (1921) M. W. N. 708; 23 Cr. L. J. 490, followed.

In case of such conviction the High Court has power to interfere by the issue of a writ of *habeas corpus* to the jailor of the jail in which the prisoner is confined. [p. 840, col 1]

(Authorities reviewed.)

Petition, under section 107 of the Government of India Act praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *habeas corpus* on the jailor, camp jail, Bellary, directing him to bring the bodies of the prisoners connected in Summary Case No. 21 of 1921 on the file of the Court of the Summary Magistrate, Mannarghat, before this Honourable Court, so as to ascertain the legality or otherwise of their detention.

Messrs. *K. P. M. Menon* and *P. Govinda Menon*, for the Petitioners.

Mr. *J. C. Adam*, Public Prosecutor, on behalf of the Crown.

ORDER.—This is a petition for a writ of *habeas corpus* by two persons undergoing a sentence of 18 months for alleged participation in the Moplah rebellion. They were charged with rioting under section 147, Indian Penal Code, an offence cognisable by the ordinary Courts. It was alleged that they had assisted the rebels in destroying a bridge. This they admitted but stated that they were compelled to do so under threat of death. They alleged, owing to the trial being summary and taking place away from the scene of action and far from their homes, they were not in a position to substantiate this defence by evidence which they could have called if the trial had taken place under the ordinary law and in its proper place.

It is admitted that they were tried by a Summary Magistrate appointed under Ordinance II of 1921 who held his Court at a place outside the area in which Martial Law was proclaimed, the alleged offence having been committed inside such area. Acting under the powers conferred by section 72 of the Government of India Act, this Ordinance was made and promulgated by the Governor General. By it Martial Law was put in force in certain areas called Administration Areas, and by section 6, Summary Courts of Criminal Jurisdiction might be constituted in any Administration Area with summary powers of trial of certain minor offences connected with the rebellion. The Military Commander had power to direct cases to be tried by Summary Courts and to distribute the work among such Courts. By section 7, no Summary Court can try any offence unless committed in the Administration Area in which such Court is established except as so provided, the ordinary Criminal Courts continued their functions.

From the decision of such Summary Courts there is no appeal and further by section 16 of the Ordinance all powers of interference with such decision by writ of *habeas corpus* or otherwise is prohibited. It follows that if the Court that tried the petitioners was a properly constituted Court under the Ordinance we have no power to interfere. But in our judgment this was not a Court properly constituted under the Ordinance, for we can find no right at all to hold a Summary Court except in the Martial Law area, and by the words of the Ordinance the jurisdiction of these Courts is local. Outside the area the ordinary rules of law prevail and there is nothing in the Ordinance to prevent this Court interfering with the decision of any Court outside the area purporting to exercise a criminal jurisdiction which it does not possess. That this is the proper construction of the Ordinance seems to have been recognised by the Government of India after these convictions by section 10 of the Ordinance V of 1921 promulgated on November 11, 1921. By that section it was enacted: "Notwithstanding anything contained in any law for the time being in force, the Local Government may, by general or special order, appoint places outside the area in which Martial Law is in force at which any Summary Court, constituted under the Martial Law Ordinance, 1921, or Special Magistrate may sit for the trial of offences."

It follows that the conviction of the petitioners was illegal and that there is no justification for their detention in prison. This view was also expressed by Kumaraswami Sastri, J. in *Kochunni Elaya Nair, In re* (1), a case in which it was not neces.

(1) 68 Ind. Cas. 26; 45 M. 14; 41 M. L. J. 441; 14 L. W. 465; (1921) M. W. N. 708 23 Cr. L. J. 490,

sary for the decision, but we think the Law was correctly laid down by that learned Judge.

The question remains, and has been fully argued before us, whether this Court has any power to interfere by the issue of a writ of *habeas corpus* to the jailor of the jail in this Presidency in which the petitioners are confined.

The law can be stated to be that in every part of the British Empire every person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *habeas corpus*. The King's Bench in England exercised the power of issuing such writs throughout the British Empire until the Statute known as the Habeas Corpus Act, 25 & 26 Vic. c. 20 was passed. By that Act the powers of the King's Bench are limited to England and such places outside England which have no local Court competent to exercise the power. It follows that these petitioners must have a right to such a writ and it is a matter of absolute right, either from a Court in this country, if there be one competent to grant it, or from the Court of the King's Bench sitting in London. In our judgment it is fully established that this Court has all necessary powers and is competent to grant the writ. That it has such or other similar powers in the Presidency Town of Madras is clear from section 491, Criminal Procedure Code. But that Code makes no provision for the exercise of that power in the *Mofussil*. This Court has, however, succeeded under the High Courts of Judicature in India Act, 24 & 25 Vic. c. 104 and the Letters Patent issued thereunder, to all the powers of the Supreme Court of Madras; and that Supreme Court had by its Charter of 1800, Art. 8 given to it the powers over "all the Territories which now are, or hereafter may be, subject to, or dependent upon, the Government of Madras aforesaid; and to have such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that part of *Great Britain* called *England*, as far as circumstances will admit" These words give to the Supreme Court the right usually exercised by the King's Bench in England of issuing the writ of *habeas corpus*.

This was definitely decided in the analogous case of Calcutta, *Ameer Khan, In the matter of* (2), in the able and illuminating judgment of Norman, J. approved and followed in this Court in *Nataraja Iyer, In re* (3).

It has been contended on behalf of the Crown by Mr. Adam in his very able argument that as the Criminal Procedure Code in sections 491 and 456 makes provision for the exercise of similar powers in Madras and for the granting of such writs in the case of British subjects in all parts of India, it must be taken to have been the intention of the Legislature to confine the powers of this Court to such cases, and that the power to issue the writ in the *Mofussil* which had been established in *Ameer Khan, In the matter of* (2) must be taken to have been impliedly taken away. In our judgment this is not sound for three reasons. In the first place, section 491 merely substitutes or adds for the Presidency Towns a different form of procedure less cumbersome than the granting of the writ of *habeas corpus*; while section 456 was necessary because in certain parts of India there was no High Court established by Charter, and as there was no Court in this country which could grant a writ of *habeas corpus* even to a European British subject in those parts it was thought necessary to give that power and such power was given by that section.

Secondly, the right which had been established was a substantive right and it could hardly have been the intention of the Legislature to take that right away by making rules of procedure or giving adjective rights for the exercise of similar powers. It is the sort of case where it can be fairly argued that if the Legislature intended to take away such an important right from the subject, it must use plain and unambiguous language Thirdly, to adopt such a construction of the Criminal Procedure Code would lead to this absurdity, namely, that a European unlawfully imprisoned would have the right to obtain the writ in this Court while an Indian subject would have to go to the King's Bench in

(2) 6 B. L. R. 392.

(3) 16 Ind. Cas 755; 36 M. 72; (1912) M. W. N. 1012; 23 M. L. J. 393; 13 Cr. L. J. 725; 13 M. L. T. 367.

London for his remedy and there is a sound rule that where one possible construction leads to an absurdity and another does not, the latter is to be preferred.

In our judgment, this Court has the power to issue this writ and in this case it is its duty to do so.

M. C. P. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 32 OF 1920.

February 7, 1920.

Present:—Mr. Justice Chevis, Acting Chief Justice, and Mr. Justice LeRossignol.

BHAI KHAN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164, 364—Incomplete chalan—*Statement of accused, record of, by Magistrate—Section applicable—Confession—Informal procedure, effect of—Dead body, pointing out of.*

If an incomplete *chalan* is sent up and the evidence available is recorded by a Magistrate, the statement made by the accused is not a statement made under section 164 of the Code of Criminal Procedure but a statement recorded under section 364 of the Code [p. 843, col 1.]

Where proceedings as to the recording of a confession are not in conflict with any section of the Criminal Procedure Code, the confession of the accused person should not be rejected simply on the ground of informality of procedure [p. 843, col 2]

The mere pointing out of the dead body by the accused would not by itself be sufficient evidence for sustaining a conviction for murder, but it would be otherwise where the accused fails to explain how he came by his knowledge of the place where the body lay. [p. 843, col. 1.]

Appeal from an order of the Sessions Judge, Mianwali, dated the 1 th December 1919.

Mr. *I. M. Mackay*, for the Appellant.

Sardar *Mehtab Singh*, S. B., Public Prosecutor, for the Respondent.

JUDGMENT.—Bhai Khan, the appellant in this case, has been sentenced to death for the murder of one Hetam on the night of the 14th October 1919; his case is before us on appeal and also in connection with the confirmation of the sentence of death.

The conviction reposes upon the deposition of *Musammat* Sattan, widow of the deceased Hetam, supported by a confession made to the Committing Magistrate by the appellant and some other corroborative details, the most important of which is the alleged discovery of the corpse in a *karir* bush, not far from the appellant's *bhan*, or hut, on appellant's indication. The story told by *Musammat* Sattan is that Hetam a year or so before his murder paid Rs. 240 to her first husband who dwelt in another village and having secured her divorce from him married her, that some six months before the murder she struck up an intimacy with the appellant who had undertaken to kill her husband if she promised to marry him. She states that shortly before the murder she induced her husband Hetam to take her to her own village Kuraddi in the Shahpur District. After her husband's departure from Kuraddi Bhai Khan came to the village and interviewed her for a few minutes, but next day returned with Nura *Musalli* and spent the day with her. In the afternoon she followed them to Ushhali to the house of Nura and the next morning Bhai Khan took her back to Kuraddi where they spent the day and night together. On the day following they again went to Ushhali and the next day left Ushhali for Wan Bhachran where her husband's *bhan* is situated. They did not, however, proceed that evening to her husband's hut but in the afternoon halted at the *bhan* of Muhammad Azam and had their evening meal there. *Musammat* Sattan stayed there the night but Bhai Khan and Nura went on and at dawn next morning Bhai Khan returned alone and told that her husband had been killed by him. They then started for Wan Bachran but separated on the road, Bhai Khan going to his own *hut* while she went to her husband's.

By noon of that day, the 15th of October, the disappearance of Hetam had given cause to the villagers for apprehension and in the evening a report was made to two Sub-Inspectors who happened to be engaged in some investigation at Wan Bachran. The Police Sub Inspector came to the house of Hetam that same night and upon close examination *Musammat* Sattan stated that Nura *Musalli* had murdered her husband. At that time she made no mention of Bhai

Khan and next morning took the Police to a well called Kauri Khuhi, because she says she had learnt from Bhai Khan that her husband's corpse had been thrown into that well. The Police had the well searched but without result, whereupon *Musammat* Sattan admitted Bhai Khan's share in the affair and made a further statement that they had spent the evening before at the *bhan* of Muhammad Azam which appears to be some five *kos* away from Hetam's *bhan*. The Sub Inspectors proceeded with her to Muhammad Azam's *bhan* and in the meantime a third Sub-Inspector proceeded to Bhai Khan's *bhan* which he locked up. After some discussion Bhai Khan made a statement and took the Police party to a thick *karir* clump hundred yards away from his *hut*, where he pointed to the body of the deceased Hetam.

The Police then presented Bhai Khan before a First Class Magistrate, Iqbal Singh, on an incomplete *chalan*. The Magistrate after recording the statement of *Musammat* Sattan as a witness called upon the appellant for his statement. Thereupon the appellant made a statement in which he admitted that he and Nura had inveigled the deceased out of his hut on the previous evening and had strangled him. He added that he had had no cause of enmity with Hetam but that he had done the deed solely for the sake of *Musammat* Sattan. Nura was tried along with Bhai Khan for this murder, but the case against him was, at a very late stage of the trial, withdrawn by order of the District Magistrate. Consequently, the appeal before us does not concern Nura. On the 12th November 1919 after the Magistrate had taken the remaining evidence in the case the statement of the appellant was again taken and he then resiled from his earlier statement, alleging that he had made it under Police pressure having been severely beaten and that the case was the result of his enmity with Alam Sher of his village. But he called for no witnesses in his defence. The witnesses regarding the discovery of the body on information supplied by the appellant are the Police Officers and witnesses Nos. 7 and 8 for the prosecution, Alam Sher and Ghulam Muhammad, whose evidence there seems to be no reason to reject. Further evidence in support of *Musammat* Sattan's story is supplied by witness No. 11, Muhammad Azam, who deposes that Nura, Bhai Khan and *Musammat* Sattan came to his *bhan* the day before the Police came to make inquiries, that they had a meal at his house and that *Musammat* Sattan stayed the night there and was taken away by Bhai Khan who returned early next morning. He is corroborated by Muhammad Chaughata, P. W. No. 12; and Raja P. W. No 13 says that on that day which he fixes in the same way from the date of the Police arrival, Bhai Khan and *Musammat* Sattan were travelling together towards Wan Bachran.

On behalf of the appellant learned Counsel has argued that the witnesses for the prosecution are not to be credited and has urged, firstly, that *Musammat* Sattan must have been under the influence of the Police; secondly, that the appellant had no motive to murder Hetam, because on *Musammat* Sattan's own showing he was able to enjoy her favours even though her husband was alive. The third point was that as the distance between Muhammad Azam's *bhan* and Hetam's hut was about ten miles, it was impossible or at any rate improbable that the appellant between the hours of 9 o'clock in the evening and 5 o'clock next morning could have covered 15 or more miles and in addition found time to murder Hetam. His last point was that even if Bhai Khan pointed out the body thereby indicating that he knew where the body lay, he was not in actual exclusive possession of the *corpus delicti* and, therefore, his action did not raise the presumption of his guilt. The reply to these points is as follows :—

Musammat Sattan would certainly have been pressed by the Police to make disclosure in the case. On her own showing she is an accomplice and it is for this reason that we have required corroborative evidence of her statement. As for the appellant's opportunities for enjoying *Musammat* Sattan's society in the lifetime of her husband, it is obvious that those opportunities would come rarely and were attended by a risk of surprise which objections would not exist if once Hetam had been removed. It is true that there is evidence that Bhai Khan has been married but it is also on the record that the marriage has not yet been consummated, and if *Musammat* Sattan's evidence is true, we see no reason

to doubt the inadequacy of the alleged motive. With regard to the objection on the score of distance between Muhammad Azam's *bhan* and the scene of the murder it is very unfortunate that there is no accurate map on the record showing the exact situation of the deceased's *hut* with reference to the *bhan* of Muhammad Azam. But even if we suppose that the appellant had to walk ten miles to the scene of murder and ten miles back we find, having regard to the fact that the date was the 15th of October, that he had at least 8 hours at his disposal. He is quite a young man and was familiar with the country that he had to traverse, and we see nothing improbable on the score of the distance to be traversed in the story told by *Musammat* Sattan and also by the appellant in his confession to the Committing Magistrate. As for the final objection we do not say that the mere pointing out of the body would be by itself sufficient evidence for sustaining a conviction for murder: but the appellant has never explained how he came by his knowledge of the place where the body lay. Indeed he does not admit that he pointed out the body; his explanation was that there was a general search by the Police in the jungle and that the body was found by nobody in particular in the course of that search.

The learned Sessions Judge has discarded the entire confession made to the Committing Magistrate by the appellant on the ground that all the formalities prescribed by section 164, Criminal Procedure Code, were not observed. We, however, do not see the necessity for dealing so drastically with the confession. The confession looks like truth, and the learned Sessions Judge has overlooked the fact that the statement was not recorded by the Magistrate under the provisions of section 164, Criminal Procedure Code. We do not propose to discuss the general desirability of sending up incomplete *chalans*, but if an incomplete *chalan* is sent up and the evidence available is recorded by Magistrate, the statement made by the accused is not a statement made under section 164 of the Code, but a statement recorded under section 364 of the Code. The Committing Magistrate seems to have been a gentleman of little experience, for there are indications in his procedure that he was uncertain whether his proceedings should be under section 164 or under section 364. But as his proceedings are in fact not in conflict with any section of the Code we see no reason why the confession of the appellant should be rejected on the ground of informality of procedure.

To resume then, we find against the appellant the statement of *Musammat* Sattan which is corroborated in material points and most strongly by the conduct of the appellant himself in revealing to the Police the place where the corpse lay. The motive for the act is patent and we have no doubt that the appellant has been rightly convicted of the crime with which he was charged. We consequently dismiss the appeal and confirm the sentence of death.

R. N.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 12 OF 1922.
CRIMINAL REVISION PETITION NO. 12 OF 1922.
July 17, 1922.

Present:—Mr. Justice Oldfield,
and Mr. Justice Ramesam.

In re MOHIDEEN PAKKIRI MARAKKAYAR—ACCUSED—PETITIONER.

Income Tax Act (VII of 1918), s. 40—Penal Code (Act XLV of 1860), s. 177—Criminal Procedure Code (Act V of 1898), s. 179—False verification in income-tax petition, complaint of—Forum, proper—Place where return received, Court having jurisdiction over, competency of, to try offence.

The offence of making a false verification in an income-tax petition is legally triable only by a Court having jurisdiction over the place where the verification was made. The place where the petition was received by the authorities does not determine the jurisdiction. [p. 844, col. 2.]

Rambilas, In re, 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 56; 1914 M. W. N. 894; 15 Cr. L. J. 688; 29 M. L. J. 175, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order,

dated the 5th December 1921, of the Court of the Sub-Divisional First Class Magistrate, Devakottah Division, in Calendar Case No. 97 of 1921.

FACTS appear from the judgment.

Mr. *C.S. Vencatachariar* (with him Mr. *M.S. Ramanuja Aiyangar*), for the Petitioner.—The lower Court had no jurisdiction to entertain the complaint. The offence under section 40 of the Income Tax Act must be deemed to have been committed in the place where the accused verified the petition, that is, Kottaipatnam and the Court having jurisdiction over that place only could try the case. The petition was no doubt received by the Divisional Officer in Devakottah. But that will not give jurisdiction to the Divisional Magistrate of Devakottah. That is not a place where any consequence of the offence ensued to attract the applicability of section 179, Criminal Procedure Code.

The Public Prosecutor, for the Crown.—The lower Court had jurisdiction on the application of section 179, Criminal Procedure Code. Some consequence must have ensued where the verified petition was received.

ORDER.—We are asked in this revision case to interfere with an order passed by the First Class Sub Divisional Magistrate of Devakottah Division disallowing the objection of the petitioner in a criminal case.

The case was instituted on a complaint by the Income-tax Assistant Tahsildar of Devakottah. In that complaint the accused was charged under section 177, Indian Penal Code, within the meaning of section 40 of the Income Tax Act VII of 1918. The facts set out are that the accused verified a petition, which he afterwards presented to the Revenue Divisional Officer under section 21 of the Income Tax Act. That verification was made at Kottaipatnam in the Tanjore District. But the last sentence of the complaint states that the offence was committed at the place where the return was received by the Revenue Divisional Officer, Devakottah, within the lower Court's jurisdiction.

It must be borne in mind that the complaint is statedly of an offence, punishable under section 177, Indian Penal Code, within the meaning of section 40 of the Income Tax Act. We are, therefore, concerned with the wording of the latter section and have to deal with it as it stands. Section 40 of the Income Tax Act says that "if a person makes a statement in a verification mentioned in section 17 or section 21 (3) which is false, and which he either knows or believes to be false or does not believe to be true, he shall be deemed to have committed the offence described in section 177 of the Indian Penal Code." Where then did the petitioner make the statement in his verification? *According to the complaint he made it in Devakottah.* The learned Public Prosecutor, however, has argued that, with reference to section 179, Criminal Procedure Code, the offence constituted by the verification will be triable, not only where the verification was effected, but also where any consequence thereof ensued, and that some sort of consequence must be held to have ensued, where the verified petition was received by the authorities. We have not been able to understand from the learned Public Prosecutor what is the exact consequence, to which he refers. For the receipt of the petition would in no sence be the consequence of its verification, since the verification would go no way towards putting the petition in transit from one place to the other. In *Rambilas, In re* (1) it was held in effect that the consequence contemplated in section 179 must be an essential part of the offence charged. That requirement is not fulfilled in the case before us. It has been suggested that an absurdity will be entailed by the petitioner's construction of section 40. For on that construction any person who verified a petition would be punishable even though no use of the petition were made and it never left his possession. We think that any such anomaly is sufficiently executed by the reference to sections 17 and 21 (3) in section 40. Taking this view we must hold that the charge can legally be tried only by the Court having jurisdiction over Kottaipatnam, Tanjore District, the place where the verification of the petition took place.

(1) 26 Ind. Cas. 136; 38 M. 639; 16 M. L. T. 505; (1914) M. W. N. 894; 15 Cr. L. J. 688; 29 M. L. J. 175.

We, therefore, direct the lower Court to return the complaint to the complainant for presentation to the Court having jurisdiction.

M. C. P.

Petition allowed.

LAHORE HIGH COURT.
CRIMINAL REVISION No. 181 OF 1922.
May 16, 1922.
Present :—Mr. Justice Brasher
KHILINDA RAM SAOHDE ✓ AND OTHERS
—ACCUSED—PETITIONERS
versus
EMPEROR—RESPONDENT.

Public Gambling Act (III of 1867), ss. 3, 4, 5—Keeping gaming house and being found in it—Joint trial—Search—Procedure—Criminal Procedure Code (Act V of 1898), s. 103.

The joint trial of the keeper of a common gaming house and of other persons for being found in the house is not illegal [p. 845, col. 2.]

Bhana Mal v. *Emperor*, 49 Ind. Cas. 779; 6 P. R. 1919 Cr.; 20 Cr. L. J. 219; 49 P. L. R. 1919; 9 P. W. R. 1919 Cr., followed.

A search conducted after the issue of a warrant under section 5 of the Public Gambling Act is not a search under Chapter VII of the Criminal Procedure Code, and section 103 of the Code has, therefore, no application to such a search. [p. 846, col. 1.]

Case reported by the Sessions Judge, Dera Ghazi Khan, with his No. 104G of 26th January 1922.

FACTS.—The Superintendent of the Dera Ghazi Khan Police having received information that the house of Khilinda Ram, accused No. 1 in the case, which is situated in the Town of the Dera Ghazi Khan, was used as a common gaming house, issued a warrant under section 5 of Act III of 1867.

Under the authority of this warrant the City Sub-Inspector, accompanied by some Police force and one Motan Ram, raided the house mentioned in the warrant on the night between 8th and 9th November 1921, and found Khilinda Ram and 11 others present there. On a search being made in the house playing cards, some *kauris* and cash aggregating to Rs. 100-2-3 were found and all the 12 persons were arrested and sent up for trial, accused No. 1 under section 3 and the rest under section 4 of the Gambling Act.

GROUNDS.—It would appear that the joint trial of the keeper of a common gaming house and of other persons for being found in such a house, is illegal.

It seems also that the search was illegal. The provisions of section 103, Criminal Procedure Code, should be followed in all searches as a general provision of law. In the present instance only one respectable person of the vicinity was called to witness the search.

For these reasons I forward this case on the Revision Side for orders.

Accused No. 1 was released on bail of Rs. 500 by order of this Court dated 14th January 1922. The fines imposed upon the rest of the accused have all been paid

Lala *Har Goval*, for the Petitioners.

Babu *S. C. Chatterji*, for the Government Advocate, for the Respondent.

ORDER.—The joint trial of Khilinda Ram and the other accused was not illegal. (See *Bhana Mal* v. *Emperor* (1)].

I am of opinion that the provisions of section 103, Criminal Procedure Code do not apply to a search conducted under section 5 of Act III of 1867. Under section 5, Criminal Procedure Code, investigations into offences under any special law are to be made according to the provisions of the Criminal Procedure Code but subject to any enactment for the time being in force. Chapter VII of the Code, which deals with processes to compel the production of documents and other moveable property and for the discovery of persons wrongfully confined, contains three sections (95, 98 and 100) authorising the issue of a search warrant by a Court in certain circumstances, and a search warrant under this

(1) 49 Ind. Cas. 779; 6 P. R. 1919 Cr.; 20 Cr. L. J. 219; 49 P. L. R. 1919; 9 P. W. R. 1919 Cr.

chapter can only be granted by a Court. Section 103 provides that searches under this chapter shall be conducted in the presence of two or more respectable inhabitants of the locality, and under section 165, Criminal Procedure Code, this provision applies also to searches conducted by the Police.

Section 5 of Act III of 1867 prescribes a special procedure which may be followed when a District Magistrate, First Class Magistrate, or District Superintendent of Police receives credible information and has reason to believe that any house, walled enclosure, room or place is used as a common gaming house. The section is to some extent analogous to section 98, Criminal Procedure Code, but it authorizes the issue of a warrant to enter and search buildings and to take possession of certain articles when the circumstances would not justify the issue of such a warrant under the Criminal Procedure Code. The warrant, moreover, may be issued by the District Superintendent of Police as well as by a Magistrate.

A search conducted after the issue of a warrant under section 5 of Act III of 1867 is not, therefore, a search under Chapter VII of the Criminal Procedure Code, and section 103, Criminal Procedure Code, can have no application. In the case of searches under the Opium Act the provisions of the Criminal Procedure Code have been expressly made applicable by section 16, but Act III of 1867 contains no corresponding section.

I decline to interfere. The accused, Khilinda Ram, must surrender to his bail and serve the remainder of his sentence.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO 1410 OF 1921.

February 17, 1922.

Present:—Mr. Justice Campbell.

RADHA KISHEN—CONVICT-PETITIONER

versus

EMPEROR—RESPONDENT.

Railways Act (IX of 1890), ss. 120, 121—Obstructing Railway servant—Abuse, whether obstruction—Travelling without ticket—Removal from carriage.

Travelling without a ticket is not one of the circumstances mentioned in section 120 of the Railways Act as justifying the removal of a person from a Railway carriage by a Railway servant.

The complainant, a Station Master, removed the accused from a Railway carriage as the latter was travelling without a ticket. Accused used abusive language towards the Station Master and was convicted of an offence under section 121 of the Railways Act:

Held, (1) that abuse or insult did not necessarily constitute obstruction or impediment to a Railway servant in the discharge of his duties, and that there was nothing to show that it had done so in this case:

(2) that, therefore, the accused could not be convicted of an offence under section 121 of the Railways Act.

Petition, under sections 435 and 439, Criminal Procedure Code, for revision of an order of the District Magistrate, Attock at Campbellpur, dated the 18th June 1921, affirming that of the Magistrate, First Class, Attock at Campbellpur, dated the 26th January 1921.

Lala *Niamat Rai*, for the Petitioner.

JUDGMENT.—The facts of this case appear to be perfectly clear. On the 24th January 1921 one Radha Kishen and two of his employees got into a train at Campbellpur station without tickets just as the train was about to start. The Station Master made them get down and Radha Kishen used abusive language towards him. Radha Kishan has been convicted of an offence under section 121 of the Indian Railways Act and sentenced to pay a fine of Rs. 25. In the first place, abuse or insult does not necessarily constitute obstruction or impediment to a Railway servant in the discharge of his duty, and does not appear to have done so in this case. Secondly, it is doubtful whether the Station Master was legally entitled to remove these persons from the train. Travelling without a ticket is not one of the circumstances mentioned in section 120 of the Act as justifyng removal from a Railway by a Railway servant. There is no evidence that the persons were travelling without tickets with fraudulent intent.

The conviction does not appear to be justified by the evidence, I accept the

petition for revision, set aside the conviction and sentence and acquit the petitioner. The fine, if paid, will be refunded.

Z. K. *Petition accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 165 OF 1922.

May 3, 1922.

Present :—Mr. Justice Lindsay.

UMA DUTT MISIR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107 514—Proceedings under s. 514 initiated within period of bond—Expiry of period under bond no bar to prosecution.

Where proceedings under section 514 of the Criminal Procedure Code are initiated within the period prescribed in a bond furnished under section 107 of the Code, the expiry of the period before the completion of the case is no legal bar to its prosecution under section 514 of the Code.

Ram Chunder Lalla, In re, 1 C. L. R. 134, dissented from.

Emperor v. *Raja Ram*, 26 A. 202; A. W. N. (1903) 237, distinguished.

Criminal revision from an order of the District Magistrate, Benares.

Messrs. *Satya Chandra Mukerji* and *Narmadeshwar Prasad Upadhiya*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The argument put forward in support of this application has the merit of ingenuity but I do not think it ought to be allowed to prevail.

The proceedings which are attacked were proceedings under section 514 of the Code of Criminal Procedure. The applicant, Uma Dat Misser, was, by an order passed on the 14th of March 1921, bound over to keep the peace for a period of one year. In or about the month of July, certain facts transpired which led to its being believed that Uma Dat had been guilty of a breach of the conditions of the bond, and as a result of this information, proceedings were initiated against him under section 514. There can be no doubt that these proceedings were taken within the period provided by the bond. For one reason or another it became necessary to transfer the proceedings under section 514 from the Court in which they were taken. It was held by this Court that those proceedings could only properly be taken in the Court of the District Magistrate of Benares and not in the Court of the Joint Magistrate who had taken up the case under section 514. An order was accordingly passed directing the District Magistrate of Benares to take the proceedings on to his own file. Instead of complying with this Court's order, the learned District Magistrate made over the case to a Subordinate Magistrate, Mr. Gada Husain. Further application was made to this Court which resulted in the proceedings taken in Mr. Gada Husain's Court being set aside as being without jurisdiction and the learned District Magistrate was directed to hold an enquiry *de novo*.

By the time all this happened, the period of one year limited by the bond had expired, and it is now contended that inasmuch as the period has lapsed, no proceedings under section 514 are possible. I have been referred to a case in *Ram Chunder Lalla, In re* (1), which had already been dissented from by a Divisional Bench of the Allahabad High Court in *Emperor* v. *Raja Ram* (2), of the Calcutta High Court in which it was held that where no proceedings under section 514 were taken by a Magistrate within the period limited by the bond, no action could be taken under this section after the term of the bond had expired. This, however, is a different case. There can be no doubt that action was taken within the period laid down in the bond and that the only reason why the case did not reach the stage of completion was that the learned District Magistrate had made a mistake in transferring the case from his own file to the Court of a Subordinate Magistrate. It was this illegality in the procedure of the District Magistrate which led to all the delay. As I understand the position, the learned District Magistrate is now only carrying on the proceedings which were initiated within

(1) 1 C. L. R. 134.
(2) 26 A. 202; A. W. N. (1903) 237.

the period of one year from the date of the bond, namely, the 14th of March 1921. In other words, the order of this Court was to direct the Magistrate to take up the case at the stage where he passed the illegal order and to continue the proceedings therefrom. I hold that there is no legal bar to the prosecution of this case under section 514, and I dismiss the application accordingly.

N. K.

Application dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No 1614 OF 1921.

February 18, 1922.

Present :—Mr. Justice Abdul Qadir.

MUHAMMAD ALI AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

F Public Gambling Act (III of 1867), s. 13—Public place—Blind alley removed from highway.

A blind alley approachable by a circuitous lane and at a considerable distance from a highway is not a "public place" within the meaning of section 13 of the Public Gambling Act.

Moula v. *Emperor*, 56 Ind. Cas. 672; 104 P. L. R. 1920; 21 Cr. L. J. 512, *Badr-ud-din* v. *Emperor*, 57 Ind. Cas. 931; 21 Cr. L. J. 691, relied upon.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Additional District Magistrate, Lahore, dated the 9th December 1921, modifying that of a Bench of the Honorary Magistrates dated 31st October 1921.

Mr. *G. J. Mackay*, for the Petitioner.

JUDGMENT.—This is a petition for revision of the order of the Additional District Magistrate, Lahore dated the 9th December 1921, upholding the convictions of a number of persons for an offence under section 13 of the Gambling Act, III of 1867. The Trial Court found that the four petitioners and their companions had been surprised by the Police while they were gambling in a public place and that cards and dice, etc., were found on the spot and some money was recovered from each of the men. The petitioners were sentenced to one month's rigorous imprisonment each as they had been previously convicted of gambling and the rest to 15 days' rigorous imprisonment each.

On appeal the sentenses of the four men were reduced to 15 days' rigorous imprisonment each and the remaining six men were given a sentence of a fine of Rs. 10 each instead of the sentence of imprisonment awarded by the Trial Court and were ordered to undergo 10 days' rigorous imprisonment in default of payment of fine.

Mr. Mackay, who appears for the petitioners in this Court, had raised various questions in his grounds for revision relating to the findings of the Courts below but he has now rightly confined his case to a point of law. He contends that the place where the petitioners were found gambling is not a "public place" and that, therefore, the petitioners should not have been convicted of gambling in a public place. Reference to a plan of the spot shows that the place in question is removed a considerable distance from the Napier Road and in order to get to it one has to pass through a circuitous lane before one gets to a blind alley where the petitioners were seen sitting. Reference is made to two decisions of this Court, where a public place, for the purposes of section 13 of the Gambling Act, is defined. In *Moula* v. *Emperor* (1) [Criminal Reference No. 615 of 1920 published as 56 Ind. Cas. 672] it is laid down that "where the accused were found gambling at a place near a public street and exposed to public view but which was not part of the public street they could not be convicted of gambling in a public." The same view was expressed in Criminal Revision No. 793 of 1920 [*Badr ud-din* v. *Emperor* (2)] where certain persons were found gambling "near the water tank within the premises of Railway Station" and it was held that the place was not a public place under section 13 of the Gambling Act. I think the present case is parallel to the above mentioned cases and the decisions referred to above must be followed.

I accept this revision, and, setting aside the convictions of the petitioners, acquit them.

Z. K. *Revision accepted.*

(1) 56 Ind. Cas. 672; 104 P. L. R. 1920; 21 Cr. L. J. 512.

(2) 57 Ind. Cas. 931; 21 Cr. L. J. 691.

LAHORE HIGH COURT.
FULL BENCH.
MISCELLANEOUS CIVIL APPEAL No. 89 OF 1919.
March 22, 1922.
Present :—Sir Shadi Lal, KT., Chief Justice,
Mr. Justice Abdul Raoof and
Mr. Justice Martineau.
Musammat UMRI—DEFENDANT—APPELLANT
versus
SHAH MOHAMMAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (u)—Remand, order of—Appeal, when lies—Appeal, second, when competent—Punjab Courts Act (VI of 1918), ss. 41, 42.

An appeal from an order of an Appellate Court remanding a case under O. XLI, r. 23, Civil Procedure Code, lies in all cases except those in which absolutely no right of second appeal against an appellate decree is given in the body of the Code or by any other law. [p. 853, col. 1.]

Faiz Ahmad v. *Badar Din*, 11 Ind. Cas. 315; 50 P. R. 1911; 137 P. W. R. 1911; 210 P. L. R. 1911, overruled.

Sawan Singh v. *Mothu*, 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. W. R. 1914; 120 P. W. R. 1914, discussed.
Fati v. *Gaddi*, 20 Ind. Cas. 788; 158 P. W. R. 1913; 279 P. L. R. 1913, approved.

In order to determine whether an order of remand is appealable or not, the test is, suppose, the Court instead of making an order of remand passed a decree on the strength of the adjudication constituting the order of remand, would there be a second appeal from that decree? If a second appeal would lie from the decree, then the order of remand is appealable, otherwise not. [p. 854, col. 1.]

Per *Martineau, J*—The competency of a second appeal is not dependent on the question whether the decision of the lower Appellate Court is based on a finding of fact or on a finding of law, for even when the decision is based on a finding of fact a second appeal will lie on one of the grounds mentioned in section 41 (1) (*b*) and (*c*) of the Punjab Courts Act. Whether or not a second appeal lies depends on the nature and value of the suit, a second appeal being barred by section 42 (2) only in a suit of the nature cognizable by a Court of Small Causes where the amount or value of the subject-matter of the suit does not exceed Rs. 500. Section 42 (1) merely restricts the grounds on which a second appeal can be entertained to those mentioned in section 41. [p. 854, col. 2.]

Miscellaneous second appeal from an order of the District Judge, Lyallpur, dated the 20th December 1918, reversing that of the Munsif, First Class, Lyallpur, dated the 10th June 1918.

ORDER OF REFERENCE TO A FULL BENCH.

MARTINEAU AND ABDUL RAOOF, JJ.—(*May 21, 1921.*)—Shah Muhammad obtained a decree for restitution of conjugal rights against his wife, *Musammat* Umri. In the execution proceedings the latter pleaded that she had become a Christian, and that, therefore, in accordance with the Muhammadan Law, the marriage with the decree-holder was dissolved and the decree could not be executed. After taking evidence the Munsif found that the judgment-debtor had embraced Christianity, and dismissed the application for execution. On appeal by the decree-holder the District Judge, being of opinion that the enquiry made by the Executing Court was not sufficiently full, set aside the order and remanded the case under O. XLI, r. 23, Civil Procedure Code, for decision on the merits, observing that what had to be decided was whether *Musammat* Umri had embraced Christianity, or whether her conversion was a fraudulent and colourable one. *Musammat* Umri has appealed to this Court from the order of remand.

Mr. Oertel, on behalf of the respondent, takes the preliminary objection that the appeal does not lie, relying on *Faiz Ahmad* v. *Badar Din* (1).

O. XLIII, r. 1 (*u*), Civil Procedure Code, allows an appeal from an order under O. XLI, r. 23, remanding a case where an appeal would lie from the decree of the Appellate Court. The question in what cases an appeal lies from such a decree is to be determined by the provisions of the Punjab Courts Act.

The ruling *Faiz Ahmad* v. *Badar Din* (1) has ceased to have any application, as that case was decided when the old Punjab Courts Act XVIII of 1884, as amended by Act XXV of 1899, was in force, and the law contained in those Acts on the subject of appeals from Appellate decrees was entirely changed by the enactment of Punjab Act I of 1912.

After the passing of Act I of 1912, which contains the same provisions as the later Act III of 1914 in regard to appeals from appellate decrees it was held in

(1) 11 Ind. Cas. 315; 50 P. R. 1911; 137 P. W. R. 1911; 210 P. L. R. 1911.

Sawan Singh v. *Mothu* (2) that there could be no appeal from a Divisional Judge's order of remand under O. XLI, r. 23 Civil Procedure Code, if that order was based on a finding of fact only, but that an appeal was competent if the preliminary point on which the decision of the First Court was reversed involved a question of law, which would allow of a second appeal if the order appealed from were a decree.

With all deference, we venture to doubt the correctness of this decision, and we think that the error consists in confusing the question whether an appeal lies from an appellate decree with the question as to the grounds on which an appeal will lie. The competency of a second appeal is not dependent on the question whether the decision of the lower Appellate Court is based on a finding of fact or on a finding of law, for even when the decision is based on a finding of fact a second appeal will lie on one of the grounds mentioned in section 41 (*a*) (*b*) and (*c*) of the Punjab Courts Act. A second appeal is prohibited by that Act only in a case of the nature mentioned in section 42 (2), *viz*, a suit of the nature cognizable by a Court of Small Causes, when the amount or value of the subject-matter of the suit does not exceed Rs. 500. Section 42 (1) does not bar a second appeal in other cases, but only restricts the grounds of the appeal, providing that no second appeal shall lie except on the ground mentioned in section 41.

Further, the rule laid down in *Sawan Singh* v. *Mothu* (2) does not provide for a case like the present in which the Appellate Court has passed an order of remand without having reversed the decision of the First Court on a preliminary point.

The words "where an appeal would lie from the decree of the Appellate Court," which are contained in O. XLIII, r. 1 (*u*) of the Civil Procedure Code of 1908, did not find a place in the corresponding section, *viz.*, section 588 (28) of the old Code, and it was held in a series of cases, *viz.*, *Collector of Bijnor* v. *Jafar Ali Khan* (3), *Mahadev Narsing* v. *Ragho Keshav* (4), *Kirte Mohaldar* v. *Ramjan Mohaldar* (5), *Chinnatambi Gounden* v. *Chinnana Gounden* (6) and *Agandh Mahto* v. *Khajah Aliullah* (7), that section 588 (28), Civil Procedure Code, (corresponding to section 42 (2) of the present Punjab Courts Act) was not controlled by section 586 and that an order of remand passed on an appeal from a decree in a suit of the nature described in section 586 was, therefore, appealable. It seems probable that it was simply for the purpose of excluding an appeal from an order of remand in cases of that description that the words "where an appeal would lie from the decree of the Appellate Court" were added in O. XLIII, r. 1 (*u*) of the Civil Procedure Code of 1908.

The view, therefore, which we are inclined to take is, that every order of remand passed under O. XLI, r. 23, Civil Procedure Code, is appealable except when it is made in appeal in a suit of the nature mentioned in section 42 (2) of the Punjab Courts Act, or in any other case in which an appeal from the appellate decree would not be allowed by law. As a different view has been taken in *Sawan Singh* v. *Mothu* (2) we think that the point should be determined by a Full Bench.

We accordingly refer the following question to a Full Bench :—

When does an appeal lie from an order of an Appellate Court remanding a case under O. XLI, r. 23 Civil Procedure Code.

Dr. *Nand Lal*, for the Appellant.

Messrs. *Oertel* and *D. C. Ralli*, for the Respondent.

ORDER OF THE FULL BENCH.

ABDUL RAOOF, J. (*February* 21, 1922).—This is a reference to a Full Bench which has been made under the following circumstances :—

Shah Muhammad, respondent, came into Court on the allegation that *Musammat* Umri was his wife and claimed restitution of conjugal rights. Khan Muhammad Sher Nawab Khan, Munsif of Lyallpur, held that *Musammat* Umri had embraced Christianity and under the Muhammadan Law the marriage had been dissolved. The prayer for restitution of conjugal rights accordingly was disallowed.

(2) 23 Ind. Cas. 817; 85 P. R. 1914; 162 P. L. R. 1914; 120 P. W. R. 1914,

(3) 3 A. 18; 2 Ind. Dec. (N. S.) 4.

(4) 7 B. 292; 4 Ind. Dec. (N. S.) 197.

(5) 10 C. 523; 5 Shomo L. R. 159; 5 Ind. Dec. (N. S.) 350.

(6) 19 M. 391; 6 Ind. Dec. (N. S.) 978,

(7) 11 C. W. N. 862.

Shah Muhammad appealed to the Court of the District Judge and urged that the alleged conversion was colourable and not genuine. The learned District Judge accepted the appeal and, holding that the real issue had not been tried by the First Court, remanded the case for re-trial under O. XLI, r. 23, Civil Procedure Code, suggesting the following points to be decided in the case:—

(1) Has *Musammat* Umri embraced Christianity and has her marriage with the appellant, therefore, become dissolved? and

(2) Is her conversion a fraudulent and a colourable one and, therefore, she is still the wife of the appellant?

Against this order of remand an appeal was preferred to this Court and registered as Civil Miscellaneous Appeal No. 89 of 1919. When the appeal came up for hearing before a Single Judge a preliminary objection was taken to its competency on the basis of the ruling in *Faiz Ahmad* v. *Badar Din* (1). Owing to the importance of the question raised the appeal was referred to a Division Bench for decision. Before the Division Bench the question was discussed at some length and reliance was placed on the ruling in *Sawan Singh* v. *Mothu* (2), in addition to the one already referred to. The Division Bench in its turn thought that the question raised was of sufficient importance to be referred to a Full Bench for decision. Accordingly the following question was referred and has come up for decision before us:—

When does an appeal lie from an order of an Appellate Court remanding a case under O. XLI, r. 23, Civil Procedure Code?

The terms of the reference are somewhat wide in their scope but the argument addressed to us requires an answer to a much narrower question. The argument put forward by Mr. Oertel, Counsel for the respondent, in support of the preliminary objection is as follows:—

(1) That under O. XLIII, r. 1, clause (*u*) an appeal from an order under r. 23, O. XLI, remanding a case would lie only where an appeal would lie from the decree of the Appellate Court;

(2) that as provided in section 101 of the Code no second appeal shall lie except on the grounds mentioned in section 100, Civil Procedure Code;

(3) that under section 100 an appeal can lie to the High Court on any of the following grounds only:—

(*a*) the decision being contrary to law or to some usage having the force of law;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law;

(*c*) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits;

(4) that no second appeal would lie on findings of fact;

(5) that it is impossible to say whether the decree which might have been passed by the District Judge, had he not remanded the case, would have been open to objection on any of the grounds mentioned in section 100, and that it was quite possible that the decision of the Appellate Court might have been based on findings of fact;

(6) That applying in this case the rule laid down in *Faiz Ahmad* v. *Badar Din* (1) and *Sawan Singh* v. *Mothu* (2), the present appeal from the order of remand does not lie under O. XLIII, r. 1, clause (*u*).

The decision in *Sawan Singh* v. *Mothu* (2) does not support the contention of the learned Counsel. So far as I am able to understand the judgments of the two learned Judges of the Division Bench, they held that orders of remand can be appealed against on exactly the same ground on which the appellate decree can be challenged in second appeal. Mr. Justice Chevis observed that: "I believe it is intended to put such orders on exactly the same footing as appellate decrees, and to make them appealable on precisely the same grounds." Mr. Justice Shah Din made the following pertinent remark on the subject at page 306* of the report:—

"Suppose the decision of the First Court was one dismissing the suit on the ground that it was barred by limitation (assuming that the question of limitation decided was a pure question of law) or on the ground that the matter in dispute was *res judicata* between the parties, and suppose that on appeal the Divisional Judge were to hold that the suit was not barred by the law

*Page of P. R. 1914.—[*Ed.*

of limitation or by the rule of *res judicata* and were to remand the case for a fresh decision on the merits, under O. XLIII, r. 1 (*u*), Civil Procedure Code, an appeal would, in my opinion, lie to this Court from the order of remand, inasmuch as an appeal would lie if the order of remand, which involved the decision of questions of law, were treated as a decree finally disposing of the suit; although after the remand the First Court might dispose of the suit only on facts, in which case, on an appeal being preferred to it, the Appellate Court would also have to record findings of fact only and dispose of the appeal on that basis. From the 'final decree' of the Appellate Court, based as it would be only on findings of fact there would be no appeal to this Court; and yet in the view that I take of r. 1 (*u*) of O. XLIII, Civil Procedure Code, an appeal would lie to this Court from the Appellate Court's order of remand because the preliminary point involved questions of law and the decision on it would be open to second appeal if the order appealed from were a decree and not a mere order."

The decision in *Faiz Ahmad* v. *Badar Din* (1) appears to be in conflict with this opinion. In this case the Court of first instance had dismissed the suit holding it to be barred by time, and the learned Divisional Judge on appeal had held that the suit was within time and had remanded it under O. XLI, r. 23, Civil Procedure Code. The learned Judges of the Chief Court held, "that as it was impossible to say whether the decree which might have been passed by the Divisional Judge, had he not remanded the case, would have varied or reversed otherwise than as to costs the decree of the Court below and whether a further appeal would lie or not from the Divisional Judge's decree no appeal lay under O. XLIII, r. 1 (*u*) of the Civil Procedure Code, against the orders of remand." If the question of limitation decided by the Divisional Judge was a question of law an appeal from the order of remand in the case was competent according to the ruling of the learned Judges in *Sawan Singh* v. *Mothu* (2).

In my opinion this rule was correctly laid down and the decision in *Faiz Ahmad* v. *Badar Din* (1) cannot be accepted as laying down the correct law. It must, however, be observed that Mr. Justice Shah Din, while considering clause (*u*) of r. 1, O. XLIII, never intended to lay down a general rule governing all cases, as is manifest from the following remark in his judgment:

"The right construction of the words 'where an appeal would lie from the decree of the Appellate Court' as used in clause (*u*) of r. 1 of the Order under consideration appears to me to be a matter of some difficulty, and it is not easy to lay down a rule which would govern all conceivable cases falling within the purview of the clause in question." Upon almost all the points in the case there was a general agreement between the two learned Judges who decided the case reported as *Sawan Singh* v. *Mothu* (2). The only difference of opinion was on the question whether an appeal from an order of remand dealing with a question of custom would lie at all. Mr. Justice Chevis being of opinion that as an appeal lay from the appellate decree on a certificate so an appeal would lie from an order of remand if a certificate were produced. Mr. Justice Shah Din, on the other hand, was of opinion that as section 40 (3) of the Punjab Courts Act did not in terms apply to such an appeal the party aggrieved by the order of remand could not claim the right under the said section to apply to the Appellate Court for a certificate on a point of custom involved in the preliminary point, and as the Appellate Court had not, by necessary implication, the power to grant a certificate to such an applicant, it would be perfectly within its right in declining to adjudicate upon the application submitted to it. From this circumstance he came to the conclusion that no appeal lay to the Chief Court from the Divisional Judge's order of remand, because it could not be found definitely that an appeal would lie from the decree of the Divisional Judge. Speaking for myself, this was too narrow a view to take. The object of the Legislature, by enacting sub-section (3) of section 41 of the Punjab Courts Act, was to make an exception in matters of second appeal regarding a question of custom or usage

of sufficient importance, and to allow an appeal on evidence also. To hold that the right of questioning a decision on custom exists in appeals from decrees and does not exist in appeals from orders of remand would create an anomaly. As rightly held by both the learned Judges, it was intended by the Legislature to put orders of remand on exactly the same footing as appellate decrees and to make them appealable on precisely the same grounds. If a mistake in deciding the question of custom can be corrected in an appeal from an appellate decree it is reasonable to hold that it can and ought to be corrected in an appeal from an order of remand also.

Exactly the same question which is urged in the present case was raised in *Lati* v. *Gaddi* (8) and my learned brother Mr. Justice Scott Smith was asked to extend the principle enunciated in *Faiz Ahmad* v. *Badar Din* (1) to the case before him, but he refused to do so, for the reasons stated in his judgment. I entirely agree in the interpretation put by my learned brother on clause (*u*) of r. 1, O XLI, Civil Procedure Code.

My answer to the question put in the reference to the Full Bench is that an appeal from an order of an Appellate Court remanding a case under O. XLI, r. 23, does lie in all cases except those in which absolutely no right of second appeal against the appellate decree is given in the body of the Code or by any other law.

SHADI LAL, C. J.—The facts relevant to the question submitted for consideration are set out in the judgment of Mr. Justice Abdul Raoof, and I agree with him in holding that the preliminary objection that no appeal lies from the order of remand is wholly untenable and must be overruled. I consider that the Legislature by using the words "where an appeal would lie from the decree of the Appellate Court" in clause (*u*) of O. XLIII, r. 1, Civil Procedure Code, intended to make it clear that the law does not allow an appeal from every order of remand under r. 23 of O. XLI, but that the order of remand is appealable only in those cases in which there would be a second appeal from the decree which the Appellate Court would have passed, if, instead of remanding the case for re-decision, it had decided the whole case itself.

It will be observed that section 588 (28) of the Code of Civil Procedure, 1882, gave a right of appeal from every order of remand irrespective of the nature and value of the suit in which the order was made, and it was consequently held that an order remanding a suit of the nature cognisable by a Court of Small Causes was appealable, even though the amount or value of the subject-matter of the suit did not exceed Rs. 500. While section 586 of the old Code (corresponding to section 102 of the present Code) expressly enacted that no second appeal lay from an appellate decree passed in a suit of small cause nature not exceeding Rs. 500 in value, there was no such restriction on the right of appeal from an order of remand. It was obviously anomalous that an adjudication, *e. g.*, a decision on a question of limitation, which was not appealable if it formed part of a decree, should be open to appeal to the High Court if it was incorporated in an order of remand. Indeed, it was held in some cases that a person appealing from an order of remand was not confined to the grounds enumerated in section 584 (section 100 of the present Code) on which a second appeal could be entertained, but could impeach the order of remand even on a question of fact.

To remove the anomaly pointed out above, the Legislature has now restricted the right of appeal from an order of remand by providing in O. XLIII, r. 1 (*u*) of the Code of Civil Procedure 1908, that an appeal lies only in cases in which, "an appeal would lie from the decree of the Appellate Court." It seems to me that the framers of the Code intended to place the right of appeal from an order of remand on the same footing as the right of appeal from an appellate decree.

I cannot accept the argument urged on behalf of the respondent that no appeal from an order of remand is allowed unless it can be predicated with certainty that the appellate decree, which may ultimately

(8) 20 Ind. Cas. 788; 158 P. W. R. 1913; 279 P. L. R. 1913.

be passed in the case, would be open to one of the objections enumerated in section 100 and would not be concluded by a finding of fact. If this contention were allowed, I cannot imagine a single case in which there would be an appeal from an order of remand because it is possible to contend in every case that the decree of the Appellate Court might proceed solely on a finding of fact and might not involve any of the questions mentioned in section 100 of the Code. In that case there could never be an appeal from an order made under r. 23 of O. XLI, and clause (*u*) of O. XLIII, r. 1, would be wholly meaningless.

I cannot give effect to a contention which would lead to such a manifest absurdity, and I have no hesitation in holding that the interpretation which the learned Counsel for the respondent seeks to place upon the words quoted above, is wholly wrong. The object of the Legislature clearly was to assimilate the right of appeal from an order of remand to the right of appeal from an appellate decree by imposing upon the former right the same restrictions as are applicable to the right of second appeal.

In order to determine whether an order of remand is appealable or not the test, in my opinion, is this:—Suppose, the Court instead of making an order of remand passed a decree on the strength of the adjudication constituting the order of remand, would there be a second appeal from that decree? If a second appeal would lie from the decree, then the order of remand is appealable otherwise not. This is my answer to the question referred to the Full Bench. The case must now go back to the Divisional Bench.

MARTINEAU, J.—I concur with the learned Chief Justice and have only to add a few remarks with regard to the rule laid down in *Sawan Singh* v. *Mothu* (2), with which I am unable to agree. It was there held that there could be no appeal from an order of remand under O. XLI, r. 23, Civil Procedure Code, if the order was based on a finding of fact only, but that an appeal was competent if the preliminary point on which the decision of the first Court was reversed involved a question of law which would allow of a second appeal if the order appealed from were a decree. As pointed out in the order of reference to a Full Bench the error in that decision consisted in confusing the question whether an appeal lies from an appellate decree with the question as to the grounds on which an appeal will lie. The competency of a second appeal is not dependent on the question whether the decision of the lower Appellate Court is based on a finding of fact or on a finding of law, for even when the decision is based on a finding of fact a second appeal will lie on one of the grounds mentioned in section 41 (1) (*b*) and (*c*) of the Punjab Courts Act. Whether or not a second appeal lies depends on the nature and value of the suit, a second appeal being barred by section 42 (2) only in a suit of the nature cognizable by a Court of Small Causes where the amount or value of the subject-matter of the suit does not exceed Rs. 500. Section 42 (1) merely restricts the grounds on which a second appeal can be entertained to those mentioned in section 41.

Z. K. *Case sent back.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 34 OF 1921.

May 25, 1922.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Ryves.

MAZHAR ALI KHAN—DECREE-HOLDER—APPELLANT

versus

MAHFUZ HASAN—JUDGMENT-DEBTOR—RESPONDENT.

Pensions Act (XXIII of 1871), s. 7—Pension, attachment of—Facts showing attachability be set out.

Ordinarily a pension is not attachable for sale. Where a decree-holder wishes to attach and sell a pension, and his case is that the pension belongs to that class which is referred to in section 7 of Act XXIII of 1871, it is his duty to set out the facts and prove his case by appropriate proof.

Letters Patent Appeal against the judgment of Mr. Justice Walsh, reported as 62 Ind. Cas. 273, reversing a decree of the Additional Subordinate Judge, Moradabad, dated 30th March 1920.

GANPATI TELI v. DAJI.

Mr. *Mohan Lal Sandal*, for the Appellant.

Mr. *Raza Ali*, for the Respondent.

JUDGMENT.—As we are in agreement with the findings of fact and the proposition of law enunciated by Mr. Justice Walsh*, we can dismiss this appeal with very few words. The decree holder wished to attach and sell a pension. It was his duty, if his case was that the pension belonged to that class which are referred to in section 7 of Act XXIII of 1871 to set out the facts and to prove his case. He did not do so. No body, even to-day, knows whether the pension was granted prior to the Act of 1871 or subsequent to it. Nevertheless, it has been argued here very strenuously that the executions-creditor did all that was necessary and that he is entitled to attach and sell the pension. He has not proved any right to attach and sell the pension. There is no reason to infer that it was granted before 1871 nor is there any reason to infer that it was granted after 1871. The matter is entirely open. A pension ordinarily is not attachable for sale. If the decree-holder wanted to bring this within the exception and show that this individual pension happened to be attachable for sale, he should have done so by appropriate proof. This appeal, therefore, fails and is dismissed with costs and fees on the higher scale.

W. C. A. *Appeal dismissed.*

*See 62 Ind. Cas. 273—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 107 OF 1922.

August 31, 1922.

Present:—Mr. Hallifax, A. J. C.

GANPATI TELI—DEFENDANT No. 1—APPELLANT

versus

DAJI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 TO 4—RESPONDENTS.

C. P. Tenancy Act (I of 1920)—Lessee of proprietary interest in village—Right to obtain and execute decree for arrears of rent—Ejectment of tenant—Tenancy right, extinction of.

A person other than the landlord, for instance, a holder of the proprietary interest at the moment, is entitled to obtain and execute a decree for arrears of rent but he cannot execute it by the special process of ejecting the tenant, as nobody but the landlord can eject a tenant for arrears of rent.

Ejectment of a tenant merely extinguishes the tenancy right, it does not transfer it to the ejector.

Appeal against the decision of the District Judge, Nagpur, dated the 9th December 1921, in Civil Appeal No. 118 of 1921.

Messrs. *A. V. Khare* and *A. V. Zinzarde*, for the Appellant.

JUDGMENT.—Mr. A. V. Khare and Mr. Zinzarde have appeared for the appellant. It is clear beyond all question that nobody but the landlord can eject a tenant for arrears of rent. If that were not clear from the words of the Tenancy Act, a consideration of the futility of such an ejectment would make it so. The landlord could give the tenant so ejected a fresh lease the moment after his ejectment or could hold the land himself or give it to a third party, but the benefit obtained by the decree-holder and the extent to which he had executed his decree would be limited to the satisfaction of having flung out the tenant, perhaps momentarily. There is no reason why a person other than the landlord, that is, the holder of the proprietary interest at the moment, should not obtain and execute a decree for arrears of rent, but he cannot execute it by the special process of ejecting the tenant, if only because that process would be meaningless and no more than an empty formality. It is urged that the appellant here has a right after ejecting the tenant to fill the vacuum caused by the destruction of the tenancy right himself, because it is a lease; it is admitted that he would have no such right if he had sold the village instead of leasing it. In this respect there is no difference whatever between a lease and a sale. Confusion of thought arises out of regarding the tenancy right as something carved out of the proprietary right which leaves a vacuum when it is destroyed. It is a right superimposed on the proprietorship, an encumbrance differing only in details from a possessory mortgage, and when it is destroyed it leaves the proprietary right unencumbered in the hands of the owner. Ejectment of a tenant merely extinguishes the tenancy right; it does not transfer it to the ejector. The appeal is dismissed without notice to the respondents.

G. R. D. & N. K. *Appeal dismissed.*

PARTHASARATHI NAIDU v. MUKUNDAMMAL.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 90 OF 1921.

July 26, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

K. M. PARTHASARATHI NAIDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

P. MUKUNDAMMAL—DEFENDANT RESPONDENT.

Document, interpretation of—Will—Power to sell, whether includes power to mortgage.

Where by a Will power is given to sell property to pay off debts, that power includes the power to mortgage, unless there be some reason to be gathered from the Will itself why it should be excluded.

Haldenby v. *Spofforth*, (1839) 1 Beav. 390; 48 E. R. 991; 8 L. J. (N. s.) Ch. 238; 3 Jur. 241; 49 R. R. 390, *Ivy* v. *Gilbert*, (1722) 2 P. Wms. 13; Prec Ch. 583; 2 Eq. Cas. Abr. 644; 24 E R. 622, affirmed on Appeal (1723); 6 Bro. P. C. 68; 2 E. R. 937, *Purna Chundra Bakshi* v. *Nobin Chandra Gangopadhya*, 8 C. W. N. 362, relied on.

Appeal from the judgment and decree of Mr. Justice Coutts-Trotter, dated 2nd August 1921 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 273 of 1920.

Mr. *T. L. Venkatramier*, for the Appellants.

Mr. *T. Ethiraja Mudaliar*, for the Respondent.

JUDGMENT.

SCHWABE, C. J.—In this case the mortgagees brought a suit to enforce the mortgage. The mortgage was executed by an executor under a Will. That Will gave the executor express power to sell any part of the estate, moveable or immoveable, as the executor might wish for purposes of paying off debts. It was contended before the learned Judge that, this power being an express power of sale, he had no power to mortgage. The learned Judge with regret came to the conclusion that that was the proper construction of the Will and that he was bound by *Haldenby* v. *Spofforth* (1) and Indian cases following that case so to hold. On a careful examination of that case, so far from being authority in favour of the proposition that the executor with power of sale cannot mortgage, it is in my judgment, direct authority for the proposition that he can, except in cases such as the case where a prohibition against mortgage can be inferred. The Master of the Rolls, Lord Longdale referring to a case of *Ivy* v. *Gilbert* (2) said thus:—"Lord Macclesfield also observed that the Court had decreed, that the trusts declared concerning the term, empowered the trustees to sell the premises, and a power to sell, implied a power to mortgage which was a conditional sale. This I conceive to mean, that where it is intended to preserve the estate, there, under a direction for sale, a mortgage will sufficiently answer the purpose." The facts of *Haldenby* v. *Spofforth* (1) were that the direction there was not to preserve the estate but to convert the whole estate into money.

Turning to the authorities in this country it is sufficient to quote *Purna Chandra Bakshi* v. *Nobin Chandra Gangopadhya* (3) which is a direct authority for the proposition that where by a Will power is given to sell the property to pay off debts that power includes the power to mortgage. By section 90 of the Probate and Administration Act, 1881, the power of an executor to dispose of immoveable property is subject to any restrictions which may be imposed by the Will. But, in my judgment, the power of sale is not a restriction imposed by the Will and the power of mortgage, so far from being inconsistent with it, is, as pointed out in the English case, included in it unless there be some reason to be gathered from the terms of the Will itself why it should be excluded. We are then asked to remand the case so that further evidence may be given. The learned Judge held, as I understand his judgment, that the onus was on the defendant to show, if it was open to him to show that there were no debts and that the executor was not mortgaging for the purpose of paying off debts. No evidence of that kind was tendered and it is, therefore, unnecessary to consider whether, if it had been tendered, it would have been admissible. In my judgment

(1) (1839) 1 Beav. 390; 48 E. R. 991; 8 L. J. (N. s.) Ch. 238; 3 Jur. 241; 49 R. R. 390.

(2) (1722) 2 P. Wms. 13; Prec. Ch. 583; 2 Eq. Cas. Abr. 644; 24 E. R. 622, affirmed on Appeal (1723) 6 Bro. P. C. 68; 2 E. R. 937.

(3) 8 C. W. N. 362.

it was a pefectly proper ruling that it was not upon the mortgagee to prove as part of his case that the executor with power of sale was acting properly in effecting the mortgage. On those grounds I think the judgment must be reversed and judgment must be entered for the plaintiffs as prayed for with costs here and below.

WALLACE, J.—I agree. I just wish to say a few words on the second point. I agree with the Trying Judge that, where an executor has the power to mortgage, the mortgagee cannot be called upon to show the reality of the testator's debts for which their money was borrowed and as the defendant here merely does not admit that there were debts other than the mortgage-debt of 24th February 1918 and does not assert that there were no other debts, there seems to me no sound ground for remand for proof of the reality of the debts for which the mortgage was taken. I agree that the second mortgage is binding on the defendant.

W. C. A.

Decree reversed.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 2286 OF 1918.
April 18, 1922.
Present:—Mr. Justice LeRossignol and
Mr. Justice Harrison.
MAULA BAKHSH KHAN—PLAINTIFF—APPELLANT
versus
FATEH JANG AND OTHERS, MINORS, THROUGH THEIR MOTHER, *Musammat* FATIMA—DEFENDANTS—RESPONDENTS.

Custom—Succession—Re-marriage of widow—Issue, whether legitimate—Manjh Rajputs *of Jagraon Tahsil, Ludhiana District.*

Although among certain sections of *Manjh Rajputs* of the Jagraon Tahsil, in the Ludhiana District, the re-marriage of widows is not recognised, yet where such a re-marriage takes place the issue of the marriage are legitimate and have an equal right of succession to the property of their father, along with the issue of any other marriage. [p. 858, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Ludhiana, dated the 27th May 1918.

Mr. *Philip Morton*, for the Appellant.
Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—The parties in this case are Manjh Rajputs of Jagraon Tahsil, Ludhiana District, and the suit out of which this appeal arises was brought by the son of Dargahi Khan, a Manjh Rajput, for a declaration that he alone was entitled to his father's estate to the exclusion of the three minor defendants, the sons of Dargahi Khan by another wife, on the ground that the defendants' mother was a widow when she married Dargahi Khan and that in accordance with the custom which governs the parties, the issue of such an union was illegitimate.

The suit has been dismissed by the Senior Subordinate Judge on the grounds that the custom alleged is opposed to general law and custom and requires very strict proof and that, though the custom is recorded in the *riwaj-i-am* or statements of custom of the Settlement of 1882, those statements carry very little weight as they are unsupported by instances. It is contended before us on behalf of the appellant that the demand made by the Court below for instances in support of the custom is unreasonable, inasmuch as it is impossible to give negative evidence of a custom by instances, and our attention has been drawn to the oral evidence which is to the effect that in four villages of Jagraon Tahsil widows are never re-married and that consequently those four villages are full of widows. The oral evidence for the plaintiff is generally to the effect that in the four villages concerned re marriage of widows is not recognised by Manjh Rajputs, and it is asserted, though not very convincingly, that Dargahi Khan on his marriage with the mother of the defendants was ostracized. That Dargahi Khan, however, was not completely outcasted and that he had adherents in the village who recognised him in spite of his marriage with the widow is clear from the fact that the marriage caused a riot in the village and persons on either side were sent to jail. Muhammad Hussain (P. W. No. 2), whilst alleging that the issue of such a marriage is not illegitimate, stated that it was debarred from succession. The reason alleged for this extraordinary custom is that the Manjh Rajputs were originally Hindus who, on their

conversion to Islam, retained their aversion from re-marriage of widows.

It cannot be doubted that in 1882 popular opinion amongst these Manjh Rajputs, at any rate, in four villages of Jagraon Tahsil, was opposed to the re-marriage of widows, but in the more recent Settlement of 1909-10 the Settlement Officer recorded his opinion that although in these four villages the same custom was alleged to prevail, there was no doubt that all tribes of Rajputs practised *Karewa*, that is, re-marriage of widows, and that it was common even among Manjh Rajputs residing in villages other than the four villages referred to in this case. Before us, although this was denied in the Court below, it is conceded that Dargahi Khan was formally married to the mother of the defendants and that the defendants are the sons of Dargahi Khan, and the question for decision now is whether the issue of an otherwise legal marriage is illegitimate merely by reason of the fact that the re marriage of a widow is regarded by certain sections of the Manjh Rajputs as opposed to custom. We are constrained to find that among this restricted community of Manjh Rajputs there is a prejudice against re-marriage of widows but that the prejudice, we hold, is inhuman and opposed to natural justice, equity and public policy. We find that Dargahi Khan broke through the popular prejudice, married a widow and succeeded in retaining his position in the society of the village, and we hold that his offspring, the defendants, are his legitimate issue.

For these reasons we dismiss the appeal with costs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 532 OF 1917.

June 23, 1922.

Present:—Sir Shadi Lal, KT.,
Chief Justice, Mr. Justice Scott Smith,
and Mr. Justice Harrison.

MELA SINGH AND OTHERS, LEGAL REPRESENTATIVES OF LEHNA, DECEASED—
DEFENDANTS—APPELLANTS

versus

GURDAS, MINOR SON OF BASANTA THROUGH *Musammat* THAKRI HIS MOTHER—PLAINTIFF—RESPONDENT.

Custom—Succession—Right of predeceased appointed hair's son.

In the absence of a special custom to the contrary, the son of an appointed heir who predeceased the appointer is not entitled to succeed to the property of the latter. [p. 860, col. 2; p. 861 col. 1.]

Chajju v. *Dalipa*, 51 P. R. 1906; 124 P. L. R. 1906; 78 P. W. R. 1906, overruled.

Mehra v. *Mangal Singh*, 27 Ind. Cas 393; 99 P. R. 1914; 71 P. L. R. 1915; 8 P. W. R. 1915, *Ralla* v. *Budha*, 50 P. R. 1893 (F. B.), *Tulsi* v. *Ram Rakha*, 66 P. R. 1903; 110 P. W. R. 1908, *Collector of Tirhoot* v. *Huropershad Mohunt*, 7 W. R. 500, *Doolee Singh* v. *Bussunt Koeree*, 8 W. R. 155, *Waryaman* v. *Kanshi Ram*, 66 Ind. Cas 309; 3 L. 17, referred to.

Second appeal from a decree of the Additional District Judge, Hoshiarpur at Jullundur, dated the 26th January 1917, affirming that of the Senior Subordinate Judge, Hoshiarpur, dated the 22nd August 1916.

Mr. *M. S. Bhagat*, for the Appellants.

Lala *Fa'ir Chand* and Mr. *Nanak Chand Pandit*, for the Respondent.

JUDGMENT.

SCOTT-SMITH (*June* 1, 1922).—The question referred to the Full Bench is whether the rule laid down in *Chajju* v. *Dalipa* (1) namely, that the son of an appointed heir, who predeceased the appointer, is entiled to succeed to the latter's property is correct. The Judges, who decided that case, admitted that there was no authority on the point and decided it in accordance with what they considered to be the general principles of the customary law. In coming to their decision they were mainly influenced by two considerations; firstly, that an element of absurdity would be introduced into the matter if the ultimate effectiveness of the appointment were made to depend on the accident whether

(1) 51 P. R. 1906; 124 P. L. R. 1906; 78 P. W. R. 1906.

the appointer or the appointed should die first; secondly, that all through the discussions about adoption in the Punjab it appeared to be clearly recognised that there is no real distinction between adoption and gift. The Judges were of opinion that the intention of the alienor is the same in both and that it is more a matter of habit than anything else that he should proceed in one way rather than the other. They said that the gift, if valid, would benefit the donee's son whether the donee himself predeceased the donor or not.

As regards the first of these considerations, I do not, with all deference see much, force in it because there is no authority that I know of, which prevents a person from appointing another heir if the one appointed by him dies. As regards the second consideration it appears to me that the appointment of an heir just as much resembles a bequest as a gift.

In the case of *Mehra* v. *Mangal Singh* (2) at page 371* of the report the following passage occurs:—

"It has been held in many cases that the appointment of an heir is tantamount to a gift which comes into operation on the death of the appointer and that the property received by the appointee should be regarded in the nature of a bequest." A passage from the judgment of Sir Meredyth Plowden at page 231 of 50 P. R, 1893 (F. B.) [*Ralla* v. *Budha* (3)] is then quoted, and the Judges go on to say:—"The appointee is a legatee of the property and the son of a legatee has absolutely no right to control an alienation by the father of the property bequeathed to the latter."

Art. 49 of Rattigan's Digest of Customary Law states that the relationship established between the appointed heir and the appointer is purely a personal one. There is ample authority for this in the rulings of the Chief Court and of the High Court. In *Tulsi* v. *Ram Rakha* (4) the Judges said:—"It seems to us clear that in a case of customary appointment of an heir the appointment is personal to him and does not operate to make all his relatives, or even his existing sons, members of the agnatic family of the adopter." In *Mehra* v. *Mangal Singh* (2) it was held that property which comes to the appointed heir as such is not ancestral *qua* the latter's son. The difference between a ceremonial adoption of the Hindu Law and the customary appointment of an heir was referred to (page 369* last paragraph, of the report) and it was pointed out that it had been repeatedly held that such an appointment does not involve the transplanting of a person from one family to another. The tie of kinship with the natural family is not dissolved and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee was said to be a purely personal one and not to extend beyond the contracting parties on either side. The Judges went on to say that it followed that the appointer or his male lineal ascendant could not be called an ancestor of the appointee's son.

In the same case at page 372* of the report the following passages occur:—

"It is, however, significant that in the case of Kritrima adoption which, as has been pointed out in several judgments of this Court, resembles the customary appointment of an heir in the Punjab, the Calcutta High Court has held that the sons of a person adopted in the Kritrima form are not entitled to inherit the property of the adoptive father [*vide*, *inter alia*, *Juswant Singh* v. *Doolee Chand* (5). At page 258 (2) of the report the learned Judges make the following observations:—

"'Under the Hindu Law as laid down in Macnaghten, Volume 1, page 76, and also in a decision of this Court in *Doolee Singh* v. *Bussunt Koeree* (6) the relation of Kritrima son extends to the contracting parties only, and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father.'

"These observations are, in our opinion, equally applicable to the person appointed an heir under the customary law."

With regard to the position of a Kritrima son the following authorities may be referred

(2) 27 Ind. Cas. 393; 99 P. R. 1914; 71 P. L. R. 1915; 8 P. W. R. 1915.
(3) 50 P. R. 1893 (F. B.).
(4) 66 P. R. 1908; 110 P. W. R. 1908.
(5) 25 W. R. 255 at p. 258.
(6) 8 W. R. 155.

* Pages of P. R. 1914 [*Ed.*]

to. In Hindu Family Law by Trevelyan, bottom of page 205 it is stated that "A Kritrima adoption does not transfer the subject of it from his natural family. It gives him, in addition to his rights in that family, rights of inheritance to the person (man or woman) actually adopting him, and to no one else. His sons acquire no rights of inheritance to his adoptive father."

In *Collector of Tirhoot* v. *Huropershad Mohunt* (7) it was held that a Kritrima son succeeds to the property of the person adopting him only. The same was held in *Doolee Singh* v. *Bussunt Koeree* (6). In Mayne's Hindu Law, 8th Edition, page 268, paragraph 204, the following passage occurs :—

"As regards succession, the Kritrima son loses no rights of inheritance in his natural family. He becomes the son of two fathers to this extent, that he takes the inheritance of his adoptive father, but not of that father's father, or other collateral relations,.....Nor do his sons, etc., take any interest in the property of theadoptive father, the relationship between adopter and adoptee being limited to the contracting parties themselves, and not extending further on either side."

In support of this the learned author quotes the case in *Juswant Singh* v. *Doolee Chand* (5). Mulla in his Principles of Hindu Law, 3rd Edition at page 415 states the same rule as to the Kritrima son's rights of inheritance.

For the respondent we were referred to a recent decision of a Division Bench of this Court in the case of *Waryaman* v. *Kanshi Ram* (8) [Civil Appeal No. 939 of 1918]. That was a case of Jats of the Hoshiarpur District and it was held that the adoption of Kanshi Ram was intended to be a complete adoption with the effect of bringing about a complete change of family. It was held that he was a fully adopted son and could succeed collaterally. The Judges in that case laid down no general principle, but merely held on the facts of that particular case that the appointed heir could succeed collaterally. It does not appear to me to have any bearing upon the point referred to us.

Another argument urged was that if the son of an appointed heir is debarred from inheriting the property of his father's appointer; he may in certain instances be deprived of inheriting in either family. Suppose, for instance, that *A* appoints *B* to be his heir. *B* has a son *C* and has brothers *D*, *E*, etc. *B's* natural father dies first and his brothers exclude him from inheritance in his natural family in accordance with the rule enunciated in paragraph 48 of the Digest of Customary Law. *B* dies next and then *A*, his appointer. *B* has been excluded from inheriting in his natural family and if his son *C* be debarred from succeeding to *A*, he will succeed in neither family. The case supposed would certainly be a very hard one, but I do not see how we can let the possibility of such a case influence us in deciding the point referred. Counsel for the appellant urges that though *B* would be excluded from inheriting in his natural family, it does not follow that his son C would be so excluded. The point is not before us at present and will be decided if and when it arises.

It was suggested to us that we should order a remand for enquiry into the custom. This, I think, would be a matter for the Division Bench to have considered and it does not appear that such a course was suggested to it. The Full Bench has only to consider whether the rule laid down in *Chajju* v. *Dalipa* (1) is correct or not. In my opinion it follows from the authorities and considerations referred to above that:—

(1) The customary appointment of an heir in the Punjab is a purely personal relationship, resembling the Kritrima form of adoption of the Hindu Law;

(2) it affects the parties thereto only;

(3) the appointed heir does not become the grandson of the appointer's father;

(4) his son does not become the grandson of the appointer.

It, therefore, follows that the son of an appointed heir, in the absence of proof of a special custom to the contrary, has no right of succession to the appointer. I would accordingly answer the question referred to the Full Bench in the negative but would add that it is always open to a party to plead a special custom which, as laid down in *Pala Singh* v. *Lachhmi* (9) and *Amin Chand* v.

(7) 7 W. R. 500.
(8) 66 Ind. Cas. 309; 3 L. 17.

(9) 82 Ind. Cas. 16; 105 P. R. 1915; 192 P. W. R. 1915.

Bujha (10) and *Gulab Khan* v. *Chiragh Bibi* (11), must be proved by instances and not deductively.

SHADI LAL, C. J. (*June* 12, 1922).—I have read the judgment of Mr. Justice Scott-Smith and reached to the conclusion that the son of an appointed heir, who predeceased the appointer, is not entitled to succeed to the latter's property. As pointed out by me in *Mehra* v. *Mangal Singh* (2) the customary appointment of an heir does not involve the transplanting of the heir from one family to another. The tie of kinship with the natural family is not dissolved, and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the apointee is a purely personal one and does not extend beyond the contracting parties on either side.

It follows, therefore, that the son of an appointed heir cannot be regarded as the grandson of the appointer; and there being no relationship between the two, neither of them can inherit the property of the other. If the appointed heir dies in the lifetime of the appointer, the existence of the former's son would not debar the latter from appointing another heir, and it is clear that the second appointed heir would succeed to the estate of the appointer.

It is to be observed that the customary appointment of an heir resembles in many respects the Kritrima form of adoption of Hindu Law, and as regards the Kritrima son, it has been held that he does not succeed to the property of his adoptive father's father, nor do his sons take the inheritance of his adoptive father. I would, therefore, hold that, in the absence of a special custom to the contrary, the son of an appointed heir acquires no right of inheritance to the appointer.

HARRISON, J.—(*June* 23, 1922.)—I agree.

Z. K. *Answered negatively.*

(10) 32 Ind. Cas. 29; 107 P. R. 1915; 209*a* P. W. R. 1915.

(11) 31 Ind. Cas. 909; 43 P. R. 1916; 131 P. W. R. 1916.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 849 OF 1920.

April 19, 1922.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Reeves.

RAM PRASAD KALWAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat AJANASIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Cross-objections—Petition stating reasons for supporting decree—Court-fees, payment of.

If, for the purpose of supporting the decree of the Trial Court dismissing the plaintiff's claim, the defendant files a petition in the Appellate Court stating the reasons on which he supported the decree, that would not amount to cross-objections for which an *ad valorem* Court-fee would be payable.

Second appeal from a decree of the Subordinate Judge, Jaunpur, dated the 22nd May 1920, confirming a decree of the Munsif, Jaunpur, dated the 2nd July 1919.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *J. M. Banerjee*, for the Respondents.

JUDGMENT.—We do not agree with the office report. In our opinion no *ad valorem* Court fee was payable in regard to the cross objections filed by the respondent. The decree of the Court of first instance was in favour of the respondents as it totally dismissed the plaintiffs' suit. The respondents could support that decree on any ground, even on a ground other than that taken by the Court of first instance. If for that purpose they filed a petition stating the reasons on which they supported the decree, that did not amount to cross-objections for which an *ad valorem* Court-fee was payable. The result of the office report would be that the appellant had to pay Court fee on the full amount claimed and the respondents, who held the decree of the Court of first instance, had to pay another Court-fee for the same claim, that is to say, two sums of Court-fees would be realised in respect of the same claim from both the parties. This surely could not be the intention of the Legislature and we do not think that the respondents were bound to pay *ad valorem* Court-fees on their cross-objections in this case.

W. C. A. *Order accordingly.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 17 OF 1922.

ORIGINAL CIVIL JURISDICTION SUIT NO. 1324 OF 1921.

July 27, 1922.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Pratt.

HAJI OOSMAN HAJI ISMAIL—DEFENDANT—APPELLANT

versus

HAROON SALLEH MAHOMED AND OTHERS—PLAINTIFFS—RESPONDENTS.

Cutchi Memons—Succession—Hindu Law, applicability of—Ancestral property, son whether takes vested interest in—"Marketable title," meaning of—Specific Relief Act (I of 1877), s. 25.

The application of the rules of Hindu Law by custom to Cutchi Memons is limited to rules of inheritance and succession, and does not extend to the rules relating to the joint property as applicable to Hindus. [p. 865, col. 1.]

A son of a Cutchi Memon has no vested interest by birth in the ancestral property of his father, and dealings with the property belonging to Cutchi Memons are conducted on this basis. [p. 866, col. 1.]

The phrase "marketable title" is equivalent to the phrase "a title free from reasonable doubt" in section 25 of the Specific Relief Act. [p 868, col. 1.]

The question whether a "marketable title" free from reasonable doubt has been made out or not, must be answered with reference to the facts of each case. [p. 864, col. 1.]

(Case-law considered and explained).

Mr. *Coltman* (with him Mr. *Setalvad*), for the Appellant.

Mr. *Munshi* (with him Mr. *Kanga*, Advocate-General), for the Respondents.

JUDGMENT.

SHAH, ACTG. C. J.—This is an appeal from a judgment of Mr. Justice Crump. The suit out of which the appeal arises was filed by the plaintiffs to enforce an agreement to sell certain immoveable properties to the defendant for Rs. 1,55,000. The defendant agreed to buy the properties in suit and paid Rs. 5,000 as earnest-money to the plaintiffs. The vendors had agreed to make out a marketable title. It is not necessary to refer to other terms of the agreement. Two of these properties had been previously purchased by the plaintiffs from the defendant, and there was no difficulty as to the title to those properties. The third property had been bought by the plaintiffs from one Fakir Mahomed, a Cutchi Memon, who conveyed the property to them on April 29, 1920, on behalf of himself and his minor brother. That conveyance is Exhibit E. The property belonged to the father of Fakir Mahomed who had bought it in 1884 from one Hajee Adam Oosman Nurani. That conveyance is Exhibit B.

It appears from the correspondence that there was some difficulty felt by the purchaser with regard to this property. By the letter of October 9, 1920, the defendant called upon the vendors to obtain Letters of Administration to the estate of the deceased Joosub Hajee Cassum Pirmahomed, on the ground that the recitals in the conveyance were not sufficient evidence of the fact that Joosab Hajee Cassum Pirmahomed had died intestate in 1911 and had left only two sons. The vendors did not accept the position taken by the defendant that Letters of Administration to the estate of the deceased father of their vendors were necessary. Subsequently, in the requisitions for title, an inquiry was made as to whether Fakir Mahomed had any male issue. It appeared that Fakir Mahomed had two sons, and in the letter of December 7, 1920, the defendant raised the objection that as the sons of Fakir Mahomed would have a vested interest in the property according to the law applicable to them the title was defective. The vendors did not accept the correctness of this position. In the letter of December 15 objections to the title were categorically stated on behalf of the purchaser, namely, first, that the objection as to the want of satisfactory proof of the fact that Joosub Hajee Cassum Pirmahomed had died intestate and had left only two sons Fakir Mahomed and Mahomed Saleh as his heirs was not removed, and that in order to meet that difficulty they insisted upon Letters of Administration being taken out to the estate of the deceased Joosub Hajee Cassum Pirmahomed, and, secondly, that the sons of Fakir Mahomed had a vested interest in the property in question, and that as their interest was not conveyed to the plaintiffs the title was defective. The plaintiffs offered, by their letter of December 18, to give further proof by way of a declaration from two respectable members

of the Jamat to the effect that Joosub Pirmahomed had died intestate and had left only two sons as his heirs according to the rules of Hindu Law as to succession applicable to Cutchi Memons; and, as regards the second objection, they contended that, according to the law applicable to Cutchi Memons, the sons had no vested interest in the property of their father. The purchaser replied, by his letter of December 22, that he was not prepared to accept a declaration of two respectable members of the Jamat as proposed.

In the end, on account of the difference between the parties on these two points, the present suit was filed by the vendors to enforce the agreement between the parties. The defendant in his written statement pleaded that he was right in insisting that Letters of Administration should be obtained to the estate of Joosub Pirmahomed, that the two sons of Fakir Mahomed had a vested interest in the property and, as the interests had not been conveyed to the plaintiffs, the title was not marketable. The defendant counter-claimed the earnest-money paid by him, and Rs. 15,000 by way of damages for failure on the part of the plaintiffs to make out a marketable title. Parties gave no evidence beyond the documents which have been put in, and which are printed in Part III of the Paper Book, subject to this that the proceedings in a certain suit were sought to be put in by the defendant but rejected by the Court as irrelevant. The notes of the Trial Judge indicating that fact should have been printed: but they are not to be found in the Paper-Book. The issues raised were: (1) whether the plaintiffs deduced a marketable title to the property thirdly described in schedule B of the plaint; and (2) whether the defendant should be entitled to his counter-claim. The learned Trial Judge came to the conclusion that the plaintiffs had deduced a marketable title, and accordingly decreed the plaintiffs' claim for specific performance of the agreement. The prayer for damages in the plaint was not pressed and a decree was passed on that basis, the defendant's counter-claim being rejected with costs.

In the appeal before us the questions raised relate to the marketable nature of the title of the plaintiffs with reference to the property in question. It has been contended on behalf of the appellant that the sons of Fakir Mahomed would have a vested interest in the property in question according to the Hindu Law applicable to the Cutchi Memons. It is pointed out that the decisions on the point that the Hindu Law applies to Cutchi Memons so far as it relates to succession and inheritance and no further are conflicting, and that there is no decision of the Court of Appeal on the point. It is contended that, under the circumstances in spite of the later decisions limiting the application of Hindu Law to the Cutchi Memons only to questions of succession and inheritance, the question may be raised by any son in this community that he has a vested interest in his father's ancestral estate, and that the title which the plaintiffs are in a position to make out is not free from reasonable doubt and not marketable on that ground. It is further urged that there is no satisfactory evidence in the case to show that Joosub who died in 1911 had only two sons, and further that he died intestate. It is pointed out that, though as a matter of law it may not be obligatory upon the sons to take out Letters of Administration, it is still open to the sons of Joosub to do so, and to place the fact of representation to the estate of Joosub beyond all doubt and dispute, and that, as the plaintiffs have refused to adopt that course, the evidence on the record should not be accepted as sufficient to establish the two facts mentioned above beyond all doubt, and that, in that state of things, the title, such as it is, should not be forced upon the defendant.

Before dealing with these two points, I may mention that several English decisions were cited to us in the course of the argument on the question as to what is a marketable title which the Courts would force upon an unwilling purchaser. I do not propose to examine those decisions in detail. It is enough to refer to the summary as given in Fry on Specific Performance, paragraphs 890 and 891, indicating the result of the decisions on the point.

On the other hand, for the respondents it is contended that the "marketable title" means "a title free from reasonable doubt," and for this purpose reliance is placed upon

the provisions of section 25 (b) of the Specific Relief Act where the expression "free from reasonable doubt" is used. In support of this view reliance is placed upon the view taken by Mr. Justice Farran in *Haji Mahomed Mitha* v. *Musa i Esa i* (1), where "a good title" is treated as meaning "a title free from reasonable doubt" and also upon the observations of Lord Eldon in *Braybroke* (*Lord*) v. *Inskip* (2), where the question for the Court was stated to be "whether the doubt is so reasonable and fair, that the property is left in his (purchaser's) hands not marketable." It seems to me that it would serve no useful purpose to attempt to define the exact meaning of the expression "marketable title," or, in other words, to lay down what should constitute, under the circumstances of a particular case, a marketable title. If there is to be any general test it must be accepted as laid down in the Specific Relief Act that it should be "free from reasonable doubt." Whether the doubt under the facts and circumstances of a particular case is reasonable or not must necessarily depend upon the nature of the objections and the facts of that case. It is clear that, so far as the objections to the title in the present case are concerned, they are of such a nature that they must be examined on their own merits. The English decisions cited to us do not throw any light on those objections. The question whether among Cutchi Memons the position that a son has a vested interest in the ancestral property of his father, just as a Hindu son in this Presidency would have, is a point which must be examined with reference to the law applicable to the Cutchi Memons and the decisions bearing on that point. The other objection raised is purely one of fact and must be decided with reference to the evidence in the case.

As regards the first point, it is a matter of great practical importance to the Cutchi Memons to know as to how they stand with reference to this point. Is the question whether the rules of Hindu Law applicable to Cutchi Memons are strictly limited to matters of inheritance and succession settled beyond reasonable doubt or not? If not, the appellant must succeed: if it is, his contention on this point must fail. On behalf of the appellant reliance is placed upon the decisions in *Ashabai* v. *Haji Tyeb Haji Rahimtulla* (3) and *Mahomed Sidick* v. *Haji Ahmed* (4) and it is pointed out that the later decisions in *Mangaldas* v. *Abdul Razak* (5) and *Advocate-General of Bombay* v. *Jimbabai* (6) conflict with the earlier decisions, and that there is no decision of the Court of Appeal. Reference was also made in the course of the argument to the two cases relating to Khoja Muhammadans, *viz.*, *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (7) and *Jan Mahomed* v. *Datu Jaffar* (8). I have examined these decisions in detial. In *Ashabai* v. *Haji Tyeb Haji Rahimtulla* (3) there was no decision on the question as to whether the application of the rules of Hindu Law to Cutchi Memons extended beyond the rules of inheritance and succession. The point decided there was, that the Hindu Law applied to them as to inheritance and succession. In *Mahomed Sidick* v. *Haji Ahmed* (4) the point is dealt with, and it was found that the custom of not recognising any distinction between the ancestral and self acquired property among the Cutchi Memons was not proved. The decision assumes that a Cutchi Memon cannot deal with his ancestral property and the custom alleged to the contrary was held not proved. As there is a certain degree of similarity in the extension of the rules of Hindu Law by custom to Khoja Muhammadans as well as to Cutchi Memons, it is relevant to point out that in *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (7), which related to Khoja Muhammadans, it was held that the rule that the Hindu Law as administered in this Presidency, in the absence of proof of custom to the contrary, is the law applicable to Khoja Muhammadans is not to be understood in its widest sense, but is confined to simple questions of inheritance and succession, and

(1) 15 B. 657; 8 Ind. Dec. (N. S.) 443.
(2) (1803) 8 Ves. 417 at p. 418; 32 E. R. 416; 7 R. R. 106.
(3) 9 B. 115; 5 Ind. Dec. (N. S.) 77.
(4) 10 B. 1; 5 Ind. Dec. (N. S.) 383.
(5) 23 Ind. Cas. 565; 16 Bom. L. R. 224.
(6) 31 Ind. Cas. 106; 41 B. 181; 17 Bom. L. R 799.
(7) 13 B. 534; 7 Ind. Dec. (N S.) 354.
(8) 22 Ind. Cas. 195; 15 Bom. L. R. 1044; 38 B 449.

in that case the question as to the right of a son to claim partition of the ancestral property was held not to be within the scope of rules of Hindu Law applicable to Khoja Muhammadans by custom. The observations which have been relied upon by Mr. Coltman in connection with this point from the judgment of the Court of Appeal do not, in my opinion, affect the main question which they decided, namely, that a son was not entitled to claim partition during his father's lifetime, which would be possible only if the application of the rules of Hindu Law was limited by custom only to rules of inheritance and succession. This, however, was a decision relating to the Khoja Muhammadans and would not directly apply to the case of the Cutchi Memons. The point was considered by Mr. Justice Beaman in *Jan Mahomed* v. *Datu Joffar* (8) generally with reference to the question as to how far Hindu Law applied to Khoja Muhammadans and Cutchi Memons by custom. But it was a case of Khojas and not of Cutchi Memons. The point arose directly later on with reference to Cutchi Memons; and in the two decisions which I have referred to, *Mangaldas* v. *Abdul Razak* (5) and *Advocate-General of Bombay* v. *Jimbabai* (6), this point was fully examined by Mr. Justice Macleod and Mr. Justice Beaman. It is true that those are decisions by Single Judges on the Original Side, and those particular cases were not taken to the Court of Appeal. But, after a close examination of the law relating to Cutchi Memons on this point, the decisions distinctly lay down that the application of the rules of Hindu Law by custom to the Cutchi Memons is limited to rules of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. They negative the view that a son has any vested interest by birth in the ancestral property of his father. The decision in *Mahomed Sidick* v. *Haji Ahmed* (4) has been considered and explained.

After those decisions it appears that, in response to a demand of the community, the Legislature passed Act XLVI of 1920 with a view to enable those members of the community who so desired to get rid of the application of Hindu Law as regards succession and inheritance. In the preamble of that Act the Hindu Law applicable to Cutchi Memons is referred to as relating to succession and inheritance. This Act received the assent of the Governor-General on September 17, 1920, shortly before the correspondence between the parties to the agreement in this case commenced. I refer to this Act only for the purpose of showing that the view taken in the later decisions has so far been accepted by the Legislature; and, indeed, if the rules of Hindu Law relating to joint family property, and in particular that relating to the vesting of property in a son by birth, were believed to be applicable to Cutchi Memons, it is reasonable to infer that the Legislature would have made provision for that in the Act to which I have referred. It is, therefore, really a serious matter at this stage in the absence of any evidence on the point, to hold that still it is a matter open to reasonable doubt whether the son of a Cutchi Memon has a vested interest in the ancestral property of his father according to the rule of Hindu Law. It is no doubt theoretically open to the defendant to urge that any such son may seek to establish such a custom at any time in spite of the decisions to the contrary of Single Judges, and that he may take such a case to the Court of Appeal and then to the highest Court of Appeal, and that he may be able to establish a special custom to the effect that a son has a vested interest in the ancestral property of his father. But the test on all these matters is, as pointed out in Fry on Specific Performance, whether the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable or, as it was put by Alderson B. in *Cattell* v. *Corrall* (9), whether there is a "reasonable, decent probability of litigation." The question is, whether there is a reasonable and decent probability of litigation on that point against the purchaser or whether it is of such a remote character that it should not be considered to create any reasonable doubt. While I concede that it is possible that the son of Cutchi Memon may hereafter seek to establish such a custom as would give him a vested

(9) (1840) 4 Y. & C. 228 at p. 237; 9 L. J. (N. S.) Ex. Eq. 37; 54 R. R. 483; 160 E. R. 989.

interest by birth in the property of his father. I am not prepared to hold that there is any decent and reasonable probability of such a claim being made : and, speaking particularly with reference to the son of Fakir Mahomed, there is no indication whatever on the facts of this case that it is any thing more than a remote possibility which ought not to be allowed to weigh against the effect of the later decisions as now understood and accepted by the Legislature. I may further point out that in the decision in *Ahmedbhoy Hubibbhoy* v. *Oassumbhoy Ahmedbhoy* (7), which was a case of Khoja Muhammadans, the Court of Appeal did not apply the Hindu Law to the extent of giving a son a vested interest by birth in the ancestral property of his father, and so far as it suggests an inference as regards Cutchi Memons it is against the possible view that a son of Cutchi Memon has a vested interest in the ancestral property of his father.

It may be relevant to point out in connection with this point that when Fakir Mahomed entered into this agreement on behalf of himself and his minor brother, Mahomed Saleh, he agreed to give a marketable title free from all reasonable doubts as would appear from clause 3 of Exhibit 1 at page 21 of the Paper-Book, Part III, and the present plaintiffs accepted that title as conveyed to them by Fakir Mahomed on behalf of his minor brother and himself. I do not say that that circumstance is in any sense binding upon the defendant ; but so far as it is an indication, it is in favour of the view that in dealing with the property belonging to the Cutchi Memons it is not considered necessary now to treat the sons of the owners as having any interest in the property by birth.

The second question is one of fact. It appears that when Fakir Mahomed agreed to sell this house to the present plaintiffs it was agreed, as would appear from clause 4 of the agreement between them, that the vendor would obtain the necessary order from the Court sanctioning the sale by him of premises, including the interest of his minor brother at his own costs. The property was described as having belonged to the estate of Joosub Hajee Cassum Pirmahomed who died on October 17, 1911, leaving Fakir Mahomed and his brother Mahomed Saleh as his heirs according to the Hindu Law applicable to Cutchi Memons. After this Fakir Mahomed made an application to the Court for his appointment as guardian of the property of his minor brother, and for leave to sell the property in question on behalf of the minor. That application was granted by the Court and he was authorized to complete the conveyance. In that application he stated that Joosub Haji, his father, died on October 17th 1911, leaving behind him his only heirs and next of kin according to Hindu Law applicable to Cutchi Memons, two sons, namely, a minor Mahomed Saleh Joosub and himself. He also made a declaration on the date of the conveyance in favour of the plaintiffs, *i. e.*, on April 20 1920 that Joosub Haji died on October 17, 1911, leaving only two sons who were his only heirs according to Hindu Law as applicable to Cutchi Memons, namely, Mahomed Saleh and himself. This was accepted by the plaintiffs, and they now maintain that what was accepted by them as sufficient proof of the title of Fakir Mahomed and his minor brother is really sufficient to establish their title to the property and leaves no reasonable doubt as to that fact.

The defendant, however, insists upon the Letters of Administration being taken out to the estate of the deceased Joosub Hajee, because he contends that there is no satisfactory evidence, first, that Joosub died intestate, and, secondly, that he had only two sons and no more. On both these points it seems to me that the position of the defendant is not reasonable and the facts are not open to any reasonable doubt. It is quite true that in the present case, beyond putting in the documents to which I have referred, the parties have adduced no evidence. But beyond the suggestion that Letters of Administration are necessary to establish the fact of the representation beyond doubt, the defendant does not suggest any good reason to doubt the truth of the two statements which have been made by Fakir Mahomed in his petition to the Court and in the declaration to which I have referred. It is clear that the Indian Succession Act does not apply to Cutchi Memons who are Muhammadans and the Probate and Administration Act V of 1881,

which would apply to them, does not contain any section corresponding to section 190 of the Indian Succession Act. It was not obligatory, therefore, upon Fakir Mahomed when he executed his conveyance in favour of the plaintiffs to have taken out Letters of Administration. The whole question to my mind is whether the two facts, namely, that Joosub Hajee died intestate, and that according to the Hindu Law applicable to him his heirs were only Fakir Mahomed and his brother Mahomed Saleh, were satisfactorily established when the plaintiffs accepted them and whether on the same materials they can be said to be satisfactorily established in the absence of the Letters of Administration. I do not say that in no case in which it is not obligatory upon a vendor to take out Letters of Administration to establish his title to the property according to law, could the purchaser require such Letters of Administration to be taken out to put an end to the doubts as to any disputed questions of fact. The simple question of fact in this case is whether in the absence of such letters, the facts in question are proved beyond reasonable doubt. Both those are facts about which ordinarily there should not be any doubt; for instance, whether Joosub died intestate is a fact which would be within the special knowledge of Fakir Mahomed. He has stated so in terms on oath, and in a manner which makes him responsible for the statement. There is no indication whatever on the present record to the contrary, and the mere suggestion that sometimes Wills of deceased persons are put forward many years after their death, is not sufficient, in my opinion, to justify any reasonable doubt as to the fact that Joosub, who died so far back as 1911, died intestate, particularly when we have the fact that during this interval nobody is shown to have ever suggested or come forward to say that he left a Will.

As regards the question whether he had two sons or more, ordinarily I should say that the statement of the son would be accepted as sufficient, and unless there is any real ground for doubting that statement, a mere suggestion of any doubt on that point would be considered either fanciful or unreasonable. In the present case there is no such ground. On the contrary we have the order of the Court appointing Fakir Mahomed as guardian of his minor brother on the footing that Joosub had only two sons and that the property belonged to the minor as an heir to his father along with Fakir Mahomed. On that point it appears that the plaintiffs offered to give further assurance to the defendant in the shape of a declaration from two respectable members of the Jamat. If there was any real doubt in the mind of the defendant, I think that that kind of assurance would be considered sufficient under the circumstances to satisfy any reasonable person. The plain fact seems to me to be that on these grounds of fact, which are not really open to any reasonable doubt, and which it is just possible may be even within the knowledge of the defendant, as he belongs to the same community and lives in the same locality, he wants to get out of the agreement.

I am, therefore, satisfied that in the present case a marketable title free from reasonable doubt has been made out; and I think that the conclusion reached by the Trial Judge on this point is right.

I may refer to the decision in *Shrinivasdas Bavri* v. *Meherbai* (10) which has been relied upon by the defendant. As I have said the question whether a marketable title free from reasonable doubt has been made out or not must be answered with reference to the facts of each case. In that case the release relied upon was in terms only by one of the two brothers, and beyond the recital in that release there was nothing to show that the other brother was dead or that the nearest heir to the deceased brother was the surviving brother who executed that release. That was held to be not sufficient to make out a title free from reasonable doubt. Here, however, the facts are different. In that case the test adopted with reference to the question whether the title was marketable or not was whether it was free from reasonable doubt. It appears that in the agreement preliminary to the conveyance sometimes the expression used is "marketable title free

(10) 39 Ind. Cas. 627; 44 I.A. 36; 19 Bom. L.R.151; 21 M.L.T. 236; 32 M.L.J. 175; (1917) M.W.N. 258; 21 C.W.N. 558; 25 C.L.J. 311; 41 B. 300 (P.C.).

from reasonable doubt" or sometimes, as in the present case, "marketable title." But, as I have said, both practically mean one and the same thing; and I do not think that in that case any other test was adopted. It is difficult to apply the decision on the facts of that case to the facts of the present case. I would, therefore, affirm the decree appealed from, and dismiss the appeal with costs.

PRATT, J.—The plaintiffs, on April 29 1920, purchased the property in this suit from Fakir Mahomed and Mahomed Saleh Joosub, and the conveyance recited that these two had inherited the property from their father, Joosub Pirmahomed, as his only heirs.

On July 30, 1920, the defendant agreed to purchase this property from the plaintiffs who consented to give a marketable title.

The phrase "marketable title" is equivalent to the phrase "a title free from reasonable doubt" in section 25 of the Specific Relief Act. This simpler definition practically embodies the English Law. Many English cases have been cited to us but it is safer to rest upon the plain words of the Indian section; for most of the English cases turn upon the difficulties of the complex English Property Law—difficulties which do not appear in the simpler system of the Transfer of Property Act.

The sole question then is whether the doubts raised by the defendant as to plaintiffs' title are reasonable. The doubts are doubts of law and of fact.

The doubt of law is whether the vendors, Fakir Mahomed and his brother, being Cutchi Memons, took a vested interest at birth on their father's property. There was a time when it was assumed that the Hindu Law of joint property applied to Cutchi Memons: *Ashabai* v. *Haji Tyeb Haji Rahmitulla* (3) and *Mahomed Sidick* v. *Haji Ahmed* (4). But these decisions are now obsolete and the application of Hindu Law is now restricted to cases of succession and inheritance as it would apply in the case of an intestate separated Hindu possessed of self acquired property: *Mangaldas* v. *Abdul Razak* (5) and *Advocate General of Bombay* v. *Jimbabai* (6). This statement of the law has received legislative recognition in the Cutchi Memons Act, XLVI of 1920, I do not think the law on the point is now doubtful, and indeed it would be disastrous if it were, for many titles must have been taken on the faith of these decisions.

The doubts of fact are: (1) whether Fakir Mahomed and Mahomed Saleh Joosub are the only sons of Joosub Pirmahomed; (2) whether Joosub Pirmahomed left a Will.

On the first point much reliance is placed on the Privy Council case of *Shrinivasdas Bavri* v. *Meherbai* (10). In that case there was an incumbrance to Damodardas and a release by Gordhandas. The question then arose whether Damodardas was dead and, if so, whether Gordhandas was his sole heir. When the purchaser asked for these doubts to be cleared the vendor refused to do so and took his stand solely on the recitals. The Privy Council held that that was not sufficient, as the recitals would not bind Damodardas if he proved to be alive or a third person claiming to be his heir. Here then the purchaser raised the question of another possible son of Joosub Pirmahomed; he was given a declaration of Fakir Mahomed and offered a declaration of two members of the Jamat. The purchaser replied that he did not consider the first sufficient and he would not accept the latter. I think this refusal was unreasonable. The vendor offered the only possible evidence and the purchaser refused even to consider it. This fact differentiates the case from *Shrinivasdas Bavri* v. *Meherbai* (10). The vendor did not rest solely on recitals but offered evidence. The purchaser refused even to consider the evidence but insisted on Letters of Administration to Joosub Pirmahomed's estate. It is not clear how the purchaser could have procured such Letters of Administration and the purchaser's conduct shows that he in fact had no doubt but was only seeking for an excuse to avoid performance.

The second point of fact is whether Joosub Pirmahomed left a Will. This is possible of course but it is extremely improbable, for ten years had elapsed since his death. I do not think this bare possibility can be said to introduce a reasonable doubt in the title. I agree that the appeal should be dismissed and the decree of the lower Court confirmed.

W. C. A. *Appeal dismissed.*

SUBBE GOUNDAN v. KRISHNAMACHARI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1549 OF 1920.

December 14, 1921.

Present :—Mr. Justice Kumaraswami Sastri and Mr. Justice Devadass.

SUBBE GOUNDAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KRISHNAMACHARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Invalid alienation by manager—Suit for possession by co-parcener—Alienation declared valid to extent of alienor's share—Plaintiff, right of, to possession of entire property—Mesne profits, determination of—Alienee, suit by, for partition of item sold, whether maintainable—Civil Procedure Code (Act V of 1908), O. XX, r. 12—Suit for recovery of immovable property—Finding by Appellate Court that plaintiff entitled to possession—Remand for determination of mesne profits with direction to pass decree in favour of plaintiff—Remand, propriety of—Inherent jurisdiction—Appeal—Remand order, treatment of, as preliminary decree.

A Hindu co-parcener has the right to require an alienee of joint property to deliver possession of the entire property in cases where the alienation by the manager is not binding on the plaintiff. The purchaser cannot sue for a partition of the item sold to him and obtain an allotment by metes and bounds of his vendor's share in that portion of the property but is bound to file a suit for a general partition. [p. 873, col. 1.]

(Authorities reviewed.)

In such a case where there has been no repudiation of the alienation on the part of the other co-parceners before the institution of the suit, the claim for mesne profits would be limited to the period from the date of suit. [p. 876, col. 1.]

Kamini Debi v. *Promotho Nath*, 27 Ind. Cas. 317; 20 C. L. J. 476; 19 C. W. N 755, followed.

Kumud Lal v. *Ramani Mohan Roy*, 25 Ind. Cas. 436; 19 C. L. J. 346 at p 347, dissented from.

Where an Appellate Court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject-matter of the preliminary decree is not warranted. [p. 872, col. 1.]

In cases falling within O. XX, r. 12, Civil Procedure Code, the proper course for the Appellate Court to take is not to remand the suit where it finds that a person is entitled to possession but to pass a preliminary decree so far as possession is concerned and to direct an enquiry as to the mesne profits in cases where the lower Court has not dealt with the question. [p. 871, col. 2.]

Where a decree, being in substance a preliminary decree is not passed as such by an Appellate Court and the case is wrongly remanded, it is open to the High Court, in second appeal, to allow the appellant to argue the appeal on the footing that, though the form of the decree was wrong, it was in substance a decree adjudicating finally the rights of the parties and was thus appealable as a final decree. [p. 872, col. 2.]

Second appeal against a decree of the Additional Subordinate Judge, Coimbatore, in Appeal Suit No. 56 of 1920, (Appeal Suit No. 59 of 1920, District Court, Coimbatore) preferred against a decree of the Court of the District Munsif, Tiruppur, in Original Suit No. 726 of 1918, (Original Suit No. 34 of 1918, on the file of the Court of the Principal District Munsif, Coimbatore).

Mr. *A. Krishnaswamy Ayyar* (with him Mr. *S. Subramania Ayyar*), for the Appellants.

Mr. *T. M. Krishnasamy Ayyar* (with him Mr. *P. Narayanasami Ayyar*), for the Respondent.

This second appeal and the Memorandum of Objections coming on for hearing on the 29th and 30th November 1921 and having stood over for consideration, till this day the Court delivered the following

JUDGMENT.—Defendants are the appellants. This appeal arises out of a suit filed by the plaintiffs to recover possession of the properties claimed in the plaint on the ground that the sale of the properties by their father to the defendants is not valid and binding on the plaintiffs and for the recovery of past and future mesne profits. The case for the plaintiffs was that the land specified in the plaint and other properties belonged to their grandfather, that on a family partition the plaint properties fell to the share of their father, that he without any necessity sold the plaint properties to the defendants for a low price, that the sale was not binding on them and that they are under Hindu Law entitled to recover possession of the properties from the purchasers. The defendants put the plaintiff to the proof that he was born at the date of the sale and contended that the sale by the plaintiff's father was to discharge antecedent debts and for other family purposes, that the consideration was adequate, that the lands were subsequently improved by them, and that the suit filed for a declaration alone without asking for setting aside the sale was not maintainable, nor was the suit claiming possession without requiring a general partition and without impleading the other co-parceners. It was pleaded that the suit was barred by limitation, that the plaintiffs were not entitled to mesne profits, and that the mesne profits claimed were excessive. Various issues, seven in number, were settled on these pleadings and the District Munsif in an exhaustive judgment has dealt with the several issues. He found that the plaintiff

SUBBE GOUNDAN v. KRISHNAMACHARI.

was born at the date of the alienation, that the alienation was for valid purposes and was binding on the plaintiffs, that the plaintiffs were not entitled to any mesne profits, that the suit was not barred by limitation, that the claim for improvements was exaggerated, that the only amount which the defendants would be entitled to was Rs. 40, that the suit as framed was maintainable as the plaintiffs were not bound to set aside the sale-deed, and that as regards possession they were entitled to recover possession of the properties sold leaving to the purchasers to file a suit for partition in respect of the plaintiffs' father's share, if so minded. In the result the District Munsif dismissed the plaintiffs' suit. On appeal the Subordinate Judge stated that the only points for decision were—

(1) Was the plaint mentioned alienation binding on the plaintiffs and to what extent?

(2) What mesne profits, if any, were the plaintiffs entitled to, and

(3) Were the defendants entitled to any and what compensation for improvements?

No objection seems to have been taken before him as regards the legal questions as to the maintainability of the suit or to the bar of limitation; and he held that the sale was not binding on the plaintiffs so far as their share of the plaint properties was concerned and that the defendants would have to bring a separate suit for partition, the plaintiffs being on the authorities entitled to recover possession of the entire property. As regrds mesne profits he held that the plaintiffs were entitled to mesne profits and that the suit would have to go back to the District Munsif for ascertaining the amount due to them. As regards improvements, he confirmed the finding of the District Munsif that only a sum of Rs. 40 was due to the defendants for improvements. He allowed the appeal with costs, reversed the decree of the District Munsif and remanded the suit to the District Munsif's Court for ascertaining the amount of mesne profits due to the plaintiffs, and directed the District Munsif to pass a decree in favour of the plaintiffs in the light of the above findings. Against this decree the defendants appeal.

A preliminary objection is taken that no appeal lies, as the order of remand was not passed under O. XLI, r. 23, Civil Prosedure Code, but was passed by virtue of the inherent power of the Court to order a remand apart from the provisions of that rule. There can be little doubt that if the order was simply an order of remand not falling within O. XLI, r. 23, it is not appealable under O. XLIII, as sub clause (*u*) only refers to an order under r. 23 of O. XLI, remanding a case. It is contended for the appellants that the decree of the Subordinate Judge is in effect a preliminary decree and that consequently, although it is in form a decree remanding the suit, it is appealable as a preliminary decree. We think that, as the Subordinate Judge has decided that the alienation is not binding on the plaintiffs, there was nothing for the District Munsif to do on remand and the decree is in effect a preliminary decree which has been wrongly drawn up as a decree remanding the whole suit. We think that the Subordinate Judge was wrong in reversing the decree of the District Munsif and remanding the entire suit for disposal. It is clear that the present case does not fall within O. XLI, r. 23, of the Civil Procedure Code, which provides for the remand of cases by the Appellate Court. This rule provides that "where the Court from whose decree an appeal is preferred has disposed of the suit on a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case and may further direct what issue or issues shall be tried in the case so remanded. ....." In the present case the District Munsif did not dispose of the suit on a preliminary point but tried all the issues and has given findings on all of them. The only thing he did not do was to ascertain the amount of mesne profits which would be due to the plaintiffs. In cases of suits to recover possession of immoveable property, r. 12 of O. XX provides that where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree (*a*) for the possession of the property, (*b*) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits, (*c*) directing an enquiry as to rent or mesne profits from the institution of the suit until (*i*) the delivery of possession to the decree-holder, (*ii*) the relinquishment of possession by the judg-

ment-debtor with notice to the decree holder through the Court, or (*iii*) the expiration of three years from the date of the decree whichever event first occurs. It provides that where an enquiry is directed under clause (*b*) or clause (*c*) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry. This rule, therefore, clearly contemplates the passing of a final decree as regards possession of the property and the amount which is payable as mesne profits or the passing of a preliminary decree for possession of the property and directing an account to be taken of the mesne profits and the passing of a final decree as regards mesne profits after the ascertainment. Turning to the definition of the decree in the Civil Procedure Code, section 2, clause (2), defines a decree as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The explanation to that section is to the effect that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. Having regard to the definition of decree and to the provisions of the O. XX, r. 12, it seems to us that the proper course which ought to have been adopted by the Subordinate Judge when he found that the plaintiffs were entitled to possession of the properties was to have passed a preliminary decree directing the defendants to deliver possession to the plaintiffs and to have directed the District Munsif to make the necessary enquiries as regards mesne profits provided for by O. XX, r. 12.

It has been argued by the respondents that the powers of remand conferred by the Code are not confined to the provisions of O. XLI, r. 23, and that, apart from the Code, the Court has inherent power to remand a suit and that the Subordinate Judge having exercised that inherent power the High Court has no power to interfere. There can be little doubt that, so far as the powers of remand are concerned, the powers conferred by O. XLI, r. 23, are not exhaustive. There are cases where, though the suit is not disposed of on a preliminary point, yet owing to an improper or defective enquiry in the lower Court, where, for example, relevent documents are not admitted or material witnesses have not been examined and the Appellate Court is not in a position to adjudicate finally upon the matters in dispute, the inherent jurisdiction to do justice between the parties has been invoked. The Civil Procedure Code of 1908 has expressly enacted section 151 in order to help the Court in doing justice to the parties in cases where there is no express provision in the Code; but the inherent power under section 151 can only be exercised in cases where, to use the words of the section, it is necessary to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. A remand to a lower Court implies that something has to be done by the lower Court in relation to the matter remanded to it. In the present case it is difficult to see what the lower Court can do as regards possession of the property. The finding of the lower Appellate Court has left nothing to be done as regards the claim for possession and it is idle to remand the case, in so far as the claim to possession is concerned, to the lower Court, as all that it can do is to pass a decree for possession, a step which was within the competence of the Appellate Court to take. In cases falling within O. XX, r. 12, we think, the proper course for the Appellate Court to take is not to remand the suit where it finds that a person is entitled to possession but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to the mesne profits, in cases where the lower Court has not dealt with the question. The course adopted by the Subordinate Judge leads to the anomaly that there will be a fresh decree passed by the lower Court and that it will be necessary to appeal against that decree, including the decree for possession, again to the Subordinate Judge who would be precluded on previous findings from going into the question of possession and to compel the party if he wants to appeal from the decree giving possession to file an infructuous appeal to the lower Appellate Court before

the question can be agitated in the High Court in second appeal. This we think is a procedure which, apart from its cumbrousness and expense, is not warranted by the provisions of the Code. We think that where an Appellate Court can pass a preliminary decree it is its duty to do so and that a remand as to matters which can be the subject-matter of the preliminary decree is not warranted. It is contended by Mr. T. M. Krishnaswami Ayyar for the respondent that where several items of immoveable properties are concerned, difficulty would arise where the Subordinate Judge deals with only one or two items and that in such cases it would lead to difficulties if a preliminary decree is passed as regards these items and the suit remanded as regards the rest. In such cases we are of opinion that the various items of immoveable properties should, for the purposes of O. XX, r. 12, be regarded as one subject-matter for adjudication and that the Court is not bound to pass a preliminary decree for possession as regards each item. In *Kamini Debi* v. *Promotho Nath* (1) it was held that if a decision of the Appellate Court in reality amounts to a preliminary decree within the meaning of the definition of decree in the Civil Procedure Code and in cases falling within O. XX, rr. 12 to 18, of the Civil Procedure Code, the mere omission on the part of the Court to embody its effect in a formal expression in the form of a preliminary decree will not negative the right of the party affected to prefer an appeal. A similar view was taken in *Kumud Lal* v. *Ramani Mohan Roy* (2). In *Sidhanath Dhonddev* v. *Ganesh Govind* (3) it was held that where the decision of a Court on certain issues conclusively determined the right of the parties regarding some matters in controversy so far as that Court was concerned, it was the duty of the Court to draw up a preliminary decree so as to enable the party aggrieved to appeal. Sir Basil Scott, C. J., and Beaman, J., held that the Subordinate Judge, in declining to draw up preliminary decree committed a material irregularity in the exercise of his jurisdiction entitling the High Court to interfere under section 115, Civil Procedure Code, and observed: "The decision of the issues, to which we have referred, conclusively determined the rights of parties regarding some matters in controversy so far as his Court was concerned; the decision on each of those issues, therefore, was sufficient to constitute a preliminary decree. The defendant has a right to appeal from a decision of the Court amounting to a preliminary decree, but he can only appeal if the decree is existent in a formal shape. This we decided in *Bai Divali* v. *Vishnav Manordas* (4). It is the duty of the Court, where it is applied to after the passing of a preliminary decree, to have the decree drawn up so as to enable the party aggrieved to appeal". The High Court directed the lower Court to draw up a preliminary decree upon the questions decided. We do not think that in the present case it is necessary to send the case down for the Subordinate Judge to draw up a proper decree and to put the parties to the delay and expense involved in what we consider to be a purely formal matter. Now that the second appeal has been filed we think, following the views taken in *Dorasami Aiyer* v. *Seshadri Venkatarama Aiyer* (5), *Kumud Lal* v. *Ramani Mohan Roy* (2) and *Kamini Debi* v. *Promotho Nath* (1), it is open to us to treat the decree of the lower Court as a decree which in substance is a preliminary one and to allow the appellants to argue their appeal on the footing that though the form of the decree of the Appellate Court is wrong, it is in substance a decree adjudicating finally the rights of the parties as regards the immoveable properties and is thus appealable as a preliminary decree. We overrule the preliminary objection of the respondents.

Turning to the merits of the appeal, three points have been taken before us; (1) that the Subordinate Judge was wrong in holding that the alienation was not binding on the plaintiffs, (2) that, as the alienation was good to the extent of the father's share, the lower Court, instead of decreeing possession and leaving the defendants to a separate suit for partition, should, in this suit at their instance, have decreed a partition and

(1) 27 Ind. Cas. 317; 20 C. L. J. 476; 19 C. W. N. 755.
(2) 25 Ind. Cas. 486; 19 C. L. J. 346 at p. 347.
(3) 17 Ind. Cas. 637; 37 B. 60; 14 Bom. L. R. 916
(4) 4 Ind Cas. 829; 34 B. 182; 11 Bom. L. R. 1326.
(5) 63 Ind. Cas. 228; 13 L. W. 618.

put the plaintiffs in possession of half the share and the defendants in possession of the remaining half and (3) that mesne profits ought not to have been awarded.

As regards the first point we think that the finding of the Subordinate Judge is conclusive and that it is not to open us in second appeal to go behind it. The Subordinate Judge finds that there was no necessity for the alienation and that there were no *bona fide* enquiries made by the defendants. There is, therefore, a clear finding of fact.

As regards the second contention, it is argued by Mr. Krishnaswami Iyer that it is open to a purchaser in a suit for possession by a co parcener, on the ground of the invalidity of the alienation and in cases where the alienation is not impeached to the extent of the father's share, to require the plaintiff at his option either to consent to a partition of the specific items conveyed and to get possession of his share after partition by metes and bounds or to require a general partition of all the joint family properties so that the purchaser need not be driven to a separate suit. The right of a co-parcener to require an alienee to deliver possession of the entire joint family property in cases where the alienation is not binding on the plaintiff is clear and the current of authority has been simply to declare the interests of the purchaser and to leave the purchaser to a separate suit for partition, if he wants to work out his interest. So far as the co-parcener is concerned, it is open to him to accept the alienation as valid and seek a partition with the purchaser of the only properties in which the purchaser is interested: *vide Subramanya Ohettyar* v. *Padmanabha Ohettyar* (6), and *Iburamsa Rowthan* v. *Thiruvenkatasami Noick* (7). A purchaser, however, cannot sue for a partition of the item sold to him and obtain an allotment by metes and bounds of his vendor's share in that portion of the property but is bound to file a suit for a general partition [*vide Venkatarama* v. *Meera Labai* (8), and *Palani Konan* v. *Masakonan* (9), though it has now been settled by the decision of the Full Bench in *Chinnu Pillai* v. *Kalimuthu Chetti* (10), that there is no fluctuation in the share to which an alienee is entitled, his share being the share of the vendor at the date of the alienation, subject of course to the equities in favour of the other members of the family against the transferor. It has also been settled that a vendee from a co-parcener is not a tenant-in-common with the other members. The view taken by Sundara Ayyar and Benson, JJ., in *Subba Row* v. *Anantha-narayana Iyer* (11), has not been followed in *Maharaja of Bobbili* v. *Venkataramanulu Naidu* (12), and *Nanjaya Mudali* v. *Shanmuga Mudali* (13), and in *Kota Balabhadra Patro* v. *Khetra Doss* (14). A purchaser has only an equity as against the other members of the co parcenery to work out his interest by a suit for a general partition. In cases where possession of the property is claimed by a co-parcener on the ground of the invalidity of the alienation as against him the current of authority is to decree possession and simply declare the right of the purchaser to a partition. In *Deendyal* v. *Jugdeep Narain Singh* (15), their Lordships of the Privy Council, while directing possession of the property sold in execution of a decree to be given back to the co-parceners, added a declaration that the appellant as purchaser in execution sale acquired the share and interest of the judgment debtor in that property and was entitled to take proceedings to have that share ascertained. In *Suraj Bunsi Koer* v. *Sheo Persad Singh* (16), their Lordships of the Privy Council gave possession to the co-parceners who sued to set aside the sale in execution of a decree in respect of a debt which did not bind them but declared "that by virtue of the

(6) 19 M. 267; 6 Ind. Dec. (N. S.) 891.

(7) 7 Ind. Cas. 559; 34 M. 269; (1910) M. W. N. 380; 8 M. L. T. 269; 20 M. L. J. 743.

(8) 15 M. 275; 4 Ind. Dec. (N. S.) 903.

(9) 20 M. 243; 7 Ind. Dec. (N. S.) 173.

(10) 9 Ind. Cas. 596; 35 M. 47; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246.

(11) 14 Ind Cas. 524; 23 M. L. J. 64; 11 M. L. T. 393.

(12) 25 Ind. Cas. 585; 39 M. 265; 27 M. L. J. 409; 16 M. L. T. 181.

(13) 22 Ind Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576.

(14) 37 Ind. Cas. 168; 31 M. L. J. 275; 4 L. W. 99; (1917) M. W. N. 149.

(15) 3 C. 198; 1 C. L. R. 49; 4 I. A. 247; 3 Sar. P. C. J. 730; 3 Suth P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.).

(16) 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

execution sale to them, the respondents acquire only the one undivided third share in the eight anna share of Mouza Bissumbhurpore, in the pleadings mentioned, which formerly belonged to Adit Sahai, with such power of ascertaining the extent of such third part or share by means of a partition as Adit Sahai possessed in his lifetime; and ordering that the appellants be confirmed in the possession of...Mouza Bissumbhurpore subject to such proceedings as the respondents may take in order to enforce their rights above declared." In *Hardi Narain Sahu* v. *Ruder Perkash Misser* (17), it was held that where joint family property is sold in execution of a decree to satisfy a claim against a co-parcener personally, all that the purchaser acquires is merely the right of the judgment-debtor to compel a partition against the other co-sharers. The High Court, when the case came before it in appeal, added the necessary party and effected a partition of the property. Their Lordships, in referring to this, observed "According to the judgment of their Lordships in *Deendyal's case* (15), the decree, which ought properly to have been made, would have been that the plaintiff, the first respondent, should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perkash Misser, and was entitled to take proceedings to have it ascertained by partition. So that, in fact, the appellant has got a decree more favourable to himself than he was entitled to. He retains possession of one-third, instead of being turned out of the possession of the whole and left to demand a partition. Their Lordships, therefore, think that there is no ground for altering the decree of the High Court, although it may have gone beyond what was necessary or proper. The decree is not strictly right, but the appellant does not suffer by that. He gets all that he would be entitled to if a partition were made." It is clear from the above observations that their Lordships were of opinion that the only right which the purchaser had in such cases is to obtain a declaration which would entitle him in a separate suit for partition to work out his interests. In *Nanjya Mudali* v. *Shanmuga Mudali* (13) it was held that where a co-parcener alienates his share in certain specific family property the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible, and that he is not, therefore, entitled to sue for partition and allotment to him of his share of the property alienated, nor has he a right to possession and to a status as a tenant-in-common. In *Pandu Vithoji* v. *Goma Ramji* (18) it was held that in a suit by a co-parcener to recover possession of property conveyed without any necessity, joint possession cannot be given to the purchaser but that he is merely entitled to a declaration that he has acquired the interest of the vendor whatever that may be in the particular property and a direction that he be left to recover that interest by separate suit for partition in which all necessary parties and properties should be joined. The learned Judges have followed the course taken by the Privy Council in *Deendyal* v. *Jugdeep Narain Singh* (15) and *Hardi Narain Sahu* v. *Ruder Perkash Misser* (17).

Reliance was placed by Mr. Krishnaswami Aiyar on *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (19) which was a suit by the members of a joint family to set aside their father's alienation of ancestral property. The respondents in that case objected *inter alia* to the form of the suit which they contended should have been for partition. The suit was decided in the lower Court without any evidence and on the allegations in the plaint and written statement. Their Lordships of the Privy Council in holding that the plaintiffs would, in the absence of any other defense, be entitled to succeed went on to observe as follows:—

"With respect to the form of suit, it was rightly pointed out by the learned Counsel for the appellants that to deny any relief

(17) 10 C. 626; 11 I. A. 26; 8 Ind. Jur. 211; 4 Sar. P. C. J. 510; 5 Ind. Dec. (N. S.) 420 (P. C.).

(18) 50 Ind. Cas. 765; 43 B. 472; 21 Bom. L. R 213.

(19) 20 Ind. Cas 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

except in a suit for partition would be to deny the right of relief altogether, since the basis of their claim is that they are still entitled to the estate as a joint undivided estate, and desire to enjoy it as such. It may well be, however, that as between Kedarnath and Jainarayan, the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath upon a partition; and that the Court, if that position were established, would itself, at Jainarayan's instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact." Their Lordships, therefore, remanded the case for trial "with a declaration that it is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interests in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath." It is argued that these observations show that the Privy Council upheld the right of an alienee from a member of a joint family to require that a partition should be effected in a suit filed at the instance of the co-parcener without the necessity of a separate suit being filed. We do not think that this is the effect of the observations. Their Lordships were dealing with a case where the suit was disposed of on a preliminary question. This contention was never raised before them and they guard themselves by stating that though it may be open to the defendant to raise that point they express no opinion as to its validity either in law or fact. We do not think that their Lordships intended to overrule the plain dictum in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (17) where they held that relief by way of partition was not open to the purchaser in a suit by a co-parcener. Sadasiva Aiyar, J. in *Subbaiya Mudaliar* v. *Thulasi Mudaliar* (20) was of opinion that their Lordships of the Privy Council did not decide the point in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (19) and guarded themselves against any idea that they expressed any opinion as to the validity of the contention either in law or in fact.

Having regard to the provisions of the Civil Procedure Code which do not allow any wide rights of counter-claim, it is difficult to see how a suit by the plaintiffs for possession and mesne profits can be converted, at the instance of the defendants, into one for a general partition which would involve the presence of other parties and an enquiry into the debts and liabilities of the family. If the claim of the defendants is to be treated as a cross-suit and if the written statement is to be stamped as a plaint in such cross suit claiming a general partition there is no reason why the defendants should not file their own suit for a general partition and work out any decree which they may obtain in the decree in the suit by the co-parcener. There is no special advantage in the defendant's doing in their written statement what they could easily do in a plaint filed by them. It is open to them as soon as a co-parcener files a suit for possession to file a suit for partition, and where proper grounds exist the Court would try the suits together so as to afford relief to all parties. On the point of view of hardship we think that the hardship would be greater if a simple suit for possession which the co-parcener is in law entitled to file in cases of invalid alienations is converted into an elaborate enquiry as to a general partition of the family.

We are of opinion that the defendants are not in this suit entitled to a partition either of the specific item conveyed or of the joint family properties generally.

As regards the claim for mesne profits we do not see any reason for mesne profits being allowed before the suit. The alienation by the father to the extent of his share will be good. In the case of sales by a father or managing member of the joint family for alleged necessity, we think the sale will be good till avoided, as it is open to the other co-parceners to affirm the transaction. The position of such a purchaser cannot be worse than that of a

(20) 22 Ind. Cas. 44; 1 L. W. 65 at p. 76; 14 M. L. T. 537 at p. 542; (1914) M. W. N. 16.

purchaser from a widow without legal necessity, in whose case it has been held that the sale is good till repudiated by the reversioners. We respectfully dissent from the view taken by Krishnaswami Ayyar, J. in *Kandasami Asari* v. *Somaskanta Ela Nidhi* (21) that a sale without necessity is incapable of ratification by the other co-parceners. Following the decision in *Bhirgee Nath Chaube* v. *Narsingh Tewari* (22) we think the claim for mesne profits should be limited to the period from the date of suit as there was no repudiation before the suit. There will be a declaration that the defendants are entitled to the half share of the vendor which they will be at liberty to work out by a suit for partition. The decree of the Subordinate Judge will be modified accordingly. Memorandum of Objection is dismssed with costs.

As the appellants have substantially failed, we direct them to pay the respondent's costs.

M. C. P. *Decree modified.*

(21) 5 Ind. Cas. 922: 35 M. 177; 7 M. L. T. 165; 20 M. L. J. 371; (1910) M. W. N. 580.

(22) 35 Ind. Cas. 475; 39 A. 61; 14 A. L. J. 1161.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

April 10, 1922.

Present :—Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Rani BIJAI RAJ KUNWAR—APPELLANT

versus

Thakur JAI INDRA BAHADUR SINGH—RESPONDENT.

Thakur JAI INDRA BAHADUR SINGH—APPELLANT

versus

Rani BIJAI RAJ KUNWAR—RESPONDENT.

Will—Interpretation—"Sir," *meaning of, in Oudh*—"Sirat," "Sirat Makbuza," *meanings of—Record of Appeal to Privy Council, inclusion of irrelevant matter in, condemned.*

By his Will a *Talukdar* bequeathed to his wife "Rs 500 per mensem from the estate besides the *sir* lands in her possession," and the question was what the testator meant by "*sir* lands in her possession":

Held, that the testator intended to bequeath to his wife an absolute estate for her life in the "*sir* lands in her possession" and not merely a right of tenancy, or other subordinate interest in them: that he intended that she alone should be the proprietor of those lands during her life without any liability to have them assessed to rent, and that, consequently, the Oudh Rent Act, XXII of 1886, as amended by Act IV of 1901 had no application.[p. 879, cols. 1 & 2.]

The word "*sir*" when used in Oudh has not the restricted meaning given to it in the Oudh Rent Act, but means land assigned to the junior branches of a family for their support, instead of breaking up the estate and giving them the ancestral shares to which they were entitled Such appanages are known in Oudh by the name of *sir*. They also form one and the chief class of *Jewan Birt*, which is a name also sometimes applied to this class of *sir*. Whole villages assigned in this way are also called *Bhayai* villages. [p. 881, col. 1.]

"*Sirat*" is the plural of "*sir*" and "*sirat makbuza*" means *sir* land in possession. [p. 879, col. 1]

The wholesale inclusion of irrelevant documents in the record of a Privy Council appeal prepared in India, condemned as "a scandal and a hindrance to the proper administration of justice." [p. 882, col. 2; p. 883, col. 1.]

Consolidated Appeals from a decree or order of the Board of Revenue of the United Provinces of Agra and Oudh, dated 16th December 1916, reversing the order of the Deputy Commissioner, Kheri, dated the 7th January 1916 and from a judgment and two decrees of the Court of the Judicial Commissioner, Oudh, dated 31st January and 30th August, 1918, affirming the judgment and decree of the Subordinate Judge, Lakhimpur.

Mr. *Dunne*, *K. C.*, and Mr. *Amiend Jackson*, for the Rani, Bijai Raj Kunwar.

Mr. *DeGruythar*, *K. C.*, and Mr. *Kenworthy Brown*, for Jai Indra Bahadur Singh.

JUDGMENT.—These are two consolidated appeals. In the earlier of these appeals Rani Bijai Raj Kunwar is the appellant, and Thakur Jai Indra Bahadur Singh is the respondent. It is an appeal from a decree or order of the 16th December 1916 made by the Board of Revenue of the United Provinces of Agra and Oudh in appeal in a suit which was brought in the Court of the Deputy Commissioner of Kheri on the 19th March 1915 by the then manager under the Court of Wards of the property of Thakur Jai Indra Bahadur Singh, then a minor, against Rani Bijai Raj Kunwar, to have Rs 5,542-11-9 assessed as rent on *Mauza* Chhauch under section 107G of Act XXII of 1886. In the later of the two consolidated

appeals Thakur Jai Indra Bahadur Singh is the appellant and Rani Bijai Raj Kunwar is the respondent. It is an appeal from two decrees, of the 31st January and 30th August, 1918, made by the Court of the Judicial Commissioner of Oudh in appeal in a suit which was brought in the Court of the Subordinate Judge of Lakhimpur on the 27th July 1915 by Rani Bijai Raj Kunwar against Thakur Jai Indra Bahadur Singh for a declaration that she was entitled to hold *Mauza* Chhauch for her life rent-free, under her deceased husband's Will, and the *Mauza* was not liable to be assessed to rent during her lifetime. It is to be mentioned here that a Chak which is within *Mauza* Chhauch is known as Chak Khakra. That Chak belongs to other persons; in Chak Khakra neither of the parties to these consolidated appeals has or claims interest or title. Where *Mauza* Chhauch is later referred to in this judgment, it is to be understood that what is referred to is *Mauza* Chhauch, excluding Chak Khakra.

After the suppression of the Mutiny of 1857, the *taluq* or estate of Mahewa, which included *Mauza* Chhauch, was in the Oudh Summary Settlement settled with Gajrang Singh; he died in 1860, and his brother Girwar Singh succeeded to the estate. Girwar Singh died in 1865, and Balbhaddar Singh succeeded to the estate. Balbhaddar Singh died in 1898, and on his death his widow claimed to be entitled to the estate of Mahewa, her claim was resisted by Rajindra Bahadur Singh, who was Balbhaddar Singh's son. He claimed to be entitled to the estate. These conflicting claims resulted in litigation, and ultimately the Board of the Judicial Committee of the Privy Council decided that Rajindra Bahadur Singh was entitled to the estate, and he entered into possession of the Mahewa estate in 1905 or 1906.

In the first Regular Settlement in Oudh *Mauza* Chhauch (except Chak Khakra) was, with plots of cultivated lands in eight other *Mauzas*, recorded under the heading "*Sir*" as in the possession of the widow of Girwar Singh. By that entry in the Register it was meant that *Mauza* Chhauch and those other plots had been given to her by Girwar Singh for her maintenance. Before the next regular Settlement in Oudh the Revenue Authorities decided that in future in the Revenue Registers only such lands as were actually home farm lands of the *taluqdar* should be entered under the heading of "*Sir*," and, accordingly, *Mauza* Chhauch was then entered in the Revenue Register as "*muafi*"—that is, as rent free land. When Raghubans Kunwar, widow of Balbhaddar Singh, took possession of the Mahewa estate under her claim of title, she was entered in the Revenue Register as *muafidar* of *Mauza* Chhauch.

After the decision in his favour of the Board of the Judicial Committee, Rajindra Bahadur Singh, on the 26th February 1906, obtained, as owner of the Mahewa estate, possession of *Mauza* Chhauch and of all those cultivated plots in the eight other villages.

Rajindra Bahadur Singh, as the owner of the estate of *taluq* Mahewa, had powers to give, sell, mortgage or bequeath the *taluq* or any part of it to whomever he pleased, but his widow, should he leave one, would be entitled to maintenance suitable to her condition as his widow. Rajindra Bahadur Singh in 1911 handed over to Rani Bijai Raj Kunwar, his wife, possession of *Mauza* Chhauch, and on the 1st September 1911 he presented a petition to the Revenue Authorities, which, so far as is material, was as follows:—

"1. The petitioner is the absolute owner of *taluka* Mahewa, District Kheri, and the village of Chhauch bearing the '*hadbast*' (boundary) No. 249 forms part of *taluka* aforesaid. The petitioner has all proprietary powers in respect of his *taluka*.

"2. The petitioner has given the entire village of Chhauch to his wife as '*muafi*.' The revenue of this village would be paid from the income of the *taluka* and the village would, always, remain in the possession of his wife, as revenue free '*muafi*.'

"3. This application is, therefore, presented, and it is prayed that entries regarding mutation of names in favour of the aforesaid wife may be made in the revenue department as herein prayed for and the village may be entered as '*muafi*' under clause 6."

On that the Tahsildar reported, on the 10th November 1911, to the Deputy Collector as follows:—

"SIR,—An application was made by Thakur Raj Indar Bahadur Singh, *talukdar* of Mahewa, to the effect that he had given *Mauza* Chhauch in Pargana Kheri to his wife as *muafi*, that its revenue would be paid from the *taluka*, and that it might be entered in the name of the Rani as *muafi*. An en-

quiry was made. A writing from the *talukadar* corroborates the contents of the application. The *talukadar* has given *Mauza* Chhauchha to his wife, the Rani, as *muafi*. As no document has been executed, mutation proceedings cannot be taken. Of course, as reported by the office, entries can be made in papers, under clause 6. In my opinion, there is no harm in making entries in this way. Under clause 6A, under the head of *muafi* in the column of remark, these words should be written: 'The whole of this village has been given by the *talukadar* to the Rani as "*muafi*" for her maintenance.' Hence this report is submitted to sanction the entries aforesaid."

Thereupon the Assistant Collector made the following order:—

"Claim for mutation of names in respect of *Mauza* Chhauch, Pargana Kheri.

"ORDER.

"I have no objection to the above being noted in the remarks column.

"(Sd.) M. ABDUL LATIF KHAN, Assistant Collector, First Class."

"11th December, 1912."

In the Register relating to *Mauza* Chhauch it was accordingly entered that the village was "rent-free land granted by the Zamindar," and under the heading "Remarks" that —"The whole of this village is by way of maintenance allowance of Bari Bahu Sahiba (the Rani Bijai Raj Kunwar) *muafi* on behalf of '*talukadar*'" (*taluqdar*). It is not contended, on behalf of Rani Bijai Raj Kunwar, that by the petition of the 1st September 1911 and those entries in the Register any indefeasible title in *Mauza* Chhauch for her life was conferred on her by Rajindra Bahadur Singh, or that he could not thereafter have sued under Act XXII of 1886 as amended by Act IV of 1901, to have rent assessed upon the *Mauza*, but it is contended on her behalf that the petition of the 1st September 1911 and those entries in the Register consequent on it show that it was then Rajindra Bahadur Singh's intention that Rani Bijai Raj Kunwar should hold *Mauza* Chhauch for her life free of liability to pay rent. In fact, she held the *Mauza* from 1911 until his death rent free.

Rajindra Bahadur Singh died on the 1st October 1912. Rajindra Bahadur Singh had, on the 14th June 1907, made his Will, which so far as it is material, is as follows:—

"WILL.

"I, Thakur Rajendra Bahadur Singh, *taluqdar* of Mahewa, son of Thakur Sheo Singh, resident of Garhi Prasadpur, pertaining to *Mauza* Madhaia, Pargana and District Kheri, declare as follows:—

"This borrowed life is uncertain, and God has not as yet blessed me with a son; but I have a daughter, three years old. I have a strong hope that He will grace me with a male child. Therefore, in order to avoid a dispute in future, I make a Will to the effect that if a son is born to me, he will be the owner, and take possession of all my moveable and immoveable properties after my death, that in case I get more sons than one, the eldest will be the owner of all my estate according to the rule of succession to the '*gaddi*,' and the remaining sons will get allowance; that if no male child is born to me, then dear Jai Indar Bahadur Singh, *alias* Jhunnu Bhaiya, son of Kunwar Sheo Indar Bahadur Singh, who is the son of my own brother, shall be the owner and take possession of all the moveable and immoveable properties owned and possessed by me at the time of my death, or to which I have a right of ownership, or possession of any kind, or to which I may acquire a right in future, without the exception of anything or right; that *Musammat* Jai Raj Kunwar, my wife, shall get Rs. 5)0 per mensem from the estate in cash, besides the '*Sir*' lands in her possession; that my wife shall be the owner, and take possession of all my personal goods, such as clothes, ornaments, utensils used in eating and cooking, articles of decoration of the residential house, etc., that Rs. 250 per-mensem shall be paid from the estate to my younger brother, Kunwar Sheo Indar Bahadur Singh, who is living with me up to this time, besides the '*Sir*' lands possessed by him, and both these two allowances in cash shall be a charge on the estate, and the person in possession of the estate shall be liable for the same; that the person in possession of the '*taluka*' shall be responsible to pay Rs. 50,000 for the expenses of each of the daughters who may be unmarried at the time of my death; that if, God forbid, dear Jai Indar Bahadur Singh, aforesaid, die intestate without leaving a male child, then his nearest male heir descending from Mahendra Bahadur Singh, Narendra Bahadur Singh and Sheo Indar Bahadur Singh, will be entitled

to succeed to the '*gaddi*' and to be the owner of all the estate....."

Thakur Jai Indra Bahadur Singh is the nephew described in the Will as Jai Indar Bahadur Singh, and Rani Bijai Raj Kunwar is in the Will referred to as *Musammat* Jai Raj Kunwar, the testator's wife.

Thakur Jai Indra Bahadur Singh did not succeed by right of inheritance to the Mahewa estate or to any part of it; his title depends on the Will, and such interest in the Mahewa estate as he has depends on the Will. He took under the Will, and not otherwise. On behalf of Rani Bijai Raj Kunwar it is contended that under the Will *Mauza* Chhanch (Chak Khakra excepted) passed to her for her life free of rent, and that *Mauza* Chhanch will not vest in Thakur Jai Indra Bahadur Singh until she has died, and that until that event shall have happened Thakur Jai Indra Bahadur Singh will not be the proprietor of *Mauza* Chhanch within the meaning of Act XXII of 1886 as amended by Act IV of 1901, or entitled to sue to have any rent assessed upon that *Mauza*. That contention depends upon the true construction of the Will, which involves the meaning of words in the Will which have been thus translated by the official translator: "That *Musammat* Jai Raj Kunwar, my wife, shall get Rs. 500 per mensem from the estate in cash besides the '*Sir*' lands in her possession." That is the official translator's rendering of the vernacular words in the Will. In the judgment of the Board of Revenue of July 1916, the words in question are translated thus: "To my wife for life five hundred rupees per mensem besides *Sirat Makbuza* will be given from the estate." In their Lordships' opinion the two translations have the same meaning. *Sirat* is the plural of *Sir* and *Sirat Makbuza* means *Sir* lands in possession. It does not appear to have been doubted by any of the Courts in India that the "*Sir* lands in her possession" passed by the Will to Rani Bijai Raj Kunwar as a rent-free estate for her life. But the question is, What did Rajindra Bahadur Singh mean by "*Sir* lands in her possession" in his Will. That he intended by his Will to bequeath to Rani Bijai Raj Kunwar an absolute estate for her life in the "*Sir* lands in her possession" and not merely a right of tenancy or other subordinate interest in them, and that he intended that she alone should be the proprietor of those lands during her life, their Lordships have no doubt.

The Courts in India who have had these suits before them arrived at different conclusions as to what Rajindra Bahadur Singh meant by the words "*Sir* lands in her possession." The Deputy Commissioner of Sitapur, who tried the Revenue Court suit, in reference to the words "*Sir* lands possessed by her," as he translated the Will, stated in his judgment that—

"These last words must be taken to refer to the '*Sir*' lands possessed by the Rani at the time of the testator's death. The village in suit is not '*Sir*' land in the strict sense of the term, but I think there can be little doubt that the word '*Sir*' is used by the testator in a loose sense, and signifies 'land held as '*guzara*.' This is not seriously disputed by the plaintiff. It is then clear that the testator wished that the defendant should continue to hold her '*guzara*' land rent-free for her lifetime."

He, however, being of opinion that Thakur Jai Indra Bahadur Singh was proprietor, and was thus entitled to sue to have *Mauza* Chhanch assessed to rent, gave Thakur Jai Indra Bahadur Singh a decree assessing the rent. From his decree there was an appeal by Rani Bijai Raj Kunwar Singh to the Commissioner of the Lucknow Division, who in his judgment stated, in reference to Rajindra Bahadur Singh's Will:

"By his Will he bequeathed to his widow .....and the '*sir*' or '*guzara*' land.....It had, before the *talukdar's* death, been duly entered as '*guzara*' held rent-free.

"The present *talukdar*, nephew of the late *talukdar*, who is under the Court of Wards succeeded to the property under the terms of the Will. He sues now to have rent assessed, as the rent free '*guzara*' of his aunt, the widow of the testator.

"The Deputy Commissioner has decreed the claim. It appears to me that the suit should never have been brought. The present *talukdar*, as represented by the Court of Wards, is willing himself to be benefited by the terms of the Will. But he wishes to deprive his benefactor's widow of the benefit, which was meant to accrue to her under the same Will. We must clearly take it that the defendant-appellant is entitled under the terms of the grant or Will to hold this village rent-free for her life."

BIJAI RAJ KUNWAR v. JAI INDRA BAHADUR SINGH.

The Commissioner of the Lucknow Division dismissed the Revenue Court suit. From that decree dismissing the suit Thakur Jai Indra Bahadur Singh appealed to the Board of Revenue. The Board of Revenue in their judgment said:

"It is urged by the respondent that under the Succession Act of 1865, she has devised (had devised to her) the land held by her as 'Sirat Makbuza,' and the effect was to give her a proprietary title for life. It is further urged that, as the village in suit was held by her in the same way as she had held the other lands at the time of the Will, the result of the Will also was to confer on her a proprietary grant for life of this village. It may be admitted that the words 'Sirat Makbuza' in the Will were certainly intended to cover the rent-free grants held by her at the time of the execution of the Will. The appellant argues, however, that there is a great difference between a whole village and plots of land within a village, however numerous the latter might be, and that a whole village could not be termed 'Sir,' however loosely the word is used, and that the fact that the previous *talukdar* made a separate application in 1911 about the whole village clearly shows that he meant to differentiate it from the other land, and for this argument there is a good deal to be said."

In the result the Board of Revenue held that section 107G of Act XXII of 1886 as amended by Act IV of 1901 applied, and made a decree assessing *Mauza* Chhaunh to rent. From that decree Rani Bijai Raj Kunwar has appealed to His Majesty in Council.

The Subordinate Judge of Kheri, before whom the civil suit first came, framed six issues, the first of which was: "Is the suit not cognizable by the Civil Court?" He held that the questions whether the plaintiff (Rani Bijai Raj Kunwar) was "entitled to hold the village (*Mauza* Chhaunh) rent-free as a life-interest bequeathed to her under her late husband's Will and that she is not liable to assessment of rent during her lifetime" were exclusively for the Court of Revenue, and by his decree dismissed the suit. Rani Bijai Raj Kunwar appealed from that decree to the Court of the Judicial Commissioner of Oudh. The learned Judicial Commissioners on the appeal held that the Civil Court had jurisdiction to entertain the suit for a declaration of Rani Bijai Raj Kunwar's legal title to *Mauza* Chhaunh under her husband's Will, but that the Civil Court had not jurisdiction to give her a declaration that *Mauza* Chhaunh was not liable to be assessed to rent during her lifetime, and remanded the suit to the Court of the Subordinate Judge for the trial of certain issues.

The suit on the remand came before another Subordinate Judge, who apparently was not himself familiar with the popular descriptions in Oudh applied to lands held for maintenance. He recorded much evidence on the subject. One of the witnesses, who had been for some years a Naib-Tahsildar in Lakhimpur, said: "Every sort of cultivated land, whether rent-free or assessed to rent, and whether held by grantee, or Shankahapdar and under-proprietor or ordinary tenant, is commonly called *Sir*. I never heard a whole village called as *Sir* of any body, though I heard a whole village called a *guzara* of a *guzaradar*." The Subordinate Judge's comment on the Naib-Tahsildar's evidence was: "His evidence goes to show that when a member of a *Talukdar's* family cultivates *guzara* land given to him and calls it his *Sir* others also call it by the same name." Another witness said: "Thakur Rajindra Bahadur Singh thought that land given to the members of a *Talukdar's* family for their *guzara* are called their *Sir*. He considered the village Chhaunh to be *Sir* of the plaintiff (Rani Bijai Raj Kunwar)." There was much other evidence, and in conclusion the Subordinate Judge found that "the word *Sir* is used in common parlance to describe a *muafi* grant of plots of land made to a member of the *Talukdar's* family for maintenance, but that a whole village assigned for a similar purpose is not called by the name of Sir...I find that the words 'Sirat Makbuza,' were used in the Will in this sense."

On the return to the order of remand the learned Judicial Commissioners proceeded to consider what Rajindra Bahadur Singh meant by the term "*Sirat Makbuza*" (*Sir* lands in possession) which he used to describe the bequest to his wife, Rani Bijai Raj Kunwar. They considered that the opinions expressed by the witnesses on that subject did not possess any particular value for the decision of that question. It has not been shown to

their Lordships that the Judicial Commissioners formed an incorrect estimate of the value of that oral evidence. The learned Judicial Commissioners took, in their Lordships' opinion, safer ground for the consideration of the question in the history of the manner in which *Mauza* Chhaush had been dealt with since it had been settled with Gajrang Singh, and particularly by Rajindra Bahadur Singh. They also placed great reliance on the introduction to the late Mr. Sykes' well-known and valuable compendium of the Law relating to the Taluqdars of Oudh, and quoted the following passage which occurs in Mr. Sykes' observations on the various classes of *Sir* in Oudh. Mr. Sykes, in discussing that subject, stated that :—

"Amongst the various classes of *Sir* under-proprietors who never had the full and exclusive proprietary right of the whole village is the land frequently assigned to the junior branches of a family for their support, instead of breaking up the estate and giving them the ancestral shares to which they were entitled. Such appanages are known in Oudh by the name of *Sir*. They also form one and the chief class of *Jewan Birt*, which is a name also sometimes applied to this class of *Sir*. Whole villages assigned in this way were also called Bhayai villages."

In support of that statement by Mr. Sykes, the Judicial Commissioner quoted a passage from Volume I of the Oudh Gazetteer of 1877, which was published under the authority of the Government, and a passage from the Fyzabad Settlement Report of 1880. The passage from the Oudh Gazetteer is as follows :—

"Second, it was common to assign to the junior branches of a family certain lands for their support, instead of giving them the ancestral shares to which they were entitled. Such appanages were also known as *Sir*."

The passage quoted from the Fyzabad Settlement Report runs thus :—

"253. *Sir* is in most cases an appanage of proprietorship, the lands constituting the home-farm of a proprietor. It is the name, too, given to the lands assigned to the junior branches of a family in lieu of the ancestral share to which they were entitled."

The Judicial Commissioners did not overlook the fact that the passages which they quoted from the Oudh Gazetteer and the Fyzabad Settlement Report had reference to the District of Fyzabad and not to Oudh generally. They observed in their judgment : "The above quotations refer to the District of Fyzabad, but the meaning of the word *Sir*, given therein appears to us clearly to be a meaning which was applied generally in Oudh." Nor did the Judicial Commissioners overlook section 108 of Act XXII of 1886, which enacted how the term "*Sir*" should be understood officially in Oudh. In reference to that section they said : "The restricted meaning of the word *Sir* given in Act XXII of 1886 is a meaning based to some extent upon the meaning of the word in the Province of Agra, and is largely the creation of the English Revenue Authorities. We consider that the learned Counsel for the appellant (Rani Bijai Raj Kunwar) is correct in his contention that the word *Sir* used by an Oudh man would bear the meaning assigned to it by Mr. Sykes, and would not be confined to the meaning which it bears in Act XXII of 1886." Their Lordships see no reason to disagree with that conclusion of the learned Judicial Commissioners.

Referring to the history of *taluka* Mahewa, the Judicial Commissioners correctly stated in their judgment that *Mauza* Chhaush (excepting Chak Khakra, which belonged to another and distinct family) and cultivated plots in eight other villages of the *taluka* were in the possession of Rani Bijai Raj Kunwar at the time of her husband's death; that some of those plots had been handed over to her by her husband, Rajindra Bahadur Singh in 1907, and the remainder of them in 1908, that he had instructed the Patwari to have them entered in the Revenue Register in her name ; and that those plots of cultivated lands had been entered into the first Regular Settlement as the "*Sir*" of the widow of Girwar Singh. The Judicial Commissioners also state that the Counsel who appeared before them admitted that those plots of cultivated lands in the eight villages were *Sirat Maqbuza*, and must be given to Rani Bijai Raj Kunwar under the terms of the Will, but he contended that *Mauza* Chhaush could not pass to her under the description of *Sirat Maqbuza*. The Judicial Commissioners came to the conclusion that in 1911 Rajindra Bahadur Singh had given *Mauza* Chhaush (excepting Chak Khakra)

to Rani Bijai Raj Kunwar as rent-free, and that the description *Sir Maqbuza* included *Mauza* Chhaunh (less Chak Khakra) and that under the Will she took an estate for her life in the *taluka* free of rent, and they gave her a decree declaring that she "is entitled to hold possession during her life of the village Chhaunh, less Chak Khakra, Pargana and District Kheri, under the Will dated the 14th June 1907 executed by Thakur Rajindra Bahadur Singh, the late *talukdar* of Mahewa." From that decree Thakur Jai Indra Bahadur Singh has appealed to His Majesty in Council.

After a careful consideration of all the facts in these consolidated appeals, their Lordships have come to the conclusions that the words *Sirat Maqbuza* in the Will did apply to and cover not only *Sir* lands which might be accurately described as "*Sir*" but also *Mauza* Chhaunh (less Chak Khakra), and that Rajindra Bahadur Singh, in confirmation of his gift of 1911 to his wife Rani Bijai Raj Kunwar, of *Mouza* Chhaunh (less Chak Khakra) rent-fee for her life, did by his Will intend to bequeath, and did bequeath, to her *Mauza* Chhaunh (less Chak Khakra) for her life as a proprietor, and without any liability to have it assessed to rent, and they also are of opinion that Thakur Jai Indra Bahadur Singh, who takes his interest in *taluq* Mahewa under that Will, and whose only title to any part of *taluq* Mahewa is under that Will, cannot repudiate the condition of the Will that *Mauza* Chhaunh should be held by Rani Bijai Raj Kunwar for her life rent-free.

It has been contended on behalf of Thakur Jai Indra Bahadur Singh in these consolidated appeals that the decision of the Board in *Parbati Kunwar* v. *Deputy Commissioner of Kheri* (1) governs this case. That contention was based on a misconception. In that case the plaintiff, who sued for an enhancement of rent, was the "proprietor" of the *mahal* there in question within the meaning of section 107A of Act XXII of 1886 as amended by Act IV of 1901, and was suing a *thikodar* who held under a lease. In this case Thakur Jai Indra Bahadur Singh is not a proprietor of *Mauza* Chhaunh or of any part of it, and will not be the proprietor while Rani Bijai Raj Kunwar continues to be the proprietor for her life, and Act XXII of 1886 as amended by Act IV of 1901 does not apply.

Their Lordships will humbly advise His Majesty that the appeal in which Rani Bijai Raj Kunwar is the appellant should be allowed with costs, and the decree or order of the Board of Revenue of the United Provinces of Agra and Oudh of the 16th December 1916 be set aside and the decree of the Commissioner of the Lucknow Division of the 7th January 1916 be restored and affirmed, and that the appeal in which Thakur Jai Indra Bahadur Singh is the appellant be dismissed with costs.

In parting with this case their Lordships desire to add one further observation upon a matter which in other cases has often before been animadverted upon, but apparently with small result, namely, the manner in which the record in Thakur Jai Indra Bahadur Singh's appeal has been prepared. When this record, which consisted of 1,134 pages, was received by the Registrar of the Privy Council it appeared to him that a large part of it, consisting of lists of property in tabular form, was unnecessary for the purposes of the appeal, and he communicated this view to the London solicitors with a suggestion that Counsel should be consulted as to eliminating this portion of the printed book. As a result the parties agreed between themselves, on the advice of their Counsel, to omit over 200 pages, which were taken out of the books and not referred to again, and this shows that they should never have been included. The persons primarily responsible for this reckless waste of money were, no doubt, Thakur Jai Indra Bahadur Singh and his advisers in India, and had he won the appeal he would certainly not have received any costs in respect of this part of the record. But at the same time their Lordships think that a duty lies upon the Court to exercise control upon the wholesale inclusion of irrelevant documents, a duty which in this case was certainly not performed. A few weeks ago, in another appeal from the same Court their Lordships drew attention to the fact that the record contained at least 781 un-

(1) 47 Ind. Cas. 394; 45 I. A. 111; 5 O. L. J. 433; 24 M. L. T. 292; 35 M. L. J. 525; 16 A. L. J 865; 8 L. W. 586; 5 P. L. W. 30?; 28 C. L. J. 449; 41 A. 541; (1918) M. W. N. 880; 23 C. W. N. 125; 20 Bom. L. R. 1095 (P. C.).

necessary pages, and they do so again with the earnest hope that the Judges of the Court of the Judicial Commissioner will take such steps as will prevent in the future the continuance of what their Lordships consider a scandal and a hindrance to the proper adminstration of justice.

W. C. A. *First appeal allowed.*
Second appeal dismissed.

Solicitors for the Appellant in 1st Appeal and Respondent in 2nd Appeal:—Messrs. *James Gray & Son.*

Solicitors for the Respondent in 1st Appeal and Appellant in 2nd Appeal:—Messrs. *T. L. Wilson & Co.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1434 OF 1921.
March 27, 1922.

Present:—Justice Sir William Chevis, Kt.

ZORA—DEFENDANT—APPELLANT
versus
CHANDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Regulation XVII of 1806, ss. 7, 8—Mortgage—Foreclosure notice, proper form of—Defective notice, effect of—Mortgagee in possession, duty of.

Section 7 of Regulation XVII of 1806 provides either for payment or tender to the mortgagor or for deposit in Court, and a notice which simply informs the mortgagor that he must pay the money within the year and says nothing as to the alternatives of tenders and deposit in Court is misleading and the defect is not cured merely by the addition of the words "in the manner provided for in section 7 of the Regulation" [p. 884, col. 1.]

Fakira v *Piyare Lal*, 21 P. R. 1901; 57 P. L. R. 1901, *Sardari* v *Chiranji Lal*, 28 P. R. 1901; 9 P. L. R. 1901, distinguished.

Tara Chand v. *Chiman*, 12 Ind. Cas. 530; 3 P. L. R. 1912; 263 P. W. R. 1911, followed.

A defective notice is fatal to the validity of proceedings taken under Regulation XVII of 1806. [p. 884, col .]

Where a mortgagee is put in possession of the mortgaged property the intention of the parties is that the land shall be properly cultivated and that the mortgagee shall put it to the best use, so that a fair amount of profits may be realised and credited towards interest due on the principal mortgage debt. [p. 884, col. 2.]

Second appeal from a decree of the District Judge, Hissar, dated the 28th February 1921, affirming that of the Subordinate Judge, Second Class, Hissar, dated the 10th April 1920.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Nanak Chand Pandit*, for the Respondents.

JUDGMENT.—The plaintiffs sue for redemption of land mortgaged by their father and uncle in 1896 for Rs. 70. According to the terms of the mortgage-deed, the mortgagee was to hold possession and the principal sum was to carry interest at the rate of Rs. 1-9-0 per cent. per mensem and compound interest at the same rate in default but profits of the land were to be credited towards interest. At the end of three years, if the mortgage was not redeemed, the land was to be regarded as sold. In 1899 the mortgagee got a foreclosure notice issued by the Court of the District Judge. The notice warns the mortgagors that if within one year of the date of the notice they do not pay the money and redeem the land in the manner provided for in section 7 of the Regulation, then the land will be regarded as sold outright and the mortgagee will be entitled to sue for possession as owner. The year of grace passed and the land was not redeemed. The mortgagee brought no suit but quietly remained in possession of the land. Now, in 1919 the plaintiffs sued to redeem. The mortgagee objects that he holds possession as owner, but this plea was overruled by the lower Courts which held that the notice issued in 1899 was legally defective. The First Court gave a decree for redemption on payment of Rs. 70 principal and interest at 12 per cent. per annum from the date of the mortgage to the date of payment. The defendant appealed to the District Judge who held that the terms of the mortgage-deed were not harsh or unconscionable, but was of opinion that the defendant was really entitled only to interest for four years and that interest after the year of grace was not legally admissible. The District Judge, therefore, dismissed his appeal.

The defendant has lodged a second appeal to this Court, and the first question is whether the foreclosure notice issued in 1899 is legally defective. On behalf of the defendant reliance is placed on *Fakira* v. *Piyare Lal* (1) and *Sardari* v. *Chiranji Lal* (2). The latter ruling is extremely

(1) 21 P. R. 1901; 57 P. L. R. 1901
(2) 28 P. R. 1901; 9 P. L. R. 1901.

brief and does not, in my opinion, throw light on the present case. In the former ruling it is laid down that it is sufficient to inform the mortgagor that he must within one year redeem the land in the manner provided for in section 7 of the Regulation. For the respondents reliance is placed on *Tara Chand* v. *Chiman* (3), a judgment in which I laid down that a notice to the mortgagor which incorrectly or incompletely describes the manner in which redemption might be made was misleading and defective, even though a reference might be made in the notice to section 7 of the Regulation. I am still of the same opinion. Section 7 of the Regulation provides either for payment or tender to the mortgagor or for deposit in Court, and a notice which simply informs the mortgagor that he must pay the money within the year and says nothing as to the alternatives of tenders and deposits in Court is, in my opinion, misleading, and I do not consider that the defect is cured merely by the addition of words "in the manner provided for in section 7 of the Regulation". I note that in *Fakira* v. *Piyare Lal* (1) there was no misdescription of the manner provided for in section 7. The notice merely stated that the mortgagor must redeem in the manner provided for in section 7 without stating what that manner was; but in the present case the notice does not content itself with a reference to section 7 but incompletely describes the methods of redemption provided for in that section. I hold then that the notice is defective and that the mortgage still subsists.

Another plea taken before me on behalf of the defendant but not pressed, was that the suit was barred as for more than 12 years after the year of grace the mortgagee held adverse possession, but the Article of the Schedule to the Limitation Act which governs the case is Art. 148 and not Art. 144. The mortgage is still subsisting and the mortgagors have a right to redeem at any time within 60 years, and the mortgagee cannot be allowed to set up any title of adverse possession within that period.

(3) 12 Ind. Cas. 520; 3 P. L. R. 1912; 263 P. W. R. 1911.

The only other question is what sum of money the plaintiffs should pay in order to redeem the land? On behalf of the defendant it is urged that the terms of the mortgage-deed should be strictly carried out, but the terms of the mortgage-deed are that profits shall be credited towards interest. Now, the interest on the principal sum was only Rs. 13 a year to within one or two annas, and the land revenue only Rs. 4-6-3. So if the mortgagee received as much as Rs. 17-6-3 yearly from the land he would be due nothing on account of interest. The mortgagee has produced no accounts, and on his behalf it is stated by Mr. Nanak Chand that the land is poor land and has yielded practically nothing. For this, however, we have only the bare statement of the mortgagee and I am not prepared to suppose that a money-lender would advance so much money on the security of land that the profits of the land would not be equal to the interest. The mortgagee was in possession and it was his duty, as long as the mortgage existed, to keep accounts. It is easy for him to keep no accounts and to assert at the time when the mortgagors sue to redeem that the land has yielded no profits. If he has neglected to cultivate the land that is his fault. The intention of the parties in such a case is clearly that the land shall be properly cultivated and that the mortgagee in possession of the land shall put it to the best use so that a fair amount of profits may be realised and credited towards interest due on the principal mortgage-debt. The mortgagee as it is gets 12 per cent. interest under the decrees of the lower Courts, and in addition he has had, or should have had, the profits of the land, and I am not prepared to hold that anything more is due to him even according to the terms of the deed. I, therefore, uphold the decrees of the lower Courts and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 220 OF 1921.

April 6, 1922.

Present:—Mr. Justice Pratt and
Mr. Justice Duckworth.

A. K. R. M. C. T. CHETTY FIRM BY ITS AGENT KRISHNAPA CHETTY—APPELLANTS

versus

MAUNG AUNG BWIN—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 24, 25—Insolvency petition by creditor—Debt, proof of.

Where a creditor applies to have his debtor adjudged an insolvent, the Court is bound to require the creditor to prove his debt, and ought not to require him to do this by means of a regular suit.

Miscellaneous appeal against an order passed by the District Judge, Pegu, dated the 10th November 1921.

Mr. *Chari*, for the Appellants.

Mr. *Maung Tin*, for the Respondent.

JUDGMENT.—In this case a creditor Chetty applied to the District Court in order to have a debtor adjudicated insolvent.

For the purpose of this appeal, it will be enough to state that, when the debtor appeared, he denied that he owed any debts to the creditor.

The learned Judge of the District Court declined to permit the creditor to prove the alleged debts, requiring him to prove them by means of regular suits. He held rightly that, in order to enable a creditor to file such an application, there must be a debt, which must be a liquidated sum payable either immediately or at some future time. This represents section 9 of the Provincial Insolvency Act, 1920. The learned Judge, however, went on to hold that clause (*b*) of section 9 seems to show that a debt must be indisputably due, and remarked that he could find no section, which empowered an Insolvency Court to make an inquiry into a question of this nature.

Here he was clearly wrong.

Section 24 (1) (*a*) of the Act lays down that the Court *shall* require proof of, amongst other matters, the fact that the creditor is entitled to present the petition. This undoubtedly refers back to section 9. This latter section lays down the conditions which entitle a creditor to present a petition against a debtor. In these are included that there must be a debt due to the creditor aggregating not less than Rs. 500. Therefore, it was incumbent on the petitioner to prove the debt.

The Act is based on the English Bankruptcy Act. Section 5 (5) of that Act provides expressly for an alternative reference of the creditor, in such circumstances as the present, to relief by regular suit. The omission of any similar provision from the Indian Act indicates that thereunder there is no similar alternative method of procedure, but that the creditor must be allowed under section 24 to prove the debt, when the debtor denies it. Further section 25 provides for dismissal of the petition on failure of the creditor to prove his right to present it, and this obviously involves the necessity of proving that right, in order to avoid dismissal.

The learned Judge of the District Court went astray by referring to the statements of objects and reasons given by the Legislature in enacting the Provincial Insolvency Act. The passage which he quoted relates, *not* to proceedings prior to adjudication, *but* to proceedings *in* the Insolvency, *i. e.*, after the adjudication of the insolvent. The order of the District Court, dated 10th November 1921, is set aside, and the case is remanded to that Court, with orders to proceed according to law. The appellants' costs will be paid by respondent, with Advocates' fees of three gold *mohurs*.

W. C. A. *Case remanded.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 198 OF 1921.

February 4, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Campbell.

HARJAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HARKE AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Non-proprietors.

By ordinary village custom a near collateral is entitled to retain possession of the house of a

deceased *Kamin* in the village *abadi* in preference to a proprietor.

A collateral in the third degree is 'a near collateral' within the meaning of this rule.

Beli Ram v. *Umar Bakhsh*, 48 Ind. Cas. 723: 116 P. R. 1918; 25 P. L. R. 1919, *Ata Ali Khan* v. *Kala*, 50 Ind. Cas. 11; 103 P. R. 1919, referred to.

Where the custom of a particular village is uncertain, the rule of general custom should be applied.

Letters Patent Appeal from a decree of Mr. Justice Moti Sagar, dated the 26th of July 1921, passed in Civil Appeal No. 2 46 of 1920, affirming that of the District Judge, Karnal, dated the 9th August 1920.

Mr. *Shamair Chand*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—This suit was for possession of a house owned by Udmi carpenter deceased. The plaintiffs were his first cousin once removed and his first cousin twice removed, both being descendants of Daulat Ram, a brother of Udmi's father. The defendants were two Jat proprietors of the village.

The first Court decreed in favour of the plaintiffs. Its judgment was reversed on appeal by the District Judge, and the learned Judge in Chambers affirmed the decision of the District Judge. The second appeal to this Court was accompanied by a certificate under section 41 (3) of the Punjab Courts Act.

The plaintiffs claimed to be owners in the *abadi* site, but the decision of the District Judge that they are not owners, and that Udmi was also not an owner is final.

The point for decision is whether by custom the plaintiffs-appellants are entitled to succeed as heirs of Udmi to his house in the village *abadi* of the site of which he was not a joint proprietor. The learned District Judge held that it was necessary for them to prove a special custom since they were not sufficiently nearly related to Udmi to be recognized as his heirs for this particular purpose by general custom. The finding of the learned Judge in Chambers was to the same effect.

In two recent rulings of this Court, *Beli Ram* v. *Umar Bakhsh* (1) and *Ata Ali Khan* v. *Kala* (2), it was held that by ordinary village custom a near collateral is entitled to retain possession of the house of a deceased *kamin* in the village *abadi* in preference to a proprietor. In the former case the collateral held to be so entitled was a first cousin and in the latter he was an uncle, that is to say, both were collaterals in the third degree. In the present instance the plaintiffs are descendants of the deceased's uncle and also collaterals in the third degree.

We are satisfied that both these rulings correctly state the general rule of custom and having regard to the customary method of computing relationship in degrees, we do not see why the direct descendants of an uncle should be in a worse position than the uncle himself would have been had he been alive. In our opinion the plaintiffs are such near collaterals as are permitted by general custom to succeed to the occupation of a deceased *Kamin's* house.

There is a copy on the record of a paragraph in the *wajib ul-arz* of 1879 of this particular village which deals with succession to the houses of non-proprietors and is in accordance with what we hold to be the rule of general custom. There is a footnote that at the time of attestation of the *wajib-ul arz* the proprietors urged that the house of a non-proprietor, who had died without male issue, should revert to the proprietary body. We read this merely as a protest and not as a statement of the existence of a special custom. At the utmost its effect can only be that the custom of this village is uncertain and this being so, the rule of general custom must be applied.

We accept the appeal, discharge the decree of the learned Judge in Chambers and restore the decree of the First Court. Respondents will pay the costs of the appellants throughout.

Z. K. *Appeal accepted.*

(1) 48 Ind. Cas. 723; 116 P. R. 1918; 25 P. L. R. 1919.

(2) 50 Ind. Cas. 11; 106 P. R. 1919.

KO TINE *v.* ISMAIL CASSIM MOORAD.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 164 OF 1920.

April 7, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Macgregor.

KO TINE AND OTHERS—DEFENDANTS—APPELLANTS

versus

ISMAIL CASSIM MOORAD—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 60—Mortgage, splitting of—Mortgagee purchasing part of mortgaged property—Redemption by one of several mortgagors—Interest—Penalty—Question of law.

A mortgagee is entitled to claim that his security should not be split up, but if, by his own act, he becomes the purchaser of a portion of the mortgage-security, he has no longer any right to claim that the security should not be split up, and the mortgagor or his assignees become liable only for so much of the mortgage-debt as is proportionate to the portion of the mortgage-security they have purchased. Where the mortgagee seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgage, he must bring into account the full value of the mortgaged property purchased by him. [p. 889, cols. 1 & 2.]

Where the question whether the interest claimed on a mortgage-deed is a penalty, depends on an interpretation of a clause in the deed, the question is not a simple question of fact, and may be raised for the first time in first appeal [p 884, col. 2.]

Where a mortgage-deed provides for the payment of an increased rate of interest in case of default in paying the mortgage-money, and such increased rate is payable from the date of the mortgage, the provision is a penalty and ought not to be allowed. [p. 889, col. 2; p. 890, col. 1.]

First appeal against the judgment passed by the District Judge, Hanthawaddy.

Mr. *Chari*, for the Appellants.

Mr. *Jeejeebhoy*, for the Respondent.

JUDGMENT.—The facts of this case may be briefly stated as follows:—

Defendants Nos. 1 and 2 executed and registered a mortgage on various parcels of land in favour of the plaintiff-respondent. Subsequently the mortgagors sold various portions of the lands mortgaged to the other defendants in this case and they have erected buildings of various kinds on them. The plaintiff-respondent then brought a suit against defendants Nos. 1 and 2 based on certain promissory-notes and obtained a decree. In execution of that decree he brought a portion of the mortgaged properties to sale and became himself the purchaser. Subsequently the mortgagors allowed certain of the mortgaged properties to be sold for arrears of land revenue and thereby reduced the mortgage security. The plaintiff-respondent then brought the present suit seeking a mortgage-decree for the whole amount then due against the remaining properties, excluding those that he had purchased himself and those that had been sold for arrears of revenue. The defendants-appellants raised various defences and, amongst others, the defence that any decree that the plaintiff-respondent may obtain should be limited so as to preserve their rights to redeem the lands purchased by them on payment of a proportionate share of the mortgage-debt. The mortgage-deed contained a provision as to interest. Interest was fixed at 2 per cent. per mensem and the money was to be re paid by the 10th of February 1907. The deed provided that on failure to so redeem interest at the increased rate of 3 per cent. per mensem for the sum so remaining unpaid should be payable. The defendants did not in their written statement contest the liability to pay this increased rate of interest. It was apparently assumed that the plaint correctly set forth the terms of the mortgage-deed.

The learned District Judge has granted a mortgage-decree as prayed for, except in respect of certain defendants as to whose liabilities the claim was given up. Issues were drawn:—

(*a*) As to whether the plaintiff was estopped from asserting his right against all or any of the defendants who were *bona fide* purchasers.

(*b*) As to whether his suit was barred by limitation.

(*c*) As to whether, if there was no estoppel, the plaintiff was entitled to a mortgage-decree against the buildings as well as the lands, and lastly

(*d*) As to whether any of the defendants would be entitled to redeem the lands purchased by them for a proportionate share of the mortgage debt.

As regards those issues, the Trial Court stated that no evidence was led as to them,

no argument was put forward and no law quoted in support of the defendants' claims. The judgment states that the learned District Judge cannot see how estoppel or limitation or right to redeem by payment of a proportionate amount of the debt arises.

In this appeal, which has been very ably argued by Mr. Chari he raises two points only:—

(i) That the defendants were entitled to redeem the lands purchased by them on payment of a proportionate share of the mortgage, and

(ii) That the increased rate of interest was a penalty and should not have been decreed.

As to the first point, he urges that, in consequence of the plaintiff respondent's purchase of certain of the mortgaged properties, the rights of the mortgagor and mortgagee in these properties were vested in one and the same person, *viz.*, the mortgagee, and that, therefore, it must be held that the mortgage, which was originally indivisible, had become opened out. He relies on section 60 of the Transfer of Property Act and urges that, even though the section does not apply to the district where these lands are situate, the principle to be deduced therefrom should be applied as a rule of equity and good conscience.

For the respondent, it is urged that the whole of the burden of the mortgage could be and was transferred to the remaining properties, and reliance was placed on the decision of their Lordships of the Privy Council in the case of *Bhora Thakur Das* v. *Collector of Aligarh* (1). In that case two properties were mortgaged and the mortgagee purchased one of them in execution of a decree obtained by him on a prior mortgage, and it was held that the other property continued liable for the entirety of the mortgage-debt, and that a purchaser of the equity of redemption in such property could not be allowed to redeem it on payment of a proportionate share of the debt. It appears to me that this is an authority dealing with an entirely different case. The mortgagee held two mortgages, and he was entitled to bring the mortgaged property to sale in execution of his mortgage-decree without affecting the liability of the property to satisfy the subsequent mortgage. This was an appeal from the decision of the High Court of Allahabad, which is reported as *Bohra Thakur Das* v. *Collector of Aligarh* (2), and in the last page of the judgment of the High Court, the difference between the two positions is pointed out. It is there said: "Supposing *A* and *B* are mortgagors of certain property which they have jointly mortgaged to *C*. Now if *C*, the mortgagee himself, purchases the equity of redemption from *A*, it is clear that he cannot be permitted to throw on *B*.' share the whole burden of his mortgage. In such a case *B*.'s share can only be saddled with the proportionate amount of the mortgage debt. But if, as is the case here, *C*.'s purchase was at a sale in execution of a decree obtained on a prior mortgage, the case is different." I am, therefore, of opinion that the decision relied on is to be distinguished and does not apply to the facts of the present case.

In *Kallan Khan* v. *Mardan Khan* (3) it was held that where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage-money. Again, in the case of *Hamida Bibi* v. *Ahmad Hussain* (4), it was held that where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee, whether by purchase or by inheritance or otherwise, there is a merger of rights and the integrity of the mortgage is broken up. And in *Narayan* v. *Ganpat* (5) it was held that the general rule is that a

(1) 7 Ind. Cas. 732; 14 C. W. N. 1034; 12 C. L. J. 272; 8 M. L. T. 276; (1910) M. W. N. 665; 7 A. L. J. 1132; 12 Bom. L. R. 1005; 20 M. L. J. 890; 32 A. 612; 37 I. A. 182 (P. C.).

(2) 28 A. 593; 3 A. L. J. 439; A. W. N. (1906) 150.
(3) 28 A. 155; A. W. N. 1905) 225.
(4) 1 Ind. Cas. 779; 31 A. 335; 6 A. L. J. 387.
(5) 21 B. 619; 11 Ind. Dec. (N. s.) 415.

mortgagee has a right to insist that his security shall not be split up, but in the following cases there is no objection to do so and to rateably distribute the mortgage debt:—

(*a*) "When the mortgagee does not insist on keeping the security entire.

(*b*) "When the original contract itself recites that the mortgagors join together in mortgaging their separate shares.

(*c*) "When the mortgagee has himself split up the security, *e. g.*, when he buys a portion of the mortgaged estate. In this case he is estopped from seeking to throw the whole burden on that part of the property still mortgaged with him."

I will refer to one more authority. In *Ohunna Lal* v. *Anondi Lal* (6) it was held that when a mortgagee holding a mortgage over two distinct properties brings one of them to sale in execution of a decree against the mortgagor not being a decree on his mortgage and purchases such property himself, the whole mortgage is not necessarily thereby extinguished; but, if the mortgagee subsequently seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him under his former decree.

There can, I think, be no question on the authorities, and under section 60 of the Transfer of Property Act, in cases to which that Act applies, that the law is so, and the mortgagee is entitled to claim that his security should not be split up but, if he becomes by his own act the purchaser of a portion of the mortgage-security, he has no longer any right to claim that the security should not be split up, and the mortgagors or assignees for mortgagors become liable for only so much of the mortgage-debt as is proportionate to the portion of the mortgage security that they have purchased. That this is so is merely equitable. Further, it is clear that the plaintiff's advisers realized the liability of the plaintiff to keep the lands purchased by him still subject to the mortgage and the right of the mortgagors and others to claim that this should be so. Accordingly, we find in the plaint that the amount paid for the properties which were brought to sale is said to have been credited towards the mortgage-debt, partly for principal and partly for interest. The object clearly was to avoid having to account for the full value of the property. It is, I think, clear that in a case such as this, the purchasers from the mortgagors would be entitled to redeem the lands they purchased on payment of a proportionate amount of the mortgage security.

It is urged that they cannot obtain the relief they seek in the present suit and that they must bring a separate suit against the mortgagee for this purpose. To compel them to bring a separate suit would clearly result in great delay, both in the present suit and before the rights of the various parties could be finally settled. I can see no reason, and I know of no rule of law, which would prevent the Court from passing a decree, limiting plaintiff's rights in consequence of certain findings of fact or of law.

Plaintiff seeks a mortgage decree and defendants desire and plead that, if he is to be granted a decree, that decree should be limited by setting out that he is not entitled to one indivisible decree against the whole of the properties, but only to a decree which would permit of each individual redeeming his own lands on payment of a proportionate share. I, therefore, think that there is no force in this objection and that it should not be allowed to prevail.

As to the second point: It is true that no defence was taken in the written statement as regards the interest; but seeing that the interest claimed was clearly one which might raise the question of its being a penalty and that the defending defendants were not parties to the document, the plaintiff ought clearly to have set out the terms of the deed as to interest. The matter depends on an interpretation of a clause in the deed. It is not a simple question of fact, and, that being so, I think it may be raised in first appeal.

It is perhaps not clear from the wording of the mortgage deed whether the increased rate of interest is to be payable from the date of the mortgage or only from the date of default; if the former, the provision is clearly

(6) 19 A. 196; A. W. N. (1897) 18; 9 Ind. Dec. (N. S.) 129.

CHIRAGH DIN v. SERAJ DIN.

a penalty and cannot be allowed; if the latter, it will fall within the provisions of the added explanation to section 74 of the Contract Act.

The interest originally fixed, namely, 24 per cent. per annum was a very high rate of interest in the case of a mortgage with valuable properties as security; and to increase the rate of interest to 36 per cent. per annum has had the result of practically doubling the amount of interest that is now payable.

In my opinion, it is clear that, had the facts been brought to the notice of the Court, it would have been held that this stipulation for an increased rate of interest was a stipulation by way of penalty and that only 2 per cent. per mensem would have been decreed.

It is to be noted that plaintiff has waited for nearly 12 years in order to exact the uttermost farthing out of the increased rate of interest.

The appeal must, therefore, be accepted and the decree of the Trial Court must be varied. There will be the usual mortgage-decree for the principal sum due with interest at 2 per cent. per mensem up to the date of decree and for six months thereafter, with subsequent interest at 6 per cent. per annum with costs.

The decree will set out that each of the defendants appellants is entitled to redeem the lands purchased by him from the mortgagors on payment of a proportionate share of the mortgage-debt and that that proportionate share shall be arrived at by including the property purchased by the mortgagee himself, which is to be taken at what is fixed as its value and not merely at the amount realized at the auction sale. The whole of the mortgaged properties having been valued, the amount due will be proportioned amongst the various properties and the amounts for which each defendant-appellant may redeem his lands shall be set out and a time fixed within which he must do so. This will necessitate an enquiry, and I would remand the case to the District Court for an enquiry to be made on these lines and the result of the enquiry, together with the opinion of the District Judge, will be returned to this Court when a final decree will be drawn up.

As to costs: No orders can be passed at present, but the matter will be decided on the return being made.

W. C. A. *Appeal accepted; Decree varied.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3009 OF 1918.

April 18, 1922.

Present :—Mr. Justice LeRossignol and Mr. Justice Harrison.

CHIRAGH DIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SERAJ DIN—PLAINTIFF, IMAM DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption suit—Valuation—Compensation for improvements, whether to be included in valuation.

In determining the value for purposes of jurisdiction of a suit for pre-emption any compensation found to be equitably due to the vendee and not as a part of the price paid by the vendee, ought not to be taken into consideration [p. 891, cols. & 2.]

Muhammad Afzal Khan v *Nand Lal*, 16 P. R. 1908; 73 P. R. 1907; 146 P. L. R. 1908 (F B.) distinguished.

Abdur Rahman v. *Charag Din*, 19 P. R. 1908; 129 P. L. R. 1908; 38 P. W. R. 1908 (F. B.), *Dharam Chand* v. *Girdhari Lal*, 38 P. L R 1902, *Hayat* v *Sant Ram*, 20 P. R. 1894 and *Muhammad Khan* v. *Ashak Muhammad Khan*, 106 P. R. 1895 (F. B.), referred to.

Second appeal from a decree of the Senior Subordinate Judge, First Class, Lahore, dated the 13th May 1918, affirming that of the Munsif, First Class, Kasur, District Lahore, dated the 19th March 1918.

Diwan *Mehr Chand*, for the Appellants.

Malik *Muhammad Hussain*, for the Respondents.

JUDGMENT.—The first question in this second appeal is whether the appeal from the Munsif lay to the Court of the Senior Subordinate Judge. In his plaint the plaintiff alleged that the property in suit belonged to him and Imam Din jointly, that it was sold by Imam Din to Chiragh Din, defendant, for Rs. 60 and that the plaintiff claimed one-half in his own right and the other half as a pre emptor on payment of Rs. 30. The Munsif found that the plaintiff had no share

in the property but was entitled to pre-empt the whole on payment of Rs. 60 plus Rs. 71-2 0 representing compensation for improvements effected by the vendee since the sale. If the value of the original suit was Rs 60, the Senior Subordinate Judge had jurisdiction to hear the appeal, but if the value of the original suit was Rs. 60; the price of the property, *plus* Rs. 71-2-0, the compensation payable for improvements, then the Senior Subordinate Judge had no jurisdiction to hear the appeal which lay to the District Court. We have been referred to *Muhammad Afzal Khan* v. *Nand Lal* (1) but that does not afford much help, for all that it lays down is that the Munsif is not competent to pass a decree in a suit exceeding the limits of his pecuniary jurisdiction.

In *Abdur Rahman* v. *Charag Din* (2) it is laid down that in a suit for possession of a house the value of the improvements effected by defendants must be taken into consideration in determining the value of the suit, but in the body of the judgment of that case it is stated that cases relating to suits for pre-emption have only an indirect bearing on the point in issue.

In *Dharam Chand* v. *Girdhari Lal* (3) it was held that the value of the suit for the purposes of jurisdiction was the value of the property which it was sought to pre-empt and that value was not affected because the defendant claimed on equitable grounds compensation for improvements.

In *Hayat* v. *Sant Ram* (4) it was held that compensation for improvements was not to be taken into account in determining the value of the suit, and in *Muhammad Khan* v. *Ashak Muhammad Khan* (5) it was laid down that the question of jurisdiction had to be determined with reference to the claim made and not to the decision upon the claim.

From the foregoing it appears to us that any compensation found to be payable by the plaintiff pre-emptor to the vendee on equitable grounds and not as a part of the price paid by the vendee is not to be taken into consideration in determining the value of a suit in a pre-emption case. The only apparent ground on which the inclusion of the amount paid as compensation can be justified in determining the valuation of the suit is that the plaintiff should pay Court fee on the value of the property he seeks possession of. On the other hand, his claim is merely to be substituted for the vendee in respect of the property in the condition in which it stood at the time of the sale. He does not pray for possession of the improvements effected since the sale nor is he invariably bound to take over those improvements. Indeed the vendee may prefer to remove the improvements effected by him, and in some cases he will be allowed to do so whilst in others he may be forced to forego all claim to them. For these reasons we think the correct view is that compensation found to be equitably due to the vendee is not to be taken into calculation for the determination of the value of the suit, and on this finding we hold that the Senior Subordinate Judge had jurisdiction to hear the appeal.

The only other point argued before us was that the Subordinate Judge was not correct in his finding that the plaintiff's property and the property sold had a common entrance from the street, and it is urged that the plan on the record is not correct. We are not, however, at this late stage prepared to allow the contention that the plan is incorrect, for its correctness was never challenged in the Courts below, and from that plan we find that the only entrance to the area in dispute is through the plaintiff's property. Consequently, the Senior Subordinate Judge is correct in his finding that the plaintiff's property and the property in dispute have a common entrance from the street.

For these reasons we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 16 P. R. 1908; 73 P. W. R. 1907; 146 P. L. R. 1908 (F. B.).
(2) 19 P. R. 1903; 126 P. L. R. 1908; 38 P. W. R. 1908 (F. B.).
(3) 38 P. L. R. 1902.
(4) 20 P. R. 1894.
(5) 103 P. R. 1895 (F. B.).

RAM NATH v. RAGGHA SAH.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 56 OF 1921.

February 10, 1922.

Present:—Pandit Kanhaiya Lal, J. C.

RAM NATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGGHA SAH—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Evidence Act (I of 1872), s. 114—Presumption—Court, duty of—Document produced by obligor—Burden of proof—Question when immaterisal.

When a document creating an obligation is produced by the obligor the strength of the presumption authorised by section 114 of the Evidence Act varies in different circumstances and the Court has to take into regard any facts or circumstances indicating that the document might have been stolen. [p. 894, col. 1.]

In a suit upon a bond if the latter is produced by the defendant with an endorsement of payment on it, the burden of establishing that the debt was still outstanding, or in other words, of showing that the bond came in the possession of the defendant by dishonest means and that the signatures to the endorsements were either forgeries or unauthorised, is on the plaintiff [p. 894, col 2.]

Mohammad Mehdi Hasan Khan v. *Sri Mandir Das*, 17 Ind. Cas. 396; 15 O. C. 278; 12 M. L. T. 392; 34 A. 511; 14 Bom. L. R. 1078; 10 A. L. J. 373; 27 C. W. N. 49; 16 C. L. J. 629; (1912) M. W. N. 1052; 23 M. L. J. 741; 39 I. A. 68 (P. C.), referred to.

Harripria Debi v *Rukmini Debi*, 19 C. 439; 19 I. A. 79; 6 Sar. P. C. J. 177; 9 Ind. Dec. (N. s.) 736 (P. C.), relied on.

The burden of proof shifts as the evidence is developed: and when both the parties produce their evidence, the question on whom the initial *onus* lay ceases to be of much importance [p. 894, col. 2.]

Kundan Lal v. *Musammat Begam-un-nisa*, 47 Ind. Cas. 887; 22 C. W. N. 937; 8 L. W. 233 (P. C.), followed.

Appeal against a decree of the Subordinate Judge, Barabanki, dated the 13th August 1921.

Messrs. *Bisheshwar Nath Srivastava* and *Har Dhian Chandra*, for the Appellants.

Messrs. *A. P. Sen* and *Ram Bharosa Lal*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for the recovery of money due on a mortgage-bond executed by Abdul Karim and Nasir Alam on the 23rd February 1912. The mortgage was effected in lieu of Rs. 1,000 re-payable within two years with interest at 2 per cent. per mensem compoundable half-yearly.

It is common ground that a dacoity was committed at the house of the plaintiff on the 14th June 1915. The plaintiff escaped by jumping down from the roof of his house but not without fracturing his arm. In the course of the dacoity the dacoits burnt the account books and other papers belonging to the plaintiff and are stated to have carried away other property including cash, ornaments and other articles.

The allegation of the plaintiff was that the original mortgage-bond in suit was lost by him in that dacoity. The defendants Nos. 2 and 3 produced that document and stated that they had obtained it from Abdul Karim, the original mortgagor, at the time they took a subsequent mortgage from him on the 26th August 1914. The learned Subordinate Judge in a well considered judgment came to the conclusion that the loss of the original bond was proved and that the defendants had failed to establish the alleged payment.

The decoity was committed in the village Paintipur near the border of the Barabanki District by about 40 men, 8 of whom were seen next morning passing by the village Mirzapur, which is in the Sitapur District with some bundles, the carrying of which aroused the suspicion of some of the villagers. They were arrested and the bundles were found to contain ornaments, some of which were identified as a part of the property which had been pledged with the plaintiff. Their capture led to the arrest of other persons. Many of those arrested were eventually convicted on the 8th December 1915. A list of the document lost in that dacoity was not then filed but the present plaintiff stated before the Committing Magistrate that the dacoits had burnt his account-books and other papers. He was under that impression when he filed the present suit, but the subsequent production of the mortgage bond in suit has led him to suggest that all the documents had not been burnt and some must have been removed by the dacoits.

The defendants have produced no direct evidence to prove that the money due on the bond in suit was paid by any of the executants to the plaintiff. They produced Abdul Karim, the original mortgagor, whose statement is that in 1913 he paid Rs. 1,000 to Nasir Alam, and got back the mortgage bond from him. In cross-examination he said that he had

paid the money by making a fresh mortgage in favour of the late Raja of Belahra for Rs. 4,000; but no copy of that mortgage-deed has been filed, and it is admitted that no money was left out of the consideration of that mortgage with the Raja of Belahra for the payment of the money due to the plaintiff. He further stated that the payment was really made in 1914 and that the amount paid was Rs. 1,000 or 1,200. The mortgage-bond contains no endorsement evidencing the payment. The plaintiff is literate. The amount due on the mortgage-bond in 1914 must have been much more than what Abdul Karim professes to have paid. It is not likely that Abdul Karim or Nasir Alam would have paid the money due on the mortgage to the plaintiff without obtaining an endorsement from him thereon.

The story of the defendants-appellants is that Abdul Karim mortgaged the property comprised in the bond in suit with Kundan Lal on the 26th August 1914 for Rs. 2,000, the whole of which was paid in cash partly before execution and partly at the time of registration. It is also asserted that at the time of taking that mortgage Kundan Lal had searched the records and come to know that there was a mortgage on the said property held by the plaintiff and learnt from Abdul Karim that it had already been paid up and that the original mortgage-bond was then made over by Abdul Karim to him with two small holes at the places where the signatures of Abdul Karim and Nasir Alam existed to indicate that it had been rendered useless. Subsequently Abdul Karim sold the said property to Kundan Lal for Rs 7,000 on the 9th April 1915. The dacoity took place on the 14th June 1915. It is difficult to say that Abdul Karim could have any motive for bringing about the dacoity after he had sold his interest in the mortgaged property to Kundan Lal, though an insinuation of that effect has been made by the plaintiff in his evidence in this case. From the notes of search made at the time of the execution of the mortgage of the 29th March 1914, it appears that a mortgage bond was executed by Abdul Karim and certain other persons in favour of Raja Abul Hasan Khan of Belahra in respect of their share in the property mortgaged for Rs. 5,000 on the 22nd May 1912 within a few months of the execution of mortgage-bond in suit. No other loan on the security of the disputed property is shown to have been taken from Raja Abul Hasan Khan of Belahra either in 1913 or 1914. If Abdul Karim was unable to pay the money due on the mortgage in suit out of the consideration advanced by the Raja of Belahra on the 22nd May 1912, it is hardly likely that he would have been able to pay any money to the plaintiff in 1913 or 1914 unless a fresh loan was taken for the purpose, of which there is no proof.

The evidence of Kundan Lal about the original mortgage-bond having been returned to him by Abdul Karim on the 26th August 1914 is not supported by any reliable evidence. The statements of Abdul Karim and Kundan Lal are conflicting. Kundan Lal states that Abdul Karim told him when returning the mortgage bond in suit that no endorsement of payment could have been obtained thereon because the plaintiff was illiterate; but Abdul Karim states that he did not say so and that he knew that the plaintiff was literate. If the document was actually returned the probability is that it would have been returned before the Sub-Registrar and a note of return would have then found a place in the registration endorsement. In fact the mortgage of the 26th August 1914 does not even say that there was no previous encumbrance in existence, though the mortgage-bond in suit did say so. The statements of Ahmad Husain and Maikn Lal about the return of the original document are unreliable and have been rightly disbelieved by the learned Subordinate Judge. Kundan Lal states that Mathura Prasad was one of the persons present when the original mortgage bond was returned by Abdul Karim to Kundan Lal; but Mathura Prasad states that he was not present at the time of the execution of the mortgage by Abdul Karim in favour of Kundan Lal and that all he knew was that at the time of the execution of the sale-deed some papers had been returned by Abdul Karim to Kundan Lal but he did not know what they were.

There is a curious note on the back of the original mortgage-bond filed by Kundan Lal on the lower left hand corner, referring

to the mortgage-bond in question in the following terms :—" Rs. 1,000 *Raggha Sah ka bainama Abdul Karim deha* ". The object of this note perhaps was to indicate to the holder who evidently did not know the language in which the document given was written that it was the mortgage of Rs. 1,000 in favour of Raggha Sah appertaining to the property about which a sale-deed had been taken from Abdul Karim. It might also mean that the document given was the sale-deed for Rs. 1,000 executed by Abdul Karim in favour of Raggha Sah or that the bond had been received from Abdul Karim in connection with the sale. Whatever the significance of that note might be, there can be no question that it could not have been made till after the sale deed executed by Abdul Karim in favour of Kundan Lal had come into existence and if the evidence produced by Kundan Lal to prove that the document in question had been returned to him by Abdul Karim on the 26th August 1914 fails, and no evidence is forthcoming to prove that Abdul Karim had paid any money to the plaintiff in satisfaction thereof in 1913 or 1914 as now stated, the story told by the plaintiff that the document had been lost at the time of the dacoity and had passed thereafter from the hands of one of the dacoits to the person interested in setting up the plea of payment becomes highly probable. The learned Subordinate Judge believed the evidence of the plaintiff and disbelieved that produced by the defendants and there is no sufficient reason for taking a different view.

Under section 114, clause (1), of the Indian Evidence Act (I of 1872) it is open to the Court to presume that if a document creating an obligation is in the hands of the obligor, the obligation has been discharged. But in raising such a presumtion the Court has to take into regard any facts or circumstances indicating that it might have been stolen. It is not denied that a dacoity had been committed at the house of the plaintiff and it cannot be seriously disputed that the dacoits had burnt his account-books and other papers and possibly taken away such documents as they might have liked to remove, of which the plaintiff, who had jumped down from the roof soon after the arrival of the dacoits, could have had no knowledge. The learned Counsel for the defendants-appellants relies on the decision in *Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das* (1) where their Lordships of the Privy Council observed that if the original bond was produced by the defendant with an endorsement of payment on it, the burden of establishing that the debt was still outstanding or, in other words, of showing that the bond came in the possession of the defendant by dishonest means and that the signatures to the endorsements were either forgeries or unauthorised is on the plaintiff. The plaintiff has stated on oath the circumstances in which he lost the document in the course of the dacoity. The learned Subordinate Judge has believed his evidence ; and as pointed out in *Harripria Debi* v. *Rukmini Debi* (2) his opinion as to the loss cannot be lightly set aside. The strength of the presumption, which might be raised when a document, creating the obligation is produced by the obligor, varies in different circumstances. The burden shifts, to use the language of Viscount Haldane in *Kundan Lal* v. *Musammat Begam un nisa* (3) as the evidence is developed; and when both the parties produce their evidence the question on whom the initial *onus* lay ceases to be of much importance. The plaintiff explained in his evidence that he was unable to file a suit earlier because his arm had been fractured and he was unable to do any work for two years and a half. The dacoity must naturally have upset him considerably, keeping him as far as his debtors went in fear of further trouble. He obtained a copy of the mortgage-bond on the 14th September 1917. The delay in the institution of the suit would not, therefore, justify an adverse inference. He states that he made demands from Abdul Karim from time to time ; that he had lost about 300 documents, out of which about 15 or 20 were registered. His account-books had been destroyed rendering a trace of the particulars of unregistered bonds difficult. He filed a suit on one of the

(1) 17 Ind. Cas. 393; 15 O. C. 278; 12 M. L. T. 392; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 17 C. W. N. 49; 16 C. L. J. 629; (1912) M. W. N. 1052; 23 M. L. J. 741; 39 I. A. 38 (P. C.).

(2) 19 C. 438; 19 I. A. 79; 6 Sar. P. C. J. 177; 9 Ind. Dec. (N. S.) 736 (P. C.).

(3) 47 Ind. Cas. 337; 22 C. W. N. 937; 8 L. W. 233 (P. C.).

registered documents and got a decree. The other documents might have been re-paid or renewed or the money due on them otherwise settled. No question was put to the plaintiff about them. His failure to file any other suit before the institution of the present one would not justify an inference that he had really lost none. The value of the property mortgaged which, according to Kundan Lal, yields a profit of Rs. 650 a year, is much more than the amount paid by Kundan Lal to Abdul Karim at the time of his purchase. Considering all the circumstances the view taken by the learned Subordinate Judge is fully justified by the evidence and the probabilities of the case.

The appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 2511 OF 1921.

April 19, 1922.

Present:—Mr. Justice Le-Rossignol.

SARDAR ALI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FAZIL—PLAINTIFF, SHER—DEFENDANT—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 30—Pre-emption suit—Sale of undivided share in joint holding—Limitation—Physical possession of part.

Inasmuch as a co-sharer in a joint undivided property has a right to every part of that property until partition, what he sells is his share or a fraction of his share in the whole of that undivided property; in other words, he sells to the extent of his interest or a portion of his interest therein the whole property, and if his assignee takes possession under the sale of any portion of that joint property, limitation for a suit for pre-emption in respect of such a sale begins to run under the second clause of section 30 of the Punjab Pre-emption Act of 1913, from time of such assumption of possession.

Miscellaneous second appeal from an order of the District Judge, Mianwali, dated the 10th June 1921, reversing that of the Munsif, First Class, Mianwali, dated the 15th March 1921.

Mr. *Abdul Ghani*, for Mr. *Zafrullá Khan*, for the Appellants.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—In this and the two connected appeals the sole question is that of limitation. The suits are brought by the sons of the vendors in each case to pre-empt shares in a large area of *shamilat*. If the date of mutation be taken as the *terminus a quo* in each case, then each suit is within time, but the First Court has found that possession was delivered to the vendees at the time of sale long before mutation, and if the date of possession be regarded, then all three suits are barred by time.

The First Court dismissed the suits as barred by time. The learned District Judge held them to be within time and remanded them for decision on the other issues, holding that the limitation in such cases was governed by Art. 120 of the Limitation Act.

In second appeal it is conceded by the respondent that the learned District Judge is wrong in applying Art. 120 of the Limitation Act, but urges that under section 30 of the Pre-emption Act the suits are within time, inasmuch as what was sold was not capable of physical possession and, therefore, time began to run against the plaintiffs only from the date of mutation.

Whether an unascertained share in an undivided property is capable of physical possession is a matter on which the High Courts have dissented, but the balance of opinion appears to favour the view that a mere share in an undivided joint property is not capable of physical possession. For that reason Art. 10 of the Limitation Act is inapplicable to cases such as these. Now, I take it that inasmuch as a co-sharer in a joint undivided property has a right to every part of that property until partition, what he sells is his share or a fraction of his share in the whole of that undivided property; in other words, he sells (to the extent of his interest or a portion of his interest therein) the whole property, and if his assignee takes possession under the sale of any portion of that joint property, time begins to run under the second clause of section 30 of the Pre-emption Act from the time of such assumption of possess-

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sion. For these reasons I hold that all three suits are too late and accepting the appeals, I dismiss the suits with costs throughout.

Z. K.

Suits dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 65 OF 1921.

February 22, 1922.

Present :—Pandit Kanhaiya Lal, J. C.

KUBER SINGH—DEFENDANT—APPELLANT

versus

Musammat RAJ KUNWAR—

PLAINTIFF—RESPONDENT.

Limitation - Mesne profits, decree for, affirmed on appeal - Application for determination of mesne profits —Limitation terminus a quo.

Where a decree for mesne profits is affirmed on appeal, the limitation for an application for determination of mesne profits is to be computed from the date of the decree of the Appellate Court.

First appeal against the decree of the Subordinate Judge, Barabanki dated 17th August 1921.

Mr. *Ram Bharose Lal*, for the Appellant.

Mr. *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—This is an appeal from a decree determining the amount of mesne profits payable to the decree-holder under O. XX, r. 12 of the Code of Civil Procedure.

It appears that Ahbaran Singh was the owner of a 6 pies share in the villages Kunwar Danda, Serai Motamid Nagar and Rampurwa and a 4-pies 10-*kirants* share in the village Baisara. He was also the owner of 10 *bighas* 11 *biswas* 5 *biswansis* of land in the village Nand Kuin. After his death Raghubir Singh, Narendar Singh, Hardat Singh and Sheo Singh, who claimed to be the heirs of Ahbaran Singh, mortgaged the said property with Maheshar Bakhsh Singh, agreeing to give him possession. A suit was subsequently filed by Maheshar Bakhsh Singh for possession of the said property with mesne profits, to which the mortgagors and a person named Kuber Singh were impleaded as defendants. On the 20th November 1916 a decree was eventually passed against them for possession and mesne profits for the two years preceding the suit, the amount of which was to be determined, it was said, in the execution department under O. XX, r. 12, of the Code of Civil Procedure and to be recoverable from Kuber Singh. The mortgagee executed this decree and obtained possession in December 1916. Kuber Singh meanwile filed an appeal from the entire decree. That appeal was dismissed on the 28th June 1917.

On the 2nd March 1920 the decree-holder applied for the determination of the mesne profits awarded to him for the years 1321, 1322 and Kharif 1323 Fasli. The Court below determined the mesne profits for 1321 and 1322 Fasli as amounting to Rs. 740 and those for Kharif 1323, Fasli, that is, till the date of the recovery of possession, as amounting to Rs. 135 ; but it awarded the decree-holder Rs. 600 out of the former amount and the whole of the latter amount.

In appeal it is contended that no decree for mesne-profits ought to have been passed for Kharif 1323 Fasli because the decree did not award mesne profits for any period in excess of two years. That contention is borne out by the decree. The amount awarded for Kharif 1323 Fasli, that is, for the period subsequent to the date of the suit must, therefore, be excluded. The amount, which the decree-holder is entitled to is, however, Rs. 740, because in the plaint an estimate of mesne profits was given by the plaintiff and it was distinctly stated that any amount that might be found due on account of mesne profits might be awarded to him. In the application filed by the decree-holder for the ascertainment of the mesne profits a demand was made for Rs. 600 ; but it was evidently not meant that he should get less than what was awarded to him by the decree. The correctness of the amount is not disputed. The decree-holder is, therefore, entitled to receive Rs. 740 for the two years preceding the suit.

It is also urged that the Court below has taken into consideration a larger share of the disputed property than was covered by the decree ; but this plea is clearly

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untenable, as the decree described the property as it existed prior to the partition. It is also urged that the application is barred by time, as it was not made within three years from the date when the original decree was passed. But by reason of the appeal the decree of the Original Court had merged in the decree of the Court of Appeal; and on the principle recognised in *Abdul Majid* v. *Jawahir Lal* (1) and *Gajadhar Singh* v. *Kishen Jiwan Lal* (2), the limitation for an application for the determination of mesne profits, if there is any limitation applicable, is to be computed from the date of the final decree, by which the award of mesne profits was confirmed. From that date the application is within time.

The appeal is, therefore, dismissed except in so far that the amount awarded to the decree-holder will be reduced to Rs. 740, representing the mesne profits payable to him by Kuber Singh for the two years preceding the suit. The defendant-appellant will get his costs in proportion here and below from the plaintiff-respondent, who will get her costs in proportion here and below from the defendant-appellant.

W. C. A. *Appeal dismissed.*

(1) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 628; 27 M. L. J. 17; (1914) M. W. N 485; 16 M. L. T. 44; 1 L. W. 485 (P. C.).

(2) 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 81 OF 1921.

January 23, 1922.

Present:—Justice Sir Thomas Richardson, Kt., and Mr. Justice Ghose.

CHARU CHANDRA MAZUMDAR —DECREE-HOLDER—APPELLANT

versus

FANINDRA NARAIN CHOUHDURY AND OTHERS—JUDGMENT-DEBTORS —RESPONDENTS.

Execution of decree—Limitation—Execution stayed by order of Court—Period of stay, if can be deducted.

In computing the period of limitation for an application for execution of a decree, the decree-holder is entitled to deduct the period during which the execution of the decree was stayed by an order of Court

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Appeal against an order of the Subordinate Judge, First Court, Pabna, in Pabna and Bogra, dated the 19th of January 1921, affirming that of the Munsif, First Court at Pabna, dated the 28th of June 1920.

FACTS appear from the judgment.

Babu *Jatindra Nath Sanyal*, for the Appellant.—The decree-holder is the appellant. The appeal is directed against an order dismissing an application for execution on the ground of limitation. The present decree was attached in execution of another decree against the decree holder in 24th January 1916, and the execution of the present decree was stayed on 25th January 1916. There was a sale held in execution of the present decree which was set aside on 5th February 1916. Then the order of attachment of the present decree was withdrawn on 3rd February 1917. The present application was made on 22nd January 1920. My submission is that the present application cannot be held to be barred by limitation. Attachment of a decree under O. XXI, r. 54, operates as a stay of execution and the period during which it was under attachment should be deducted in computing limitation. Refers to *Kiran Shashi Debi* v. *Chandrika Prosad Singh* (1). The judgment-debtors who had notice of this application took no objection. I submit the learned Judge was wrong in holding that the application was barred. Refers to *Bindu Bashini Dasya* v. *Keshab Lal Basu* (2), *Gobindnath Choudhuri* v. *Basiruddin Mondal* (3).

No one appeared for the Respondents.

JUDGMENT.—This is an appeal from an order of the learned Subordinate Judge of Pabna dismissing an application for execution of a decree on the ground that it is barred by limitation. We have not had the advantage of hearing the respondents in this case as they did not appear. The material dates which appear from the judgment of the learned Subordinate Judge are these. The decree which is sought to be executed was attached in execution of another decree which appears to have been obtained against the decree-holder on the 24th January 1916 and the execution of the present decree was stayed by an

(1) 30 Ind. Cas. 587.

(2) 37 Ind. Cas. 66; 21 C. W. N. 945; 23 C. L. J. 109.

(3) 61 Ind. Cas. 504; 31 C. L. J. 163.

order dated 25th January 1916. The order, however, was modified to this extent that the decree-holder was allowed to proceed with the sale in execution of his decree, if the amount due on account of the other decree was kept in deposit out of the purchase money of the property which would be sold. The sale was held on the 26th January 1916 and the decree-holder applied for setting off the purchase money against his dues under the decree. That application was allowed apparently under some misapprehension. The judgment-debtors applied to have the sale set aside and it was set aside on the 5th February 1916. There was an appeal by the decree-holder and a second appeal both of which were dismissed and the execution of this decree was stayed by an order of the Court. Then on the 3rd February 1917 the attachment order against the present decree was withdrawn and the decree-holder applied for execution of his decree on the 22nd January 1920. A notice was issued on the judgment-debtors as to this application. Apparently the judgment debtors took no objection and an order was made on the 28th February 1920 for attachment of the properties mentioned in the application.

Two points have been urged on behalf of the decree-holder in support of his appeal. The first ground is that the present application for execution was not barred as he is entitled to deduct the period during which the execution of his decree was stayed by an order of the Court, that is to say, the period between the 5th February 1916 and the 3rd February 1917 when the attachment order against his decree was withdrawn. The last step previous to the 5th February 1916 taken by the decree-holder in aid of execution was on the 26th January 1916 and if the period stated above be deducted then his present application is within three years of the last step taken in aid of execution. It appears that it is so and, therefore, the present application for execution is within time. We need not therefore, consider the other point raised by the learned Vakil for the appellant.

The judgment of the lower Appellate Court is, therefore, set aside and the case is sent back to the Court of first instance in order that it may proceed with the execution of the decree.

The decree-holder is entitled to his costs in all Courts, hearing-fee in this Court being assessed at two gold *mohurs*.

B. N. *Case remanded.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 49 OF 1921.

August 1, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

THE OFFICIAL ASSIGNEE OF MADRAS —APPLICANT—APPELLANT

versus

ALLU N. RAMACHANDRA AIYAR AND OTHERS—GARNISHEES—RESPONDENTS.

Insolvency—Manager of joint Hindu family adjudicated insolvent—Official Assignee, rights of.

The Official Assignee, on the insolvency of the managing member of a joint Hindu family, succeeds to,—

(*a*) the undivided interest of the insolvent in the joint property, and

(*b*) his rights as managing member, so far as they can be exercised for his benefit;

he is not entitled to have vested in him the shares of the other members, although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency. [p 899, col. .]

Fakirchand Motichand v. *Motichand Hurruckchand*, 7 B. 438; 8 Ind. Jur 93. 4 Ind. Dec (N. S.) 294, *Nunna Brahmayya Setti* v. *Chidaraboyina Venkataswamy*, 26 M. 214, referred to.

The Official Assignee is entitled to all the rights of the insolvent, including the right to possession, except such rights as are in their nature personal to a member of the family as such. [p. 899, col. 2.]

Appeal from an order of Mr. Justice Kumaraswami Sastry, dated 23rd February 1 21, passed in the exercise of the Ordinary Insolvency Jurisdiction of this Court in Insolvency Petition No. 201 of 1919.

Mr. *V. Varadharaja Mudaliar*, for the Appellant.

Mr. *A. Kandasami Mudaliar*, for the Respondents.

JUDGMENT.—The Official Assignee in the insolvency of N. B. Balaswami Aiyar and Narasimha Iyar brought this suit against the minor sons of N. B. Balusami Iyar to set aside a deed of partition executed by that insolvent in favour of his minor sons. The learned Judge, Kumaraswami Sastry, J., held that the deed was fraudulent and void against the Official Assignee. The Official Assignee asked for declarations that the interests of the minors in the property should

be vested in him and that the possession of all the properties included in the deed should be delivered to him. These declarations were refused and hence this appeal. It has, however, been admitted before us that the declaration that the shares of the sons has vested was rightly refused and the only question remaining for our decision is whether possession ought to have been ordered to be delivered to the Official Assignee.

This involves a consideration of the rights of the Official Assignee to joint family property when the managing member is adjudicated insolvent, for N. B. Balusami Iyar was the managing member of the joint Hindu family consisting of himself and his sons and as such managing member had control over the properties in question. This insolvent's interest in the partnership business belonging to two insolvents was not an ancestral property. The minor sons had no interest in it and the debts of N. B. Balusami Iyar are in the main business debts incurred in the partnership business.

It can be taken as established law that the Official Assignee on the insolvency of the managing member of a joint Hindu family succeeds to two things, (1) the undivided interests of the insolvent in the joint property, and (2), his rights as managing member so far as they can be exercised for his own benefit. It is also established that he is not entitled to have vested in him the shares of the other members although he can deal with them if the insolvent could lawfully have done so if there has been no insolvency. The propositions are to be found clearly stated in the judgment of Latham, J., in *Fakirchand Motichnnd* v. *Motichand Hurruckch nd* (1) which has been followed in many subsequent cases. This is the combined effect of sections 7, 30 and 52 of the Presidency Towns Insolvency Act and of the Hindu Law as to the rights of a managing member. See *Nunna Brahmayya Setti* v. *Chidaraboyina Venkataswamy* (2). It follows that the Official Assignee standing for this purpose in the shoes of the insolvent can alienate the minor sons' interests in the joint property for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or an immoral purpose, the presumption being that they were not.

The question remains whether the Official Assignee is entitled to possession of the joint property. He is joint owner of the property, and, in my judgment, he must be entitled to joint possession thereof. It is no doubt true that a stranger cannot by reason of having purchased a share in the joint property insist on having a joint possession. But the Official Assignee is not an alienee but the representative of the insolvent.

There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights such as the right to live in the family house or to share in the family meals. But in my judgment he is entitled to all the rights of the insolvent including the right to possession except such rights as are in their nature personal to a member of the family as such.

I expressly refrain from deciding anything as to what the respective rights of the parties will be hereafter. It is for the Official Assignee to decide after examining the nature of the debts whether he can exercise the insolvent's right as managing member of selling the assets for the benefit of the creditors; and if there are separate assets of the insolvent in which his co-parceners have no interest, to what extent they are to be used in paying the debts, in relief of the joint family property, and so on, and it may be open to the minor sons, if so advised, to object to any proposed sale on the ground that the debts that it is proposed to discharge were incurred for an immoral or illegal purpose, though it is right to point out that it has in this case already been argued, that the business was of an illegal or immoral character by reason of its alleged speculative nature and this point has been decided adversely to the contention of the minor sons by the learned Judge who heard the case. In *Sanyasi Charan Mondal* v. *Asutosh Ghosh* (3) where the persons entitled to 4/5th of the undivided joint family property were adjudicated insolvents but the member of the family

(1) 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294.

(2) 26 M. 214.

(3) 26 Ind. Cas. 836; 42 C. 225.

entitled to the other 1/5th was not, the Court directed that the Receiver who was in the position of the Official Asignee should take possession of 4/5th share of the property. In this case the Official Assignee as representing the managing member is entitled to joint possession of the whole and the order in this case must be varied accordingly. The case is one of general importance and there will be no order as to costs, except that the Official Assignee will take his taxed costs of this appeal on the original side scale out of the estate.

V. N. V.
W. C. A.

Order varied.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

May 12, 1922.

Present:—Lord Buckmaster, Lord Atkinson, Lord Sumner and Lord Parmoor.

PRAMATHA NATH ROY—APPELLANT

versus

THE HON. WILLIAM ARTHUR LEE—RESPONDENT.

Limitation Act (IX of 1908), s. 12 (2)—Time requisite for obtaining copy of decree, how determined—Conduct of appellant.

In determining what is the requisite time for obtaining a copy of a decree, the conduct of an appellant must be considered No period can be regarded as requisite under section 12 of the Limitation Act which need not have elapsed, if the appellant had acted with reasonable promptitude and taken reasonable and proper steps to obtain the copy. [p. 901, col 1.]

Bani Madhub Mitter v. *Matungini Dassi*, 13 C. 104; 6 Ind. Dec. (N. S.) 568 (F. B.), referred to.

Appeal from a decree of the Calcutta High Court (Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Charlis Chetty KT.) dated the 29th January 1919 and printed as 52 Ind. Cas. 582.

JUDGMENT.

LORD BUCKMASTER.—The appellant in this case is the defendant in a suit which the respondent instituted by a plaint filed on the 24th June 1916. The various stages in the litigation are set out in detail in the judgment of the Chief Justice in the Appeal Court at Calcutta, and it is unnecessary that they should be repeated. Among these there was a decree made on the 14th February 1918 decreeing in favour of the respondent and against the appellant the sum of Rs. 27,443. Application made by the appellant to Mr. Justice Greaves to set that decree aside was refused on the 26th July 1918. The appellant desired to appeal from that refusal, and he produced his memorandum of appeal before the Court on the 30th August of that year, on the eve of the Court arising for the vacation.

By r. 3 of Chapter 32 of the Rules of the High Court of 1914, it is provided that every memorandum of appeal shall be accompanied by a copy of the decree or order appealed from, and with this rule the appellant did not comply. The memorandum of appeal was, however, admitted without the order, subject to all objections that might be raised on the hearing which took place on the 27th of January 1919. It was then decided by the High Court that the appeal was out of time, and it is from that judgment that the present appeal has been brought. That the notice of appeal was out of time, in fact, is beyond dispute, for the period of appeal is twenty days from the date of the decree or order which it is sought to impeach, and that period expired on the 15th August 1918. But there is a provision contained in section 12, subsection 2, of the Limitation Act of 1908, which provides that in computing the time for appeal there shall be excluded the time requisite for obtaining a copy of the decree. The appellant's contention is that the time "requisite" within the meaning of that subsection is the time which, in the circumstances of the case, is actually occupied in obtaining the decree, and that, so regarded, the time that ought to be deducted here is more than sufficient to rectify the delay.

The facts with regard to that matter are these:—After the order had been made on the 26th July no steps were immediately taken by the plaintiff to have the order drawn up, but after the lapse of four days it was competent to the defendant to apply for that purpose. The four days elapsed and nothing was done. On the 6th August application was made by the plaintiff to have the order drawn up, and on the 7th August the draft of the order was sent to the appellant. The order was simplicity itself, but the appellant only returned the draft on

the 16th August. On the 28th August it was signed, and on the 3rd September it was filed by the plaintiff.

Now, the learned Judges in the Appeal Court have held that in determining what is the requisite time referred to in section 12 of the Limtation Act the conduct of the appellant must be considered, and their Lordships think that in so determining they have rightly regarded the statutory provision. In their Lordships' opinion, no period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and propepr steps to obtain the order. In the present case he took none, and the periods between the 30th July and the 6th August, and again between the 7th August and the 16th August, which were within the appellant's control, are sufficiently great to prevent the appellant saying that the time that did elapse must have elapsed even if he had acted with reasonable promptitude.

It is then urged that there is an authority, decided in 1886, which has been the origin of a practice undeviatingly followed by the Courts in Calcutta in the interpretation of the Statute, and that practice is said to be that in determining what is the time requisite which may be deducted you are, in all cases, to look at the time that has actually elapsed in obtaining the order. Their Lordships are unable to see how this decision, *Bani Madhub Mitter* v. *Matungini Dassi* (1) which is reported in 13 Cal. at p. 104 can have been so misunderstood. In that case judgment was pronounced on the 17th July 1883, and the decree was signed on the 23rd July so that only six days elapsed between the pronouncing of the judgment and the signing of the decree. It would be impossible for anybody to suggest that that was an unreasonable time. Again, the application for the copy was made on the 3rd August, and it was obtained on the 11th August; another eight days elapsed there for which the appellant need not be held responsible. All that that case decided was that those two periods of time, one of which was prompt and effective and the other of which the appellant might not have been able to control, ought to be deducted from the length of time between the decree and the lodging of the memorandum. It certainly does not support the proposition that in determining what period is to be deducted in any case the time actually consumed in obtaining the decree is to be regarded. Their Lordships have been referred to a well-known book on practice which, it is said, shows that that is the practice notwithstanding the limited character of the judgment; but even there it is impossible to find this practice laid down in terms so plain and so unhesitating that their Lordships could rely upon that authority for the purpose of saying that it has become established as the equivalent of a rule of Court.

Their Lordships think that the appellant here is wrong, for the reason stated, which they regard as forming the foundation of the judgment appealed from.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

N. K. *Appeal dismissed.*

(1) 13 C. 104; 6 Ind. Dec. (N. S.) 563 (F. B.).

MADRAS HIGH COURT.
CIVIL APPEAL No. 65 OF 1920.
April 24, 1922.
Present:—Mr. Justice Phillipps and Mr. Justice Devadoss.

NALLANCHAKORAVARTHULA APPALACHARYULU AND OTHERS —DEFENDANTS—APPELLANTS
versus
NALLANCHAKKRAVANTHULA RAMACHANDRACHARYULU, MINOR, BY MOTHER AND GUARDIAN, PERINDEVI THAYARAMMA— PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 22 (1) (2)—Notification under cl. (1)—Description of property—Refusal of Registration—Sufficiency of description for identification—Suit to enforce registration—Necessary parties.

The mere fact that there has been a notification under clause (1) of section 22 of the Registration Act would not, under clause (2) of the same section, be enough for refusal of registration to a document not described according to that notification, unless the power of refusal in such a case was expressly given by the notification. [p. 90², col. 2.]

Where a notification merely provides that in certain districts the description should be in a certain manner and does not give any further direction, the proviso under clause (2) of section 22

of the Registration Act would have the effect of entitling a document to be registered provided the description is sufficient to identify the property. [p. 902, col. 2.]

Where a compromise agreement contains a recital that "all the immoveable property pertaining to the family of the executants and mentioned in schedule A described herein below shall be divided into four equal shares," the description of the property, for purposes of registration, is sufficient for its identification. [p 902, col 2; p. 903, col. 1.]

Maulvi Sayid Mahmud v. *Muhammad Zubair*, 3 Ind. Cas. 506: 31 A. 523; 6 A. L. J. 627; 6 M. L. T. 5, doubted.

Narasimha Nayanevaru v. *Ramalingama Rao*, 10 M. L. J. 104, referred to.

When a document purports to be executed by certain persons it is essential that those persons, even though they are minors, should be brought on record in a suit to enforce registration so as to make the proceeding binding upon them in so far as the proceedings have been conducted *bona fide* by their guardians. [p. 903, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Original Suit No. 31 of 1917.

Mr. *A. Krishnaswami Aiyar*, for the Appellants

Mr. *P. Narayanamurthi*, for the Respondent.

JUDGMEMT.—In this case the plaintiff has obtained a decree to compel registration of the document Exhibit A and an appeal is filed by the defendants. This document was presented for registration and registration was refused both by the Sub Registrar and by the Registrar on appeal on the ground that it was a document dealing with immoveable property and the description of the property was not sufficient to identify the same.

Under section 21 of the Registration Act there are certain provisions for the description of immoveable property in documents presented for registration; but under section 22, clause (2), it is provided that "save as otherwise provided by any rule made under sub-section (1), failure to comply with the provisions of section 21, sub section (2) or sub-section (3), shall not disentitle a document to be registered if the description of the property to which it relates is sufficient to indetify that property." In this appeal, it is first of all contended that there has been a notification relating to Kistna District under section 22 of the Act and apparently there has been some such notification, but it does not appear that the village in which the immoveable property is situated has been surveyed or that it would be possible to describe the property by its survey number as prescribed by the notification. Apart from this, it appears to us that clause (2) of section 22 provides that a document shall not be refused registration merely because there has been a notification under section 22 clause (1) unless that notification so provides. If such notification provides that "Certain description shall be given" of the immoveable property and failing such description registration can be refused, the question would be clear; but, if it merely provides that in certain districts the description should be in a certain manner and does not give any further direction, it seems to us that the proviso under clause (2) would have the effect of entitling a document to be registered provided the description is sufficient to identify the property. It would appear that in *Maulvi Sayid Mahmud* v. *Muhammad Zubair* (1) it was held that a rule framed under section 22, clause (1) was imperative and was not affected by the proviso in clause (2) of the same section. If that is the effect of that decision, we may say with respect that at present we are not altogether prepared to accept it, but in the present case this is a matter which need not be decided, for it does not appear that the property now in question can be described by survey numbers as directed in the notification of the Local Government regarding the Kistna District.

We then have to see whether the description of the property is sufficient to identify the same. The document sought to be registered is substantially a compromise agreement and one of the conditions of that compromise is that "all the immoveable properties pertaining to the family of the executants and mentioned in Schedule A described herein below shall be divided into four equal shares" and the division is to take six months after the execution of the document There is another provision also that "a deed of partition shall be executed separately on a proper stamp paper and that the same shall be got registered and that this agreement shall be got registered on 19th December 1916." No doubt the property is not very definitely described

(1) 3 Ind. Cas. 506; 31 A. 523; 6 A. L. J. 627; 6 M. L. T. 5.

but it is stated to be the family property and we think that the description is sufficient for the identification of the property. It is not as if this were a document effecting an actual transfer of the property; it is merely a declaration of the intention to effect partition with a recital that the partition is to be finally effected by a separate registered instrument. Our view that this description is sufficient is completely supported by the decision of this Court in *Narasimha Nayanevaru* v. *Ramacingama Rao* (2) in which it was held that the description of the property as 'my family property' without anything further was sufficient. Here we have also a schedule which does to a certain extent define the lands referred to. We accordingly find that the description is sufficient.

Even if the document could be registered so far as regards the immoveable property, it contains various other provisions which do not relate to immoveable property and as decided in *Amirdom* v. *Muthukumara Chetty* (3) it could have been registered at least so far as it purports to be an agreement for partition. We accordingly hold that the Subordinate Judge was right and that the document should be registered.

A further objection is taken that defendants Nos. 4 and 5 who were minors at the time of execution and on whose behalf the document was executed by their guardians were unnecessary parties to this suit, the argument being that under the Registration Act, the executant of a document is the guardian and not the minor. Whether this is so or not is immaterial, for when a document purports to be executed by certain persons it is essential that those persons, even though they are minors, should be brought on record in a suit to enforce registration so as to make the proceedings binding upon them in so far as the proceedings have been conducted *bona fide* by their guardians. They are clearly necessary parties to this suit and this contention fails.

The appeal is accordingly dismissed with costs.

M. C. P.

N. H. *Appeal dismissed.*

(2) 10 M. L. J. 104.
(3) 13 M. L. J. 303.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 14 AND 15 OF 1918.

April 15, 1921.

Present:—Mr. Justice Das and Mr. Justice Ross.

SURAJ PRASAD PANDEY—DEFENDANT—FIRST PARTY—APPELLANT

versus

SOMRA MAHTO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mesne profits, application for ascertainment of—Venue—Application, nature of—Interest—Discretion—High Court, power of, to interfere.

The proper Court in which to institute proceedings for the ascertainment of mesne profits is the Court passing the decree, even though the claim exceeds the ordinary pecuniary jurisdiction of such Court. [p. 904, col 1.]

Robinson v. *Duleep Singh*, (1879) 11 Ch. D. 798 at p. 813; 48 L. J. Ch. 758; 39 L. T. 313; 27 W. R. 21, *Dinanath Sahai* v. *Mayawati Kuer*, 60 Ind. Cas. 346; 6 P. L. J. 54; 2 P. L. T. 143; (1921) Pat. 69, relied on.

An application for ascertainment of mesne profits decreed is not a suit, but a proceeding in a suit, consequently, where mesne profits are decreed, the plaintiff is entitled to such profits for three years before the date of the suit. [p. 904, col. 2.]

It is entirely within the discretion of a Court to fix the rate of interest decreed, and the High Court will not, in second appeal, interfere with that discretion. [p 905, col. 2.]

First Appeal.

Messrs. *S. Sinha*, *Saroshi Charan Mitter* and *Ambica Pd. Upadhaya*, for the Appellant.

Mr. *Baikuntha Nath Mitter*, for the Respondents.

JUDGMENT.

Ross, J.—The respondents in these two appeals were plaintiffs in Suits Nos. 827 and 826 of 1911, in which they claimed that two sale deeds, executed by the mother of the respondent, Somra Mahto, and other relations, in favour of the appellant in respect of an eight annas share in 9 *bighas* 3 *kathas* and 3 *dhurs* of land and a 12 annas share in 22 *bighas* and 14 *dhurs* of land in Gopowlia and Peperdarbi, did not affect their interests, and prayed for possession.

The suits were dismissed by the Munsif but were decreed by the Subordinate Judge on appeal and a second appeal to the High Court was dismissed in 1916. The present applications were made in 1918 for the ascertainment of mesne profits and the respondents claimed in the first case a sum

of Rs. 8,500-14-0 from 1315 to 1320 and in the second case a sum of Rs. 13,197 from 1318 to 1320. The Subordinate Judge has given a decree for Rs. 1,425-14-4 in the first case and Rs. 2,219-7-8 in the second. The Appeal No. 15 of 1918 relates to the former and the Appeal No. 14 of 1918 relates to the latter suit and the defendant is the appellant. There are cross-objections in both the cases.

At the outset three legal objections were taken. It was contended, first, that the decree for mesne profits was without jurisdiction, because no mesne profits were asked for in the plaint; but, on the contrary, it was said that a separate action would be brought for mesne profits. Reference was made to the case of *Robinson* v. *Duleep Singh* (1) in support of the argument that the pleadings must be looked at in relation to the decree. In the present case, however, the decree is perfectly clear and there is no doubt about its meaning. It is, therefore, unnecessary to look at the pleadings in relation to it. And the relief granted, namely, mesne profits, is not inconsistent with the relief that had been asked for, namely, possession, except so far as there is a statement in the plaint that a separate action would be brought. But in any case this point is concluded by the decision of the High Court dismissing the second appeal which was preferred against the decision of the Subordinate Judge.

The second point was as to the jurisdiction of the Court. When the applications for ascertainment of mesne profits were made to the Subordinate Judge, he said that he had no jurisdiction and referred the plaintiffs to the Munsif. But his decision was reversed by the Calcutta High Court. According to the decisions of this Court the Subordinate Judge was right. In *Dinanath Sahai* v. *Mayawati Kuer* (2) it has been held that the proper Court in which to institute proceedings for the ascertainment of mesne profits is the Court passing the decree, even though the claim exceeds the ordinary pecuniary jurisdiction of such Court. The same view was taken in the case of *Mohammad Abdul Ghafoor* v. *Mahtab Choudhury* (3) in which case also, it may be noted, no claim for mesne profits was made in the plaint. But this plaint also is concluded by the decision of the High Court which granted a rule against the order of the Subordinate Judge and made it absolute and directed him to ascertain the amount of mesne profits.

The third point was that the claim for the first three years was barred by time according to the rule laid down in Art. 109, Schedule I of the Limitation Act and the decision in *Krishnanand* v. *Kunwar Partab Narain Singh* (4) that mesne profits can be claimed only for three years before suit. The learned Counsel for the appellant contended that the applications made in 1913 must be treated as the starting point for limitation and that the claim must, therefore, be limited to three years before that date. But the Act allows three years before the date of the suit, and the applications were not suits, but proceedings is the suits; and the decrees passed in these suits can only be understood on the assumption that the plaints were treated as stating claims for mesne profits. The material date, therefore, is the date of the suits. The suits were filed on the 8th of July 1911. Consequently the plaintiffs are entitled to mesne profits from the 8th of July 1908, that is, the 27th of Asarh 1315. But as this is almost the end of the agricultural year 1315 that year must be excluded from account and the decree of the Subordinate Judge must be modified by disallowing the claim for the year 1315.

On the merits three points were taken. The first was that the Commissioner had erred in allowing 30 maunds a *bigha* as the paddy crop. The oral evidence on both sides was disbelieved, but it was contended on behalf of the appellant that the evidence of the two Sub Inspectors was not open to objection. That evidence is supported in one case by receipts (Exhibits C and D) and in the other by the report of the Sub-Inspector of Police who made over the crops of the disputed land to the disputants. Their evidence relates to the years

(1) (1879) 11 Ch. D. 798 at p. 813; 48 L. J. Ch. 758; 39 L. T. 313; 27 W. R. 21.

(2) 60 Ind. Cas. 346; 6 P. L. J. 54; 2 P. L. T. 143; (1921) Pat. 69.

(3) 41 Ind. Cas. 231; 2 P. L. J. 394.

(4) 10 C. 785; 11 I. A. 88; 8 Ind. Jur. 335; 4 Sar. P. C. J. 551; Rafique & Jackson's P. C. No. 80; 5 Ind. Dec. (N. S.) 526 (P. C.).

1321 and 1323 and the amount of paddy made over in these years works out at 7 maunds a *bigha* in the first year and 8 maunds a *bigha* in the second. The Commissioner has discarded the evidence of these witnesses on the ground that they have been gained over by the appellant. This is manifestly an unfair criticism and is not open to him because there was nothing in the cross-examination of either witness to suggest such an idea. On the other hand, the appellant himself admitted in his written statement that the cutturn of paddy was 14 or 15 maunds a *bigha* and this admission itself shows that the figures arrived at from the Police report and the receipts cannot truly represent the cutturn of the total area. This confirms the finding of the Commissioner, that these figures cannot be accepted because they do not relate to the produce of the entire land in dispute in either year. These figures can, therefore, form no criterion. Moreover, the evidence on behalf of the appellant shows that the outturn is 12 maunds even in a year of drought. The Commissioner has given other reasons for his conclusion that the produce amounts to 30 maunds, the most important being the result of an experimental crop cutting. I do not think that it can be said then that the Commissioner's estimate is excessive; and certainly the evidence of the two Sub-Inspectors and the documents connected therewith do not afford a sufficient basis for disturbing the Commissioner's finding.

There is a cross-appeal on this point which may be dealt with at once. The learned Pleader for the respondents contends that the Commissioner ought to have allowed 50 maunds a *bigha*. He referred to the village note as showing the fertility of the land and the fact that it is irrigated by canal and to certain documents relating to the neighbouring village Jura which show a large outturn there. On the other hand, the learned Counsel for the appellant referred to certain deeds of sale as showing that land had been transferred at low rates and consequently cannot be very productive. On the whole I think that no good ground has been made out for raising the rate arrived at by the Commissioner after local enquiry.

The next point was that the costs of cultivation had been deducted at the rate of Rs. 8 a *bigha*, whereas two of the defendant's witnesses say Rs. 10 or 11 and Rs. 12 or 13 and the third witness on whose statement the Commissioner has proceeded says not Rs. 8 but Rs. 8 to 10. Now this was an allowance which the Commissioner need not have given at all and in giving it I think that he acted rightly in taking the lower figure stated by a defence witness.

The third point was that the rate had been fixed at 4 *paseris* a rupee whereas on the evidence it should be 6 *paseris*. The evidence on both sides having been disbelieved, the Commissioner would ordinarily proceed on the admission of the defense *viz.*, 6 *paseris*. He has given no reason in his report for fixing the rate at 4 *paseris* nor has the Subordinate Judge dealt with this matter. The point is not expressly taken in the numerous objections to the Commissioner's report, and from the absence of any reference to it in the judgment it must be assumed that the point was not argued. If it had been argued before the Subordinate Judge he might have made a reference back to the Commissioner in order that he might state the reasons for which he had fixed the rate at 4 *paseris*. The point not having been taken before the Subordinate Judge it is not, in my opinion, fair to raise it now, and it must, therefore, be overruled.

One further point remains to be dealt with in the cross-objection. It was argued that interest had been allowed at only 6 per cent. whereas 12 per cent. ought to have been given. This was a matter entirely within the discretion of the Subordinate Judge and this Court will not interfere with his decision.

The result is that the Appeal No. 15 of 1918 is allowed to this extent only, that the sum awarded for 1315 must be disallowed. In other respects this appeal and the entire Appeal No. 14 are dismissed. The cross-objections are also dismissed. There will be no order as to costs of the appeals.

DAS, J.—I agree.

W. C. A.

Appeals dismissed.

MUHAMMAD ATA ULLAH KHAN v. GOPALA MAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2056 OF 1921.

February 17, 1922.

Present :—Mr. Justice Broadway.

MUHAMMAD ATA ULLAH KHAN—DEFENDANT—APPELLANT

versus

GOPALA MAL AND ANOTHER—PLAINTIFFS AND KANSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (1 of 1913), s. 30—Limitation—Physical possession—Joint holding.

A share in an undivided *mahal* is not susceptible of physical possession within the meaning of section 30 of the Punjab Pre-emption Act.

Ramsukh Das v. *Fazal-ud-din*, 19 P. R. 1898, referred to.

Bishen Singh v. *Firoz Chand*, 40 Ind. Cas. 618; 97 P. R. 1917; 93 P. W. R. 1917; 113 P. L. R. 1917, distinguished.

Second appeal from a decree of the District Judge, Karnal, dated the 22nd June 1921, reversing that of the Munsif, First Class, Karnal, dated the 6th May 1920.

Lala *Tirth Ram*, for the Appellant.

Mr. *Rai Krishna*, for the Plaintiffs-Respondents.

JUDGMENT.—On the 1st of November 1917 Singh Ram and Kanshi Ram e'c., sold certain lands to *Khan Sahib* Muhammad Ata Ullah. Two unregistered sale-deeds were executed, each being for Rs. 99. Mutation in connection with these two unregistered sale-deeds was effected, by a single mutation on the 30th June 1918. On the 12th May 1919 Gopala Mal and Salloo Mal sued for possession by pre-emption of the lands sold. It was admitted that the price mentioned in the sale-deeds had been paid and *Khan Sahib* Muhammad Atal Ulah admitted the plaintiff's right of pre emption. He, however, pleaded that the suit was time barred as he had taken physical possession of a part at any rate of the lands bought by him more than a year prior to the institution of the suit. The plaintiffs contended that what had been sold was 15/154th of an undivided holding which was incapable of physical possession and that, therefore, time began to run from the date of the mutation, *i. e.*, 30th June 1918. The Trial Court upheld the defendants' plea and holding that the claim was time-barred dismissed the suit. Thereupon the plaintiffs appealed to the District Judge who took a different view and, holding that a share in an undivided holding was incapable of physical possession found the suit to be within time and granted the plaintiffs a decree. Against this decree *Khan Sahaib* Ata Ullah has come up to this Court in second appeal through Mr. Tirath Ram, and I have heard Mr. Raj Krishna for the respondent.

Ground No. 2 of the appeal was withdrawn by Mr. Tirath Ram as having been drafted on a misconception of the lower Appellate Court's judgment. He contended, however, that the lower Appellate Court was wrong in holding that physical possession had not been taken of a part of the property, namely, certain fields which were recorded in *Kharif* 1917 as *Khali* or *banjar* and in *rabi* 1918 as cultivated by tenants under the appellant. He referred to *Bishen Singh* v. *Firoz Chand* (1) and urged that, as in that case so in this, in regard to uncultivated field physical possession was sufficiently constituted by the vendor pointing such fields out to the vendees' agent on the spot when directing the tenants of the cultivated fields to give produce in future to the vendees. In the present case, however, my attention was not drawn to any evidence showing that the vendors had at any time told their tenants to pay the produce in the future to the appellant. From the authorities cited at page 410 of Ellis' Law of Pre-emption, 4th Edition, it will be seen that it has been respectively held that a share of an undivided *Mahal* is not susceptible of physical possession—see also *Ramsukh Das* v. *Fasal-ud-din* (2). It seems to me that the finding arrived at by the learned District Judge is that the property purchased by the appellant being not capable of physical possession, he did *not* obtain physical possession and this appears to me to be a finding of fact which I cannot examine in second appeal.

I accordingly dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 40 Ind. Cas. 618; 97 P. R. 1917; 93 P. W. R. 1917; 113 P. L. R. 1917.

(2) 19 P. R. 1898.

DUVVURY RAMAMURTHY *v.* PABBINEEDI BULLIRAJU.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 164 OF 1919.

March 24, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

DUVVURY RAMAMURTHY—PLAINTIFF—APPELLANT

versus

PABBINEEDI BULLIRAJU—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 3 (3)—"Holding" whether means ascertained holding—Co-tenants—Ejectment suit—Suit for ascertainment of shares in holding—Civil Court, jurisdiction of.

Under the Madras Estates Land Act a tenant cannot sue for ejectment of his co-tenant in the case of an unascertained holding, for the definition of the word "holding" in section 3 (3) of that Act shows that only ascertained holdings are contemplated by it.

Therefore, although in the case of a tenancy-in-common, a tenant cannot bring a suit for ejectment of his co-tenant in a Civil Court, yet he can sue for ascertainment of his share in the holding in that Court to enable him to bring the ejectment suit in the Revenue Court.

Appeal against a decree of the Court of the Subordinate Judge, Cocanada, dated the 12th December 1918, in Appeal Suit No. 40 of 1918, preferred against a decree of the Court of the District Munsif, Cocanada, in Original Suit No. 39 of 1917.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—The plaintiff, here appellant, has sued for ascertainment by division of his share of the property, which he and defendant are at present holding in common and for ejectment of defendant from that share, on the basis that defendant is in possession of it as a non-occupancy tenant. The lower Appellate Court returned the plaint for presentation to a Revenue Court.

This disposal would, no doubt, be appropriate, if the prayer for ejectment could be regarded separately and if that remedy were authorised by the Madras Estates Land Act in the circumstances. But the Act provides for the grant of relief only in respect of holdings; and the definition of holding in section 3 (3) by reference to parcels entails, in our opinion, that only ascertained holdings are contemplated. This is consistent with Chapter X and is supported by the interpretation placed on the similar provision of the law in Bengal in *Parbatty*

IND. ENG. & MOTOR CO. *v.* GLADSTONE WYLLIE & CO.

Debya[1] v. *Mathura Nath Banerjee* (1). Until the plaintiff has had the holding, in respect of which he asks for ejectment, ascertained it will be meaningless for him to approach a Revenue Court; and this is the real substance of the complaint he makes against the lower Court's direction to him to do so, that a Revenue Court cannot grant partition.

We may at this point observe that the opinion of the Full Bench in *Gadadhara Das Bezbaii* v. *Suryanarayana Patnaik* (2) would appear on the pleadings to be fatal to plaintiff's prayer for ejectment. That, however, is no reason why he should be refused the other relief to which he appears to be entitled.

The course we take is accordingly to set aside the decision of the lower Courts, to allow the plaintiff to amend his plaint by withdrawing the prayer for possession and to remand the suit to the District Munsif's Court for re-admission and disposal as a suit for ascertainment of plaintiff's share in the property, which, he alleges, is held by himself and defendant as tenants-in-common. Plaintiff must, of course, pay the deficient stamp duty on the prayer for partition within a reasonable time to be fixed by the District Munsif, since he has not paid duty on that amount already.

Each party will bear his own costs in this and the lower Appellate Court to date. Costs before the District Munsif will be costs in the cause.

M. C. P.

N. H. *Appeal allowed; Case remanded.*

(1) 15 Ind. Cas. 453; 16 C. W. N. 877; 16 C. L. J. 9; 40 C. 29.

(2) 64 Ind. Cas. 317; 41 M. L. J. 97; (1921) M. W. N. 413; 44 M. 677; 14 L. W. 453.

CALCUTTA HIGH COURT.

CIVIL RULE No. 427 OF 1921.

August 24, 1921.

Present:—Justice Sir N. R Chatterjea, KT., and Mr. Justice Cuming.

INDIAN ENGINEERING AND MOTOR COMPANY, LIMITED—PETITIONERS

versus

GLADSTONE WYLLIE AND CO., MANAGING AGENTS OF S. D. GARVIS & CO. AND OTHERS—OPPOSITE PARTIES.

Calcutta Rent Act (III B. C. of 1920), s. 2 (c)—

INDIAN ENGINEERING & MOTOR CO. v. GLADSTONE WYLLIE & CO.

'Premises' if includes workshop—Workshop having retiring room and office room, if "premises."

A workshop is not included in the word "premises" as defined in section 2 *e* of the Calcutta Rent Act, and the mere fact that an Engineer of the workshop has a retiring room, or that a room is used for the purpose of an office connected with the workshop does not bring the case within the word "premises" as used in the Act. [p 910, col. 1.]

Epsom Grand Stand Association Limited v. *Clarke*, (1919 35 T. L. R 525; 63 S. J. 642, distinguished.

Rule against an order of the Court of the Controller of Rents, Calcutta in Cases Nos. 1719 and 255 of 1921.

FACTS appear from the judgment.

Mr. *P. N. Dutt* (with him Babu *Nripendra Chandra Das*), for the Petitioners.—This Rule was directed against an order of the Rent Controller refusing my application for standardisation of the rent under section 15 of the Calcutta Rent Act (III of 1920 B. C). The facts briefly are these. Mr. Garvis obtained a lease of the premises in 1915 for two years with option of renewal for another two years for the purpose of a dwelling or factory. We took sub-lease from him from 1st November 1919. There were two applications under section 15 of the Act—one was by opposite party—Gladstone Wyllie & Co. and the other by me. Their case was taken up first, evidence was gone into and was finally dismissed. My application was next taken up and was dismissed on that ground. The Rent Controller says that the premises do not come within the meaning of the word "premises" as defined in section 2 (*e*).

[CHATTERJEA, J.—Can apply under section 15 as a sub-lessee?]

Undoubtedly. Refers to section 15 of the Calcutta Rent Act, section 2 (*g*); *Epsom Grand Stand Association Limited* v *Clarke* (1). occupying the premises as a retiring room. It was originally let out as a dwelling house. I have a right to live in that house. Refers to *Ethari Lal* v. *Baldeo Narain* (2).

[COMING, J.—What is the question of jurisdiction here?]

As to whether the Rent Controller had jurisdiction to fix standard rent. Refers to *Balakrishna Udayar* v. *Vasudeva Aiyar* (3).

(1) (1919) 35 T. L. R. 525; 63 S. J. 642.

(2) 48 Ind. Cas. 14; 40 A. 674; 16 A. L. J. 717.

(3) 40 Ind Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I.A. 261 (P. C.).

The premises come within the operation of the Act as a shop. A shop includes a workshop. Refers to Oxford Dictionary, Volume VIII, Part II, page 736. The Controller was bound to consider the original purpose for which the premises were let. The previous occupier, my lessor, lived there for more than a year. Even in the present condition the house is undisputably let as an office in part. Refers to the Preamble of the Act. The Act ought to be liberally construed.

Mr. *S. C. Bose* (with him Babus *Asita Ranjan Ghosh*, *Hira Lal Ganguli* and *Himadri Bhusan Roy*), for the Opposite Parties.—On the evidence no other finding was possible. The house was let for the purpose of workshop. It is their evidence that the building was not used for residential purposes. As to the distinction between a shop and a workshop refers to *Haynes* v. *Ford* (4); Halsbury's Laws of England, Volume XIV, pages 441, 510; Stroude's Judicial Dictionary (2nd Edition) Volume III, 1873; A workship does not come within the operation of the Rent Act.

Mr. *P. N. Dutt* replied in brief.

JUDGMENT.—This Rule was directed against an order of the Rent Controller disallowing an application made by the petitioner under section 15 of the Calcutta Rent Act for fixing the standard rent of No. 40, Middle Road, Entally, on the ground that the place was not "premises" as defined in section 2 (*e*) of the Rent Act and as such it did not come within the purview of the Act.

It appears that one Mr. Garvis obtained a lease of 40, Middle Road, Entally, from the opposite party, Nanda Lal Counder, sometime in 1915 for a period of two years with option of renewal of the same for two years: Mr. Garvis took it for the purpose of "dwelling or a factory". He lived there for sometime but he used it mainly for the purpose of factory (for preparing specie boxes for Government). He then left for Japan sometimes in 1919.

The petitioner before us—the Indian Engineering and Motor Company Ltd.,—obtained a sub lease from Mr. Garvis from the 1st November 1919.

(4) (1911) 2 Ch. 237 at pp. 248, 256; 80 L. J. Ch. 490; 104 L. T. 696; 75 J. P. 401; 9 L. G. R. 702; 27 T. L. R. 416.

Two applications were made to the Rent Controller—one by Gladstone Wyllie & Co., Managing Agents of Mr. Garvis for fixing the standard rent, and another by the petitioners. The latter made an application to the Rent Controller, that their case might be heard along with the case instituted by their lessors. The first application, namely, that of Gladstone Wyllie & Co. was taken up and evidence was adduced in that case. The application was dismissed on the 31st March 1921. Messrs. Gladstone Wyllie & Co. have not taken any step for setting aside that order.

Subsequently on the 3rd June the case in which the petitioner was the applicant was taken up, and the Rent Controller held that no separate order was required in that case as it would be governed by the order passed in the case instituted by Gladstone Wyllie & Co.

It appears that the Rent Controller inspected the premises, and upon the evidence adduced on behalf of Messrs. Gladstone Wyllie & Co., came to the conclusion that the premises was nothing but a workshop, that although there was a small building which might, formerly, have been used as a residence, there was no doubt that it was a part of the workshop, that the building was now quite uninhabitable and that long disuse had brought on its present condition.

It is contended before us by the learned Counsel on behalf of the petitioner, first, that under section 2, clause (*e*) of the Rent Act the purpose for which the premises were let out should be considered, secondly, that even if the place was let out for the purpose of a workshop it comes within the definition of "premises" and that in any case, if any portion of it was used as an office or dwelling house, it would come within the said definition and lastly that the petitioner had no opportunity of adducing evidence in the case instituted by him.

So far as the second contention is concerned, namely, that a workshop comes within the definition of "premises" under section 2 of the Act, it is to be observed that that section lays down that "premises means any building or part of a building, or hut let separately for residential, charitable, educational or public purposes or for the purposes of a shop or an office, including any land appertaining thereto and let therewith.

It is said that a "workshop" would come within the word "shop" and we are referred to the Oxford Dictionary in support of the contention that a shop means a "place, a house or building where goods are made or prepared for sale and sold". That is not how the expression 'shop' is ordinarily understood. But apart from that, the word "shop" is defined in Wharton's Law Lexicon as being a "place where things are kept for sale." We have been referred to the case of *Epsom Grand Stand Association Limited* v. *Clarke* (1). But it seems that in that case the premises were let out for the purposes of residence, and business also. The defendant, his family and servants had continually lived on the premises and their residence was in accordance with the terms of the lease. A portion of it was used as a public house. Bankes, L. J., observed: "The house was dwelt in and it was let to the defendant for that purpose. In the fullest sense it was a dwelling house and nonetheless so because it was a public house."

All that the case establishes is that when premises are let out and occupied as a dwelling house, the fact that a part of them is also used for some business does not prevent them from being a "dwelling house." The learned Judge also observed that he could not accept the contention that because it was let for business purposes it could not be a dwelling house within the Act. But there the business for which a portion of the house was used was the business of a publican which is the sale of wines, spirits and beer. That case is no authority for holding that a workshop or factory comes within the definition of a "shop" or a "dwelling house."

With regard to the first contention, *viz.*, the purpose for which the place was let out, should be considered, it appears that in the present case the letting to Mr. Garvis was for dwelling or for a factory. The petitioner before us—Indian Engineering and Motor Company, however, took a sublease in 1919. There was no lease drawn up, and there was merely an exchange of letter which, however, has not been produced. Mr. Garvis says "I have sub let the premises from November 1919 and ever since November 1919 they have been using the

plase as their workshop in the same manner as they are doing now." He further states that negotiations about the lease to the Indian Engineering Company were made through one Mr. Mitter in October 1919 and that Mr. Mitter said that the plase was required for their workshop. Other evidense was to the same effect and there is no doubt that at any rate since the petitioners obtained the lease for the purpose of a workshop, they have used it as a workshop.

The fast that a room in the bungalow was used as an office does not, we think, bring the case within the word "pramisss". In a workshop or factory, a portion of it may be used for an office for supervising the work and keeping attendance registers, &c., and we think that the mere fast that the Engineer of the Company had a retiring room, or that a room was used for the purpose of an office connected with the workshop does not bring the case within the word "premises" as used in the Rent Act. It is clear that it was not let out to the Indian Engineering Company for the purpose of an office or for dwelling purposes.

As regards the third contention we are not satisfied that the petitioner has any reason for complaint. There is no suggestion that the petitioners had any further evidence to adduse other than the evidense adduced by Messrs. Gladstone Wyllie and Co. the Managing Agents of Mr. Gravis (the lessor of the petitioners.) As a matter of fast, Mr. Garvis, Mr. Mitter, the Engineer of the Indian Engineering Company, and two of the Directors of the Company were examined in the case instituted by Messrs. Gladstone Wyllie & Co. There was no petition made to the lower Court that the petitioners had any other evidence to adduse; and no ground has been taken before us complaining of any exclusion of evidense, nor that the petitioner had been prejudiced by anything done by the Rent Controller. On the contrary, one of the grounds in the petition to this Court is that the Rent Controller had acted illegally and with irregularity in failing to consider the purpose for which 40 Middle Road was let out, and the *circumstances disclosed in the evidence.*

In these circumstances, we think that the Rule must be discharged with costs—three gold *mohurs* to the opposite party Nanda Lal and one gold *Mohur* to Messrs. Gladstone Wyllie & Co.

P. N.

Rule discharged.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 536 OF 1920.

February 1, 1922.

Present:—Mr. Justice Kumaraswami Sastri.

PERUMAL MOOPAN—RESPONDENT —PETITIONER

versus

M. K. VENKATACHARIAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, application under—Remedy by suit or proceeding open—Court, jurisdiction of—Limitation Act (IX of 1908), s. 5—Period of limitation, extension of—Revision.

There is nothing in the language of section 151 which prevents a party to a suit from applying under that section simply because he has a remedy by a separate suitor proceeding. Courts cannot act under section 151 of the Civil Procedure Code if provision is made for a particular contingency by the Orders and Rules of the Code, but in cases not covered by them parties should not be put to the trouble, delay and expense of filing suits for relief which can be properly given in the suit itself The language of section 151 of the Civil Procedure Code is wide and refers to inherent powers of a Court to make such orders as may be necessary for the sake of justice. A stranger to a litigation, however, cannot intervene after a suit or a proceeding is disposed of, and claim the protection of section 151 of the Code or appeal to the inherent powers of the Court to do justice. [p. 911, col. 2.]

Ajant Singh v. *Sundar Mall* (*F. T. Christien*), 16 Ind. Cas 587; 17 C. W. N. 862, followed

Drew v. *Willes*, (1891) 1 Q. B. 450; 60 L. J. Q B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 374, *Eda Punnayya* v. *Jangala Kama Kotayya*, 53 Ind. Cas. 184; 37 M. L. J. 398; 26 M L. T. 327; 10 L. W. 471; (1920) M W. N. 1, distinguished.

Where a Corporation or Company is made a party to a proceeding but is not represented by a person having legal authority to do so and an order is passed adversely to it, it is competent to a Court to vacate the order under section 151, Civil Procedure Code on the application of a person through whom the Company can legally act. [p. 911, col. 1]

Where a lower Appellate Court exercises the discretion conferred by section 5 of the Limitation Act and extends the prescribed period of limitation, a High Court cannot interfere under section 115 of the Civil Procedure Code. [p. 911, col. 1.]

PERUMAL MOOPAN v. VENKATACHARIAR.

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order of the District Court, Trichinopoly, dated 16th February 1920, in Civil Miscellaneous Petition No. 466 of 1919 (in Appeal Suit No. 345 of 1916).

Mr. *K. R. Rangasami Aiyangar*, for the Petitioner.

Mr. *K. Muthiah Mudaliar*, for the Respondent.

JUDGMENT.—It is clear that when Appeal Suit No. 345 of 1916 was filed and disposed of, the Co-operative Credit Society of Kalathur had gone into liquidation and was represented by the Assistant Registrar of Co-operative Societies as liquidator. The appellant in that appeal made the Society a respondent but alleged that it was represented by its former President whose powers to represent the Society had ceased before filing of the appeal. The decision of the District Munsif in favour of the Society was reversed and the transfer of the decree made by the President acting on behalf of the Society was recognised.

The Registrar of the Co-operative Credit Societies applied to the District Judge to set the decree in Appeal Suit No. 345 of 1916 aside owing to the Society not having been properly represented and to re-hear the appeal after bringing him on record as the proper person to represent the Society. He applied under section 151, O. XXII, r. 10 and O. XLVII, r. 1 of the Code of Civil Procedure.

As regards the delay the District Judge in the exercise of the powers conferred by section 5 of the Limitation Act excused the delay and I do not think that under section 115 of the Civil Procedure Code I can interfere with his discretion. Even assuming that O. XLVII, r. 1 does not apply the question is whether he had power to act under section 151.

I am of opinion that where a Corporation or Company is made a party to a proceeding but is not represented by a person having legal authority to do so and an order is passed adversely to it, it is competant for the proper officer to apply for vacating the order and for a decision after hearing the person through whom the Company can legally act. It cannot be said that the Company is not a party simply because a wrong person represents it. No doubt the decree or order passed under such circumstances will not bind the Company and it will be open to it to have it set aside but the question is whether it cannot do so under section 151 of the Code.

I find nothing in the language of section 151 which prevents a party to a suit from applying under that section simply because he has a remedy by a separate suit or proceeding. Courts cannot act under section 151 if provision is made for a particular contingency by the Orders and Rules but in cases not covered by them I do not see why parties should be put to the trouble, delay and expense of filing separate suits for relief which can be properly given in the suit itself. The language of section 151 is wide and refers to the inherant powers of the Court to make such orders as may be necessary for the ends of justice.

No doubt a stranger to the litigation cannot intervene after the suit or proceedings are disposed of and claim the protection of section 151 or appeal to the inherent powers of the Court to do justice. *Drew* v. *Willis* (1) which was referred to by the appellant's Vakil, refers to a case where a stranger to the proceedings wanted to vacate it after orders had been properly passed. Lord Esher, M. R. observed that no Court has power to vacate an order after it has been properly made by reason of facts that occurred subsequently. In the present case the complaint is that the order in Appeal Suit No. 345 of 1916 was not properly made as the respondent was not properly represented.

Reference has also been made to *Eda Punnayya* v. *Jangala Kama Kotayya* (2) which turned on O. IX, r. 13. The learned Judges held that a minor who was said to be represented by a guardian *ad litem* who did not consent to act cannot be regarded as a party to the proceedings and so cannot be said to be prevented for sufficient cause from conducting them. I doubt if this is authority for holding that registered Companies or Societies cannot be said to be parties simply because they are not represented by a proper officer.

(1) (1891) 1 Q. B. 450; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 373.

(2) 53 Ind. Cas. 184; 37 M. L. J. 399; 26 M. L. T. 237; 19 L. W. 471; (1920) M. W. N. 1.

ASMAT ULLAH v. BIHARI LAL & SONS.

I think the decision of Mookerjee and Beachcroft, JJ., in *Ajant Singh* v. *Sundar Mall* [*F. T. Christien* (3) is in point.

The order of the District Judge was, in my opinion, within his power and I see no grounds to set it aside. I dismiss the petition with costs.

M. C. P.

N. K. *Petition set aside.*

(3) 16 Ind. Cas. 567; 17 C. W. N. 862.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 580 OF 1917.

March 3, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Campbell.

ASMAT ULLAH—PLAINTIFF—APPELLANT

versus

MESSRS. BIHARI LAL AND SONS OF FEROZEPUR CANTONMENT.—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 63, 73—Sale of goods—Extension of time—Breach—Damages, measure of.

Section 63 of the Contract Act does not entitle a promisee for his own purposes and without the consent of the promisor to extend the time for the performance of the contract to his own advantage. There must be an agreement or mutual understanding to waive [p. 914, col. 2.]

Abaji Sitaram v *Trimbak Municipality*, 28 B. 68; 5 Bom. L. R. 689 and *Muthaya Manigaran* v. *Lakku Reddiar*, 14 Ind. Cas. 255; 37 M 412; 11 M. L. T. 301; (1912) M. W. N. 456; 22 M. L. J. 413, relied upon.

The measure of damages in a case of non-delivery of goods contracted to be sold is the sum by which the contract price falls short of the price at which the purchaser might have obtained goods of like quality at the time when the goods should have been delivered [p. 914, col. 2.]

Ismail Sait and Sons v. *Wilson & Co*, 45 Ind. Cas. 942; 41 M. 709; 23 M. L. T. 320; (1918) M. W. N. 399, *Mackertich* v *Nobo Coomar Ray*, 30 C. 477; 7 C W. N. 48, *Jugmohandas* v. *Nusserwanji*, 26 B. 744; 4 Bom. L. R 604 and *Jamal* v. *Moolla Dawood Sons & Co.*, 31 Ind. Cas. 949; 43 C. 493; 20 C.W.N. 105; 30 M. L. J. 73; 14 A. L. J. 89; 19 M. L. T. 80; 3 L. W. 181; 23 C. L. J. 137; (1916) 1 M. W. N. 70; 18 Bom. L. R. 315; 9 Bur. L. T. 8; 43 I. A. 6 (P. C.), relied upon.

First appeal from a decree of the Additional Judge, Lahore, dated the 22nd December 1916.

Mr. *Muhammad Rafi*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—This appeal is the result of a suit for damages for breach of contract brought by *Mistri* Asmat Ullah, Factory owner of Lahore, against Behari Lal and Sons, merchants of Ferozepore.

The contract, about the terms of which there is no dispute, is dated the 14th of June 1914 and by it the defendants agreed to supply to the plaintiff the following goods:

(*a*) For delivery at Sangla Hill station 750 bundles of steel hoops at Rs. 8 per cwt. each bundle containing half a cwt; 150 bundles to be delivered in each of the months of September 1914 to January 1915. Bardana or Hessian cloth, 45 inches wide, weight 9 ounces, at Rs. 15 per hundred yards; 10,000 yards to be delivered in monthly consignments of 2,000 yards from September 1914 to January 1915.

(*b*). Delivery at Lahore Railway Station, 1,600 bundles of steel hoops at Rs. 8 per cwt., each bundle weighing $\frac{1}{2}$ cwt. 400 bundles to be deliverd monthly from September to December 1914, 56,000 yards of *bardana* 40 inches wide; $7\frac{1}{2}$ ounces at Rs. 13-8-0 per hundred yards in monthly consignments of from 4,000 to 12,000 yards from September 1914 to March 1915.

In both cases the purchaser was to pay for each consignment when he received the Railway Receipt for the next consignment.

Nothing was delivered by the defendants except 3,670 yards of *bardana* at Lahore on account of the September consignment of 4,000 yards. After much correspondence between the parties, to which reference will be made presently, the plaintiff on the 30th August 1915 sued the defendants for delivery of the goods contracted for on payment of the agreed price, or, in the alternative, for Rs. 9,393-8 9 as damages for breach of contract.

It appears that the *bardana* and the hoops were required for making up bales of cotton. The lower Court held in regard to the hoops that both parties waived the time fixed in the contract for delivery, that damages were due to the plaintiff to be calculated with reference to the position in July and August 1915, that at that time the defendants had offered to let the plaintiff have hoops at Rs. 10-4 0 per cwt. and that, since the plaintiff had refused the offer, Rs. 2 per cwt., being

the difference between Rs. 8, the contract price, and Rs. 10, was a fair measure of damages. In regard to the *bardana* the lower Court held that the plaintiff himself broke the contract, that no damages were due to him and that the defendants were entitled to credit for Rs 495 7-3 on account of 3670 yards of *bardana* supplied. The plaintiff accordingly was given a decree for Rs. 2,350 *minus* Rs. 495-7-3, total Rs. 1,854-8 9.

Both parties have appealed. The plaintiff claims damages for failure to supply the hoops at Rs. 7 per cwt., the rate claimed in the plaint, and has also contested the finding that he was not entitled to damages on account of the *bardana*. The defendants assert non liability to pay damages for failure to deliver the hoops. This judgment will dispose of both Appeals Nos. 580 and 982 of 1917.

On the 14th of August 1914 the defendants wrote to the plaintiff that owing to the outbreak of War their correspondents in Europe were unable to guarantee shipments.

Plaintiff replied on the 17th of August that the War had nothing to do with the matter and that he expected the defendants to carry out their contract.

On the same date the defendants informed the plaintiff by letter that the goods had been despatched on the 20th of July by a German Steamer SS. Gutenfels and that in view of the then prevailing conditions it was impossible to say when the vessel was likely to arrive at Karachi.

Plaintiff replied on the 20th of August that he had nothing to do with Europe Shipments and that what he had bought were steel hoops and *tartan* cloth for delivery at Sangla Hill and Lahore Railway Station.

Thereafter there was delivery of two bales of *bardana* at Lahore which the plaintiff claimed were of short measure. It is necessary to keep separate the question about the hoops and that of the *bardana* and we proceed to deal first with the hoops the history of which is bound up with that of the Ss. Gutenfels.

On the 28th of September the plaintiff wrote and telegraphed to the defendants asking for the September deliveries of hoops.

On the 5th of October the defendants replied that the performance of their contract to supply hoops had become impossible until the shipment arrived, that they had heard that it had arrived at Port Said and that endeavours were being made to bring the goods on to Karachi.

On the 22nd of October the plaintiff, through Mr. Herbert, Advocate, claimed formally from the defendants Rs. 1,461 8-9 as damages for non delivery of hoops in September, at the rate of Rs. 7 per cwt.

On the 4th of November Mr. Manohar Lal, Advocate, replied to Mr. Herbert on behalf of the defendants, pointing out that it was not their fault that the September supplies had not arrived, that the defendants had given the plaintiff ample notice, that the plaintiff knew that the contract was for German made hoops, that the Gutenfels was expected to be allowed to proceed from Port Said and that when the vessed reached India, they would be happy to make such deliveries as supplies from her permitted.

On the 29th of November the plaintiff put in a further claim for damages at the same rate on account of failure to deliver hoops in the month of October. This claim was signed by the plaintiff personally and did not refer to the defendants' letter of the 4th of November. We may say at once that there is no evidence of the defendants' letter of the 4th of November having reached the plaintiff before the 29th of November.

On the 27th of April 1915 the plaintiff telegraphed to the defendants that the Gutenfels was down on the shipping list to arrive at Karachi on the 26th of April and requested that the steel hoops should be despatched 1600 bundles to Lahore and 750 bundles to Sangla. In an undated letter apparently written on the 27th or some later date in April the plaintiff referred to Mr. Manohar Lal's letter of the 4th November 1914, confirmed his telegram and said that he would feel obliged if Mr. Manohar Lal would ask the defendants to despatch the 2350 bundles of hoops to Lahore and Sangla. He added that if they did not do so, he would be compelled to take legal steps against them. The reply to this letter is dated the 28th of July 1915. Mr. Manohar Lal on behalf the defendants said that only 1000 bun of hoops of the specification to be deli at Lahore had arrived in the Gutenfel

clients were prepared to deliver these and also 750 bundles at Sangla but not at Rs. 8 per cwt. On account of special War charges which they had had to pay, the defendants would charge Rs. 10-4 per cwt. instead of Rs. 8. The plaintiff could have the 1750 bundles on two conditions: (1) that he first satisfied the defendants' claim for payment for the September *bardana* which had been pending since October and about which there had been correspondence; and (2) that he accepted delivery of the hoops against actual payment through a Bank to which Railway Receipts would be sent. It was added that these two conditions must be satisfied within a fortnight The letter concluded by saying that the defendants did not consider that the plaintiff was entitled to any deliveries of hoops under the contract, but that for the sake of maintaining friendly trade relations they were willing to make the special concession offered.

The plaintiff's reply was dated 6th August 1915 and so far as the hoops were concerned referred to the defendants' letter of 6th November, and said that he would accept delivery of the goods contracted for, despite the fact that time for delivery had long since passed, but declined to pay more than Rs. 8 per cwt. or to make any payment for *bardana*. The defendants were reminded that by the contract payment was to be made for each consignment when the Railway Receipt for the next consignment arrived and not before and they were given a week in which to make delivery or pay certain specified damages in default of which a suit was threatened. Mr. Manohar Lal wrote twice in reply that he was awaiting instructions from his clients and finally wrote on 1st September, by which time the suit had been filed, saying that unless the plaintiff took delivery of the hoops in ten days on the terms of the letter dated 28th July the hoops from the Gutenfels would be sold at his risk.

Now it is perfectly clear that the contract for the supply of the hoops was broken by the defendants and the questions for determination are when it was broken, and, with reference to the due date for delivery to what damages, if any, the plaintiff is entitled.

The lower Court has gone wrong in its method of assessing damages. It held that both sides waived the time fixed for delivery in the contract. This as we shall show presently was correct. It held further that both parties were willing as late as September 1915 that delivery should be made then. This is wrong. The defendants were only willing to make delivery on new terms, which they sought to impose and which were at variance with the original agreement, and the plaintiff steadfastly refused to accept those terms. Thirdly, it decided that as the plaintiff refused to pay Rs. 10-4 per cwt. for the hoops in July he did not consider them to be worth that price, and thus that the Court was justified in fixing the measure of damages at Rs. 10 per cwt. This shows a misapprehension of the law governing such cases, which is to be found in section 73 of the Indian Contract Act. Both parties admit the application of this section and both rely upon Illustration (*a*). It is laid down, too, in *Ismail Sait and Sons* v. *Wilson and Co.* (1) that the measure of damages is the sum by which the contract price fell short of the price at which the purchaser might have obtained goods of like quality at the time when they should have been delivered. *Mackertich* v. *Nobo Coomar Ray* (2), *Jugmchandas* v. *Nusserwanji* (3) and *Jamal* v. *Moolla Dawood Sons and Co.* (4) are to the same effect. In the last named case their Lordships of the Privy Council stated that the market price at the time of breach is the decisive element.

Section 63 of the Indian Contract Act contains the law regarding extension of time for delivery. It is conceded, as was ruled in *Abaji Sitaram* v. *Trimbak Municipality* (5) and *Muthaya Manigran* v. *Lakku Reddiar* (6), that this section does not entitle a promisee for his own purposes and without the consent of the promisor to extend time to his own advantage and that there must be an agreement or mutual understanding to waive.

(1) 45 Ind. Cas. 942; 41 M. 709; 23 M. L. T. 320; (1918) M. W. N. 399.
(2) 30 C. 477; 7 C. W. N. 431.
(3) 26 B. 744; 4 Bom. L. R. 504.
(4) 31 Ind. Cas. 949; 43 C. 493; 20 C. W. N. 205; 30 M. L. J. 73; 14 A. L. J. 89; 19 M. L. T. 80; 3 L. W. 181; 23 C. L J. 137; (1916) 1 M. W. N. 70; 18 Bom. L. R. 315; 9 Bur. L. T. 8; 43 I. A. 6 (P. C.).
(5) 28 B. 66; 5 Bom. L. R 689.
(6) 14 Ind. Cas. 255; 37 M. 4 2; 11 M. L. T. 301; (1912) M. W. N. 436; 22 M. L. J. 413.

It has been argued by Mr. Manohar Lal for the defendants that there was no agreement here to waive time; that, although the defendants made an offer to agree to an extension in their letter of the 4th November, the terms of the plaintiff's letter of the 29th November make it plain that the offer was declined; and that the subsequent telegram and letter of April 1915 cannot be taken to consitute acceptance of the offer.

There is, however, no evidence that the defendants' letter of the 4th November to Mr. Herbert was placed in the plaintiff's hands before the 29th November. The plaintiff's letter of the 29th November contained a claim for damages for non delivery in October which the previous letter of 22nd October had stated would be made in the event of non-delivery, and it was written not by Mr. Herbert but by the plaintiff himself. It contained a threat to sue and a statement that a similar claim would be made for more damages if the November consignments were not delivered. There is no proof that Mr. Herbert continued to act for the plaintiff after he had written the letter of 22nd October. If he had done so, he might have been expected to write the letter of 29th November also. The plaintiff filed no suit. He made no further claim for damages for non-delivery in November or in December. He did not refer in his letter of 29th November to the defendants' letter of 4th November and there is no apparent reason why he should not have done so had he seen it. In our opinion a reasonable interpretation of the correspondence is that the plaintiff, when the defendants' letter of the 4th November came to him, decided to accept the offer and to await the arrival of the SS. Gutenfels and that the letter of 4th November, the plaintiff's letter and telegram of April 1915, and the defendants' letter of 28th July 1915 prove that there was an agreement to extend time for performance of the contract, so far as it related to the hoops, until the lapse of a reasonable interval after the Gutenfels had reached Karachi.

The defendants' letter of 28th July 1915 contains the first mention by them of an intention to charge more for the hoops than the price agreed to in the contract, and this claim and the imposition of conditions for payment at variance with the terms of the contract, fix, in our opinion, the date of breach of the contract by the defendants after extension of time as the 28th July 1915.

Now as regards damages. The plaintiff claims Rs. 7 per cwt. the difference between Rs. 15 per cwt. and the contract rate Rs. 8. He has produced evidence that the market-rate for steel hoops at Karachi was Rs. 14-12 on 30th June 1915. Rs. 15 on 23rd April, Rs. 15 on 3rd May, Rs. 17 on 22nd May, that it was at Multan Rs. 18 on 24th April. Rs. 20 on 9th June, Rs. 15 (old hoops) on 17th May, Rs. 17-8 on 1st July, and that it was Rs. 15-4 on 29th April at Bombay. There is also evidence that the defendants sold hoops at Karachi at Rs 16 on 30th August 1915 and at Rs. 17-12 on 4th September 1915. There is good reason for supposing that these were off the Gutenfels. The defendant Behari Lal admitted as a witness in the lower Court that he had sold the hoops which came on the Gutenfels to other parties, and declined to give the price.

There is no evidence of any rates prevailing lower than those above quoted and, in our opinion, Rs. 15 per cwt. delivered at Lahore and Saugla Hill was a rate below the market rate in July and August 1915. The deposition of Mr. F. Read, agent of Volkart Bros., Lahore, shows that the plaintiff lost contracts for bailing cotton between October 1914 and June 1915 owing to shortage of hoops.

A further argument by Mr. Manohar Lal remains to be disposed of. He contends with reference to section 73 and Illustration (*a*) that the plaintiff could have obtained hoops of the specification entered in the contract on 28th July 1915 at Rs. 10-4 by accepting the defendants' offer of them at this price, and that his means for remedying the inconvenience caused by non-performance of the contract lay in such acceptance under protest and reservation of the right to claim damages subsequently. The short answer to this (leaving aside the fact that the offer was not for the whole quantity to be supplied under the contract) is that the defendants' offer of 28th July 1915 was not unconditional and that the conditions imposed were not consistent with the terms of the contract. This was particularly the case in regard to the demand for

payment for the *bardana* supplied. The defendants sent one consignment. There was some dispute about short measure and the defendants omitted to send any more. The contract provided that payment should be made for the consignment received only when the plaintiff got the Railway Receipt for the next consignment.

We find that the plaintiff has succeeded in establishing his claim for damages for non-delivery of 1175 cwt. steel hoops at Rs. 7 per cwt.

The claim for damages for non-delivery of *bardana* beyond the first consignment was argued by Mr. Muhammad Rafi for the plaintiff but eventually was given up. It is not necessary, therefore, to deal with the evidence concerning it. Mr. Rafi is probably right in contending that the contract was broken by the defendants and not by the plaintiff, as held by the lower Court, but there was clearly no extension of time for delivery of the *bardana* and there is no proof that the plaintiff suffered any loss. On the contrary there are indications that the market-price at the times of the several breaches from September 1914 to March 1915 was not more and was probably less than the contract rates.

The result is that we accept the plaintiff's appeal and enhance the decree in his favour to one for Rs. 1,729-8-9 with proportionate costs in both Courts, that sum being calculated as follows :

Damages for non-delivery of

	Rs.	as.	p.
1175 cwt. steel hoops at Rs. 7	8,225	0	0
less price of 3670 yards *bardana* supplied ...	495	7	3
	7,729	8	9

The appeal of the defendants fails and is dismissed with costs.

Z. K. *Plaintiff's appeal accepted ; Defendants Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 49 OF 1920.

May 9, 1921.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Krishnan.

T. V. TULJARAM ROW—PLAINTIFF —APPELLANT

versus

T. A. RAMACHANDRA ROW—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 89, 90—Execution sale—Proclamation—Place of sale, omission of—Place well-known—Sale, setting aside of—Substantial injury—Partnership suit—Sale for realising assets—Sale, setting aside of, on deposit—R. 89, object of.

The omission of the place of sale in the sale proclamation, although a clear irregularity, would not justify the setting aside of the sale, if the place of sale being well-known, no body is misled by the proclamation and no prejudice is caused to the applicant. [p. 918, col. 2.]

Arunachellam v. *Arunachellam*, 12 M. 19 (P. C.); 15 I. A. 171; 5 Sar P. C. J. 265; 12 Ind. Jur. 371; 4 Ind. Dec. (N. S.) 363, distinguished.

O XXI, r. 89 of the Civil Procedure Code provides modes of relieving judgment-debtors from the hardships to which they are exposed by Court sales in execution of decrees against them at great undervalues, and is inapplicable to the case of sale in a partnership suit on behalf of all parties to the suit for the purpose of realisation of the assets of the partnership. [p 9 8, col 2.]

Sundaram v. *Mamsa Mavuthar*, 63 Ind. Cas. 937; 40 M. L J. 497; 3 L W. 498; 29 M L. T. 269; (1921) M. W. N. 272; 44 M. 554 (F. B.), referred to.

Appeal from the judgment and order of Justice Kumaresam Sastri, dated the 30th March 1920, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No, 378 of 1919.

Messrs. *G. Devasagayam* and *K. Ramachandra*, for the Appellant.

Mr. *O. P. Ramaswami Aiyer*, Advocate General, and Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—This is an appeal from an order of the learned Judge on the Original Side refusing to set aside a sale by the Official Referee under the orders of the Court made in a partnership suit for the purpose of realising the partnership assets and the main ground of objection taken is that there was no place of sale mentioned in the proclamation of sale.

In O. XXIVA of the Original Side Rules which provides for proceedings before the

Official Referee, under the head of sales by the Official Referee, it is provided that, unless otherwise ordered, all sales by the Official Referee shall be by public auction, and in cases of immoveable property, shall be held at the premises. Under that rule, even though the property to be sold includes moveables as well as immoveables the sale must be held at the premises when the properties are sold as one lot. Even in such cases the duty of bringing in the sale proclamation falls upon the party who has the conduct of the sale. Unfortunately in this case, a printed form of sale proclamation for a sale in execution of a decree was used which for some reason or other does not strictly follow the form given in form No. 23 in the Original Side Rules but on its the place of sale. Possibly this printed form comes from the office of the Official Referee by whom a great number of sales are conducted, and having regard to the rule I have just referred to, the name of the place of sale is not mentioned because everybody is assumed to know it. If that is so, it is a distinct defect and the sooner this form of sale proclamation is altered so as to state the place at which the sale is to be held the better. But the question in this case is whether it is open to the defendant at this stage to object to the sale on this ground and whether a material irregularity has been shown by which he was prejudiced so as to justify the Court in setting aside the sale under O. XXI, r. 90 or at any rate in accordance with the principles prescribed by that rule

Under r. 203 of the Original Side Rules the order for sale is to direct the applicant to bring into Court a proclamation of sale for the approval of the Registrar and he is to adjourn the case to come on before the Judge in Chambers on a fixed day. Then under r. 205, the applicant is to bring in two copies of the proclamation of sale in form No. 27 or No. 28. Both these forms contain the name of the place of sale. Then the Registrar under r. 205, is to determine the manner of advertising and to fix the date and place of the sale. Under r. 203 copies of the proclamation approved by the Registrar are to be signed by him and the case is to be posted on the adjourned date before the Judge in Chambers who may then order the sale to proceed or make any such order as he thinks fit. That is the time when it is open to the parties to take any objection whatever to the proclamation of sale. Under r. 206, it is only then that they can take any objection to the lots, the market value or the reserved price mentioned in the affidavit of the applicant; but they can also before the Judge in Chambers equally take objection to such a manifest slip as the omission of the place of sale. No such objection was taken in this case although numerous other objections were urged including objections as to the manner in which the sale has been advertised. The reason stated as to why no such objections were raised is because every one understood that, following the practice prescribed by the rules for the Original Side the sale being by the Official Referee, it would be at the premises which were described for sale in the sale-proclamation. It is not necessary for the purpose of the present case to consider whether the appellant should be held absolutely barred from taking this objection to the absence of the mention of the place of sale in the proclamation because he did not take it before the Judge in Chambers as he ought.

The decision of the Privy Council in *Arunachellam* v. *Arunachellam* (1) relates to an alleged insufficiency in the description of the property to be sold as distinguished from the present objection to the absence of any place of sale in the proclamation. In that case, the Privy Council held that the failure to take the objection at the proper time prevented its being taken later as a ground for setting aside the sale. "It would be very difficult indeed," their Lordships say, "to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships'

(1) 12 M. 19 (P. C.); 15 I. A. 171; 5 Sar P. C. 265; 12 Ind. Jur. 371; 4 Ind. Dec. (N. S.) 363.

opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection." In the present case we think all that happened merely amounted to an irregularity by which the appellant was not prejudiced. It appears from the affidavit, and is found by the learned Judge that this formal defect misled nobody.

I may further say here that the handbills which have been exhibited do not contain the place of sale and the only inference which anyone with ordinary common sense would come to is that the sale was to be at the premises because no other premises was stated where the sale was to be. As the learned Judge has pointed out, the sale was well-attended and there is no reason to suppose that any possible bidder was kept away. It was not a sale likely to draw a very large number of bidders, because although, no doubt, the properties to be sold included desirable premises near the Popham's Broadway, yet the sale proclamation showed that they were subject to incumbrances of an unusual kind, and of such a nature as would possibly require litigation in order to ascertain their amount. Further, the plaintiff's counter-affidavit states that, when objection was taken during the sale by Mr. Ramachandrier to the fact that the place of sale was not mentioned in the proclamation, the Vakil on the other side ran over to the Official Referee's room which is the only other place where the sale could possibly take place and also to the Press close by the High Court premises and found no body to bid. Therefore, there is no reason to differ from the learned Judge when he says that what happened was an irregularity which did not prejudice the parties. It is quite different from some of those cases which have been cited and where the sale was ordered to be held at one place and was actually held at another place, or where the sale was ordered to be held at one hour and was actually held at another hour. These errors were calculated to seriously mislead possible bidders. In the present case the actual place, no doubt, was not mentioned, as it ought to have been, by a slip, but that non-mention, in our opinion, is not calculated to mislead anybody. There was the well-known practice in regard to sales by the Official Referee and in the absence of any mention as to the place of sale, the natural inference would be that the sale was to take place at the premises and if anyone had felt any doubt about it and enquired, he would at once have been told so. There is also evidence that people came to the Official Referee's room and enquired whether there were any copies of the Proclamation of Sale to be obtained at 'Popham's house,' Anna Pillai Street, the main premises for sale, which goes to show that they knew perfectly well that the sale was going to take place there.

We hold, therefore, agreeing with the lower Court, that in this case there was no material irregularity which would justify us in setting aside the sale under r. 90 or the principles embodied in that rule.

Another objection has been taken that the Official Referee refused to adjourn the sale at about 5-30 P. M., when called upon to do so on the ground that it was getting dark. In the first place, we do not think that it was getting dark at about 5-30 P. M. on the 28th February. When I pointed out that, according to our ordinary experience, it does not get dark at 5-30 P. M., on the 28th February it was alleged that that was a very dark place but that is an objection which would apply equally to earlier portions of the day. This objection appears to us to be of a frivolous character and to have been rightly rejected by the learned Judge.

Another objection was taken that the appellant was entitled, under the express terms of O. XXI, r. 89 of the Code of Civil Procedure, to come in to set aside the sale on a deposit of the purchase-money *plus* 5 per cent. This rule appears to have no application to the circumstances of the present sale which is for the realisation of partnership assets in a partnership suit. R. 89, which is old section 310A, provides, as has been recently held by the Full Bench, [*Sundaram* v. *Mamsa Mavuthar* (2)] modes of relieving judgment-debtors from the hardships to which they are exposed by Court sales in execution of decrees against them at great under-values. The rule says: "Where immoveable property has been sold in execution of a decree any person owning such property or holding an interest therein by virtue of a

(2) 68 Ind. Cas. 937; 40 M. L. J. 497; 13 L. W. 498; 29 M. L. T. 279; (1921) M. W. N. 272; 44 M. 551 (F. B.).

title acquired before such sale may apply to have the sale set aside on his depositing in Court a sum equal to 5 per cent. of the purchase-money and for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered." The rule is obviously inapplicable to a case of sale on behalf of all parties to the suit for the purpose of realisation.

Then we are referred to r. 214 of the Original Side Rules which provides that an application under section 310A which corresponds to the present O. XXI, r. 89 shall be made on Judge's summons supported by affidavit which shall set forth the objections to the sale or the confirmation thereof. That rule applies, of course, only to cases to which r. 89 of O. XXI is applicable and we are clearly of opinion that r. 89 is not applicable to the circumstances of the present case.

The result is that the appeal fails and is dismissed with costs.

KRISHNAN, J.—I agree.

M. C. P.

N. H. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 486. OF 1920.

July 7, 1921.

Present :—Sir Henry Drake-Brockman Kt., J. C.

NANHELAL AND OTHERS—DECREE HOLDERS—APPELLANTS

versus

GULSHANRAI—JUDGMENT DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—*Preliminary decree—Amendment after expiry of limitation for applying for final decree—Final decree, application for—Extension of time.*

The holder of a preliminary decree applied for amendment of the same on the ground that the sum as entered in the decree was less than that granted by the judgment. The application was made after the expiry of the period of limitation prescribed for applying for a final decree. The Court made the amendment as desired. The decree-holder preferred an application for a final decree counting the limitation from the date of the amendment:

Held, that the application was not maintainable as the decree-holder by postponing his amendment till after the expiry of the period of limitation prescribed for making the preliminary decree final, could not revive his right to obtain a final decree by reason of such a variation in the preliminary decree. [p. 921, col. 1.]

Dinaji v. *Laxman*, 29 Ind. Cas. 589; 11 N. L. R. 92, *Ashfaq Husain* v. *Gauri Sahai*, 9 Ind. Cas. 975; 33 A. 284; 15 C. W. N. 370; 8 A. L. J. 332; 13 C. L. J. 351; 9 M. L. T. 380; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 20 M. L. J. 1140; (1911) 2 M. W. N. 177; 38 I. A. 37 (P. C.), *Tarsi Ram* v. *Man Singh*, 8 A. 492; A. W. N. (1883) 156; 5 Ind. Dec. (N. S.) 224, *Daya Kishan* v. *Nanhi Begam*, 20 A. 304; A. W. N. (1898) 43; 9 Ind. Dec. (N. S.) 555, *Ahsan-ul-lah* v. *Dakkhini Din*, 27 A. 575; 2 A. L. J. 287; A. W. N. (1905) 108, distinguished.

Appeal against a decree of the District Judge, Hoshangabad, dated the 27th August 1920, confirming the decree of the Senior Subordinate Judge, Hoshangabad, dated the 10th May 1920.

Dr. *H. S. Gour*, for the Appellant.

Mr. *G. L. Subhedar*, for Respondent No. 2.

JUDGMENT.—The facts of this case may be briefly stated as follows. On the 21st September 1912 a preliminary decree for sale on foot of a mortgage was obtained by the mortgagees which allowed the mortgagors time till the 21st March following to pay a sum of Rs. 3,725 for principal, interest and costs calculated up to the latter date and directed that this amount should carry interest at the rate of Rs. 4 per cent. per annum. On the 10th May 1916, that is, when the period allowed by Art. 181 of the Limitation Schedule had already expired, the decree holders applied for a final decree, but this was struck off the file at their request on the 22nd July following in the absence of the judgment-debtors. No further action was taken till the 23rd January 1919 when the decree-holders put in a second application for a final decree. On the 1st March 1919 one of the judgment-debtors pleaded that the application should be dismissed as time-barred and the decree-holders on the 22nd idem applied for amendment of the preliminary decree on the ground that the figures contained in it did not correspond with the relief granted by the judgment. The alleged discrepancies were admitted by the only judgment debtor who appeared, their nature being as follows:—

(1) the correct amount payable for principal, interest and costs is Rs. 3,778 9.9;

(2) the interest awarded by the judgment is at the rate of Rs. 4 per cent. per annum.

The aforesaid judgment-debtor contended that amendment should not be allowed,

inasmuch as the decree-holders had throughout calculated the interest due at the proper rate and had accepted Rs. 3,725 as the correct amount due for principal, interest and costs calculated up to the 21st March 1913. The Trying Judge overruled this contention and on the 12th July 1919 ordered the desired amendment to be carried out.

Meanwhile, on the 21st June 1919, the decree-holders had withdrawn their second application for a final decree. On the 15th July following they preferred a third application for such a decree, but this was dismissed on the 10th May 1920 on the ground that the amendment of the preliminary decree did not alter the date from which the period of limitation allowed by Art. 181 of the Limitation Schedule began to run. With reference to the decision in *Dinai* v. *Laxman* (1) it was held that the errors in the preliminary decree were merely arithmetical and as such made no appreciable addition to the rights of the decree-holders. A similar view was taken by the District Judge in appeal and the decree-holders have now come up to this Court.

For the appellants reliance is placed on the entry in the third column of Art. 181 of the Limitation Schedule. That entry shows that the time from which the prescribed period of three years begins to run is "when the right to apply accrues." On the authority of *Dinai* v. *Laxman* (1), this right is said to have accrued from the date on which the preliminary decree was amended, inasmuch as the decree to be made final is obviously the amended, not the original, decree. This view is said to be supported by the decision of the Privy Council in *Ashfaq Husain* v. *Gauri Sahai* (2). In that case a decree for sale was passed on foot of a mortgage against several defendants jointly on the 25th August 1900 and made absolute on the 21st December 1901. As against one defendant the conditional decree was *ex parte* and it was set aside on her appeal on the 11th March 1902. On the 15th August following a decree was passed against her on the merits and her appeal was dismissed by the High Court on the 16th November 1904, the conditional decree being made absolute against her on the 27th November 1905. Their Lordships held that the latter decree supplemented and completed the prior one and for the first time justified the decree holder in applying for joint execution against the defendants as he did on the 21st December. The objection of the defendants who attended the proceedings which preceded the conditional decrees of the 25th August 1900 and the 21st December 1901 but were no parties to the decrees of August 1902 and November 1905 and contended that limitation ran as against them from the 21st December 1901 was thus overruled.

For the second respondent, on the other hand, it is contended that the decision in *Dinaji* v. *Laxman* (1) is concerned only with the right of appeal from an amended decree and includes no pronouncement on the rights of the decree-holders to execute the amended decree. It is also urged that the amendments actually obtained were of a kind the necessity for which should have been detected as soon as the preliminary decree was passed. Reliance is also placed on the fact that Art. 181 of the Limitation Schedule contains no clause similar to the fourth clause in Art. 182. Further, the following cases are cited as indicating that amendment of a decree cannot operate to revive a right of execution which was already time-barred when the amendment was made: *Tursi Ram* v. *Man Singh* (3), *Daya Kishan* v. *Nanhi Begam* (4), *Ahsan-ul-lah* v. *Dakkhini Din* (5).

With regard to the three cases last mentioned I need only say that they have no real bearing on the question now under consideration. All were decided when the Limitation Act of 1877 was in force and that Act contained no provision corresponding to the fourth clause of Art. 182 in the Act of 1908. With regard to the proper interpretation of the entry in the third column against Art. 181 I am of opinion that in view of the great extent of the class to which this Article applies no rigid construction of the expression "the right to apply" can safely be adopted. To

(1) 29 Ind. Cas. 589; 11 N. L. R. 92.

(2) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370; 8 A. L. J. 332; 18 C. L. J. 851; 9 M. L. T. 880; 18 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; (1911) 2 M. W. N. 177; 38 I. A. 87 (P. C.).

(3) 8 A. 492; A. W. N. (1886) 156; 5 Ind. Dec. (N. S.) 224.

(4) 20 A. 304; A. W. N. (1898) 47; 9 Ind. Dec. (N. S.) 555.

(5) 27 A. 575; 2 A. L. J. 267; A. W. N. (1905) 108.

hold that the decree holders became on the amendment of their preliminary decree entitled to a final decree on the basis of the amended decree seems to me to involve a logical absurdity. The original preliminary decree gave its holders a right to sell the mortgaged property for default in payment of a sum less by about Rs. 53 than that to which the judgment pronounced them entitled. On what principle of natural justice or common sense can it be maintained that because a somewhat larger sum was actually due than the preliminary decree mentioned, the decree holders should be able to revive a right which by their own negligence they long ago forfeited? The position reached in consequence of the amendment should not improve the decree-holders' right as against the judgment-debtors, for, if the latter failed to pay the sum of Rs 3,725, they failed *a fortiori* to pay Rs. 3,778 9 9. The reason why no limitation has been prescribed for amending a decree is probably that the Court which passed the decree has power to amend *suo motu* and it would be most anomalous if a decree-holder by postponing his application for amendment till long after the expiry of the prescribed period of the limitation could revive his right to obtain a final decree on the basis of his preliminary decree.

My own decision in *Dinaji* v. *Laxman* (1) is not really in point. In the first place both the judgment and decree were in that case amended. In the case now before me the judgment makes interest after the institution of the suit payable at the rate fixed by the mortgage, while the calculations made for the purposes of drawing up the decree were evidently based on the mistaken assumption that the said interest was only 4 per cent. per annum. Secondly, as pointed out for the second respondent, I was not called upon in that case to decide any question as to the effect of the decree when amended upon the rights of the parties as they stood before the amendment.

In the present case the amendment which the decree holders sought was one which the Court was bound by law to make, inasmuch as section 33 of the Civil Procedure Code requires a decree to follow the judgment, while r. 6 (1), O. XX, First Schedule to the Code, lays down that the decree shall agree with the judgment. In these circumstances I see no force in an argument used for the appellants to the effect that the judgment-debtors should have appealed against the amended decrees if they did not wish it to have the effect for which the decree-holders now contend.

The result is that the appeal fails and is dismissed with costs. I allow Rs. 30 as Counsel's fee for the hearing in this Court. Costs in the Courts below will be paid as already ordered.

N. H. *Appeal dismissed.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 102 TO 106 OF 192 .

April 27, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice and Mr. Justice Coutts-Trotter.

KANALAL BROYA PLAINTIFF—APPELLANT

versus

BALARAM PARAMASUKDOSS—DEFENDANT—RESPONDENT

Letters Patent (Mad), cl. 15—Decision on preliminary issue, whether judgment—Negotiable Instruments Act (XXVI of 188), s. 13 (2)—Shah jog hundis *whether negotiable instruments—Madras High Court Original Side Rules, r. 63 (a), scope of.*

The decision of a Judge sitting on the Original Side of the High Court on an issue set for trial before the rest of the suit is a judgment within cl. 5 of the Letters Patent. [p 924, col. 1.]

Chinery, Ex parte, Chinery, In re, (1884) 12 Q. B. D. 342; 53 L. J. Ch 662; 50 L. T. 344; 32 W. R 469; 1 Morrell 81, *Onslow* v *Inland Revenue Commissioners*, (1890) 25 Q. B D 465; 59 L J. Q. B. 556; 63 L. T. 513; 38 W. R. 728, *Tuljaram Row* v. *Alagappa Chettiar*, 8 Ind. Cas. 340; 35 M. 1; (1910) M W N. 697; 8 M L. T 453; 21 M. L. J. 1, *Kulasekara Naicker* v. *Jagadambal Ammal*, 50 Ind. Cas 49; 42 M. 352; 9 L. W. 822; 36 M. L. J. 351; 25 M. L. T. 292, referred to.

Shah jog hundis are negotiable instruments. [p. 924, col. 1.]

Per *Schwabe, C. J.*—Rule 63 (*a*) of the Original Side Rules includes all documents in the nature of negotiable instruments specifically described in it and the questions of how far a particular Bill of Exchange might be negotiable or what the restrictions might be on its negotiability are alien to the rule. [p 923, col. 2.]

Appeals against the orders in Civil Suits Nos. 355 to 359 respectively of 1921, dated the 6th September 1921, passed by Mr. Justice Phillips in the exercise of the Ordinary Original Civil Jurisdiction of this Court.

KANALAL BHOYA v. BALARAM PARAMASUKDOSS.

Mr. *G. Krishnaswamy Iyer*, for the Appellant.

Mr. *S. G. Sadagopa Mudaliar*, for the Respondent.

JUDGMENT.

SCHWABE, C. J.—In this case the matter comes before us on appeal from an order of Phillips, J. It arose in this way. An issue or issues were framed and he directed that a particular issue should be tried before the trial of the rest of the suit. He tried that issue and he gave a decision upon the hearing of that trial and he gave it in what is called a judgment. Speaking for myself I do not see how it could be called anything else. There was an issue directly to be tried, we have got a decision of a Judge upon matters in issue in the action between the parties; and I have tried to find some other mode of expressing what he did and I could find none—he gave his judgment. The English cases are quite clear as far as the distinction between a "judgment" and an "order" is concerned, and the guiding principle is that a decision is a judgment which is given in an action. See *Chinery Ex parte, Chinery, In re*(1) and *Onslow v. Inland Revenue Commissioners* (2). The matter here is to be decided under clause 15 of the Letters Patent where the right of appeal is from a judgment of the Original Side. There have been a considerable number of cases on that point here and attempts have been made to give an exhaustive definition of the meaning of the word "judgment" in that section, particularly in *Tuljaram Row* v. *Alagappa Chettiar* (3) and *Kulasekara Naicker* v. *Jagadambal Ammal*(4), the attempted definitions not having been identical. But I think they are all of them wide enough to cover the facts of this case, and I do not propose to attempt to add a further definition to these which have already been given in those cases. The preliminary objection fails.

COUTTS-TROTTER, J.—I am of the same opinion, I have never been very clear either in English Courts or in these as to the precise differentia between a "judgment" and an "order". I well remember that Scrutton, L J. and the present Chief Justice of Allahabad carefully considered *Austin Friars Steamship Company* v. *Strack* (5) and were held by the Court of Appeal to have come to the wrong conclusion.

On the whole, the balance of my mind is to regard them as resulting in something which is properly called a judgment, because otherwise it might result in shutting out the defendant from the Court altogether.

(This appeal coming on for final hearing this day the Court delivered the following judgment.)

SCHWABE, C. J.—In these five suits orders were made under O. VI (*a*) of the Original Side Rules that the defendants should find security for the amount claimed. There is no appeal from that order. Four of the suits were on documents known as *shah jog hundi*, and the fifth Original Suit No. 356 of 1921, was on another different document, which, on the face of it, purports to be an acknowledgment of indebtedness and a promise to pay interest. Security was furnished and the case was proceeded with. Then, on the application of the defendant, certain issues were set down for trial, one of the issues being whether or not these documents were negotiable instruments. It has been held by the learned Judge who heard the matter, without hearing any evidence and without giving any opportunity which was asked for adducing evidence that they were not negotiable instruments and he accordingly ordered all the security to be re-paid to the defendant with costs up to date to be paid by the plaintiff and that the action should proceed, as though they had never been lodged under the terms of that order as ordinary suits.

As regards four of these documents, in my judgment, the documents in question were negotiable instruments. I think they come directly within the definition in section 13 (2) of Negotiable Instruments Act of 831, as amended by the Negotiable Instruments Act, 1914 as being payable in the alternative to one of several payees. But, whether this is right or not, they are, in my judgment, still covered by r. 63 (*a*)

(1) (1884) 12 Q. B. D. 342; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 Morrell 31.

(2) (1890) 25 Q B. D. 465; 59 L. J. Q. B. 556; 63 L. T. 513; 38 W. R. 728.

(3) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N 697; 8 M. L. T. 453; 21 M. L. J. 1.

(4) 50 Ind. Cas. 14; 42 M. 352; 9 L. W. 322; 36 M. L. J. 251; 25 M. L. T. 292 (F. B.).

(5) (1906) 2 K. B 499; 75 L. J. K. B. 658; 94 L. T. 875; 70 J. P. 528; 22 T. L. R. 70

of the Original Side Rules, for although those rules are entitled "Procedure on Negotiable Instruments" and section 62 refers to suits on negotiable instruments, it is clear from the wording of r. 63 (*a*) that it was intended that all documents in the nature of negotiable instruments specifically described in r. 63 (*a*) as "Bills of Exchange, *hundis* or promissory-notes" should be included and that the framers of that rule were not considering the question of how far a particular Bill of Exchange might be negotiable, or what the restrictions might be on its negotiability provided it came under the description of promissory-note, Bill of Exchange or *hundi*, which were all intended to be included within the very useful powers given by that order. To take the extreme instance of a cheque or other Bill of Exchange payable "to *A. B.* only" and marked "not negotiable," in my view this procedure would apply as the document is a Bill of Exchange, though the particular Bill of Exchange is not negotiable. On these grounds I think that the decision of of the learned Judge in respect of the four actions is wrong.

As regards the fifth action the position is rather curious. The learned Judge did not consider it separately, but it is included in the decision that the documents are not negotiable instruments; but this has been decided in the absence of evidence which may well be available at a proper trial of the matter to the effect that the form of document is recognised among these people as being a negotiable instrument passing by delivery from hand to hand. If a man write to another a definite statement in this formal way that he owes a certain amount and that he agrees to pay interest on it, it is quite conceivable, though I am expressing no opinion upon it that it is intended that it should be a document, that he can transfer by delivery. How that may be it is impossible to say without evidence on the point. That being so, I think that the judgment in respect of that document too is wrong, and the learned Judge was wrong to find as he did find without evidence, that this was not a negotiable instrument.

I think the right view is that the position must be the same as it was before the orders under appeal. Security was ordered for the whole amount of the five actions. The defendant, who knows perfectly well what document No. 2 is, did not choose to appeal from that order. He cannot have that order reversed or varied by a judgment on a preliminary point, which judgment, I think, should be reversed. It, therefore, follows that the proper order to make is to allow all these appeals with costs and to direct that the money or security taken out of Court by the respondent be forthwith replaced.

I think that the best course in respect of these cases is that all the five cases should be tried together as though they were ordinary suits. We have expressed our decision that four of the documents are negotiable instruments. As regards the fifth it should be open to discussion whether it is a negotiable instrument. It may be by custom negotiable. Further, the plaintiff may have a cause of action on it even if not negotiable. It is better that all the five should be tried together as ordinary suits and disposed of.

The costs of the preliminary hearing before Phillips, J., must be re-paid, and they must be costs in the cause. The defendant must put back into Court within fourteen days the Government Promissory Notes of the face value of Rs. 24,000 or pay into Court that amount in rupees even if the time falls within the vacation, and in default of such payment, the appellant would be entitled to a decree for the full amount and he will be at liberty to apply to the vacation Judge to give him such a decree. The defendant also will have liberty to apply to him.

COURTS-TROTTER, J.—I am of the same opinion. I do not up to this moment understand how it was that Phillips, J., persuaded himself that, by framing a preliminary issue of this nature, he could overrule an unappealed order of Kumaraswami Sastri, J., That is my first view.

In the next place I am unable to follow the order and judgment which appear to hold that a *shah jog hundi* of this form is not a negotiable instrument. It seems to me that there are many reasons for supposing that it is. I am perfectly content to take it that the words payable to any '*shah*' (which was translated into a respectable person) are so vague and indefinite

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as to be incapable of enforcement in a Court of Law and, therefore, the instrument stands as payable to Khanya Lalji, the drawee. With regard to the instrument in Suit No. 355 I wish to guard myself against saying that I am convinced that, even if there were evidence produced to show that it was treated as a negotiable instrument, that would be conclusive. I only desire to say that an opportunity should be given to call for such evidence, if it is available, and the Court should consider, having heard the evidence if it is produced, whether in law it would be sufficient to confer negotiability upon such instruments. I take it that, even if you have evidence, that a certain instrument is treated as a promissory note, if its language is such that by no conceivable acceptance of the words in their ordinary significance, it could not be construed, the Court might have to say that, in spite of the proof of the existence of the custom the custom was so entirely at variance with the tenor of the instrument as to be unreasonable. For the rest I agree with my Lord.

M. C. P.

Appeal allowed;
Case remanded.

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 100 OF 1921.

April 7, 1922.

Present :—Sir Sydney Robinson, Kt., Chief Judge, and Mr. Justice Macgregor.

P. R. P. L. CHETTY FIRM BY THEIR AGENT NACHIAPPA CHETTY—APPELLANTS

versus

G. LON POW AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (3)—Execution of decree—Payment, satisfaction or adjustment pleaded—Payment not certified—Duty of Court—Fraud, allegation of—Treatment of plea of payment as application for certifying payment—Fraud—Limitation Act (IX of 1908), s 18, application of.

The provisions of clause (3) of r 2 of O. XXI of the Civil Procedure Code are not to be rendered nugatory by the application of the general provisions of section 47 of the same Code. The clause is equally applicable where adjustment is set up by the judgment-debtor in answer to an application for execution. [p 926, cols. 1 & 2.]

Trimback Ramkrishna Ranade v. *Hari Laxman Ranade*, 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686, *Hansa Godhaji Marwadi* v. *Bhawa Jogaj Marwadi*, 31 Ind Cas. 232; 40 B. 333; 18 Bom. L. R. 22, *Biroo Gorain* v *Jaimurat Koer*, 13 Ind Cas. 63; 16 C. W. N. 924; 16 C. L. J. 174, *Alathoor Badrudeen* v. *Gulam Mohideen*, 12 Ind. Cas. 56; 36 M. 357; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 24 M. L. J. 541, *Parma Ram* v *Lehna Singh*, 53 Ind. Cas. 413; 135 P.R. 1919; 57 P L. R 921, referred to.

The decree-holder is bound to certify an adjustment, and the judgment-debtor is also given a right to apply to the Court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment-debtor, and he does not deserve the consideration of the Court if he fails to take the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court. [p. 926, col. 2.]

An adjustment not certified according to law cannot be enquired into by a Court even though fraud on the part of the decree-holder is alleged. [p. 925, col 2.]

It is not for a Court of Justice to refuse to observe a provision of the law because hardship may result in consequence. The Court has merely to interpret and apply the law as laid down by the Legislature, and it would not be doing its duty if it acted otherwise [p 926, col. 2.]

It is, however, open to a Court to oppose a fraud so far as it can do so within the law, and where an application for execution is opposed on the ground of payment or satisfaction or adjustment, the Court may rightly treat the objection so taken as an application to the Court to certify the alleged payment or adjustment provided that the objection betaken within the period of limitation allowed by law. [p. 927, col. 1.]

In such a case, where the Court decides to treat an objection to execution on the ground of payment, as an application for certifying the payment, the judgment-debtor pleading fraud cannot extend the period of limitation under section 18 of the Limitation Act, for that section applies only where the *knowledge* of a right is fraudulently kept away, and not to a case where a person is prevented by fraud from *exercising* a right of which he is fully aware. [p. 927, cols. 1 & 2.]

Miscellaneous appeal against an order passed by Rutledge J., on the Original Side.

Mr. *Judge*, for the Appellants.

Mr. *Dantra*, for Respondents Nos. 1 and 2.

JUDGMENT.—The appellant Chetty obtained two decrees against the present respondents in Civil Regular No. 91 of 1916 and Civil Regular No. 50 of 1918. On the 27th February 1920 a compromise was effected between the parties, and a petition was filed in Civil Regular No. 50, praying that full satisfaction of the decree might be recorded and certain other orders passed. It is not denied that both parties were present and both were represented by Counsel. The Deputy Registrar did not understand the prayer, and Counsel asked for time to amend it, agreeing that prayer

was defective. After an adjournment, Counsel appeared and amended the prayer, presumably after consultation with their clients. Ninety days from the 27th February expired on the 27th May 1920, and on the 1st June the decree-holder applied to execute the decree in Civil Regular No. 91. Notice of this application was admittedly received by the respondents some time prior to the 30th August of that year but it was not until the 23rd November 1920 that they filed an objection to the execution petition. It is said that the intervention of the long vacation accounted for this. The objection was that the decree had already been satisfied together with the decree passed in Civil Regular No. 50, and that the petitioner's application was fraudulent. They were called upon to file particulars of the alleged fraud, and on the 7th January 1921 they filed a long affidavit in which they set out that the compromise effected related to both the decrees; that the Chetty had brought them the petition written out and assured them that it contained the terms of their agreement in full and believing him they had signed the petition and gone to Court and saw it filed, and thus believed that satisfaction of both the decrees had been entered up. They only learnt that this was not so when the application for execution in Civil Regular No. 91 was served on them. The Deputy Registrar on this ordered an enquiry under section 47 into the alleged fraud. An appeal was filed from that order, and the learned Judge on the Original Side upheld the Registrar's order. This appeal is against that decision.

The questions that we have to decide, therefore, are as to whether the satisfaction of the decree in Civil Regular No. 91 never having been certified, the Executing Court is bound not to recognize it, if this be so, whether the objection to the petition for execution may be treated as an application to the Court under O. XXI, r 2 (2), and if so, whether it is not barred by limitation.

As to the first point, respondents rely on the case of *Trimbak Ramkrishna Ranade* v. *Hari Laxman Ranade* (1) which was followed in *Hansa Godhaji Marwadi* v. *Bhawa Jogji Marwadi* (2). In the latter case it was held that the Court should not in the exercise of its duty under section 244, Civil Procedure Code, allow a clear case of fraud to be covered and condoned by the provisions of O. XXI, r 2. Three further cases were referred to. There was in this case a very clear indication of fraud on the part of the decree-holder. The contrary opinion has, however, been taken by the Calcutta and Madras High Court in earlier cases which were not referred to.

In *Biroo Gorain* v. *Jaimurat Koer* (3) it was held that it is not open to the Court of Execution to enquire into the fact of a payment or adjustment of a decree which has not been certified or recorded as provided in clause (1) of r. 2 of O. XXI even when the conduct of the decree-holder is alleged to have been fraudulent. The point for consideration is thus stated in the judgment, whether "although the adjustment has not been certified in the manner contemplated by r. 2 of O. XXI of the Code of 1908, as the conduct of the decree-holder is fraudulent, it is open to the Court to investigate the allegations of fraud under section 47 of the Code of 1908." Reference is made to all the cases cited in the later Bombay case referred to above. It is pointed out that the Madras case was dissented from in a later decision of that Court, and that the Calcutta case when analysed did not support the proposition contended for. The learned Judges say: "The contention of the learned Vakil for the appellant in substance is that in cases where the conduct of the decree holder is fraudulent, it is open to the Court, in fact it is incumbent on the Court, to investigate the allegation of fraud under section 47 of the Code of 1908, notwithstanding the clear and specific provisions of clause (*e*) of r 2 of O. XXI. This argument is obviously fallacious. A proceeding under r. 2, O. XXI, is a proceeding under section 47 of the Code, inasmuch as it decides a question between the parties to the suit and relating to the execution, satisfaction or discharge of the decree made in the suit. If the contention advanced on behalf of the appellants were to prevail, in all cases where fraud is imputed to the decree-holder, the provision of clause (3)

(1) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686.
(2) 33 Ind. Cas. 232; [1916] B. 333; 18 Bom. L. R. 22.
(3) 13 Ind. Cas. 63; 16 C. W. N. 923; 16 C. L. J 171.

of r. 2, O. XXI would become nugatory; in other words, the provisions of r. 2 would be superseded by the wider provisions of section 47." The Court further decided the question of limitation that has been raised in the case before us, and they said: "We may further point out that even if it is established that the conduct of the decree-holders is fraudulent the judgment-debtor is not entitled to obtain an extension of the time within which an application is to be made to the Court under clause (2) of r. 2 of O. XXI. Section 18 of the Limitation Act which deals with the effect of fraud is clearly of no avail to the appellants" and after quoting that section, the judgment goes on: "It is not suggested on behalf of the appellants that they were kept by means of fraud from the knowledge of their right to make the application mentioned in clause (2) of r. 2 O. XXI. Their grievance is that they have been kept by means of fraud from the exercise of their right to make this application; consequently, if we were to accede to the contention of the appellants, we should have to substitute for the phrase 'from the knowledge of such right,' the phrase 'from the exercise of such right.' But clearly the knowledge of a right and the exercise thereof are fundamentally distinct things..... But if the judgment-debtor, notwithstanding the express provisions of clause (2), r. 2. O. XXI, still enters into an adjustment with the decree-holder out of Court and omits to take the necessary precaution of making an application within the time allowed by law, he has no just ground of complaint when the decree holder takes advantage of his omission to seek the protection of the law."

Again, in the case of *Atathoor Badrudeen* v. *Gulam Mohideen* (4) it was laid down that a payment or adjustment of a decree cannot be recognised by any Court executing the decree unless the same has been certified in the manner allowed by law. The clause is applicable where in answer to an application for execution an adjustment is set up by the judgment-debtor. Further, though a judgment-debtor's counter-petition may be treated as an application to certify, the same cannot be allowed in the absence of any fraud, if it is made beyond 90 days of the adjustment. It is pointed out that the judgments relied on by the Bombay High Court quoted above had been dissented from and how some were to be distinguished.

Finally, in the case of *Parma Ram* v. *Lehna Singh* (5) the two Bombay cases cited above were differed from, and the same view as is now taken in the Calcutta and Madras High Courts was adopted.

The balance of authority clearly, therefore, appears to be in favour of the view that the provisions of clause (3) of r. 2 of O. XXI are not to be rendered nugatory by the application of the general provisions of section 47 of the Code. With that view we entirely agree. The provision was enacted to prevent the Courts being flooded with false defences to applications for execution setting up a payment or adjustment in part or in whole which would be made merely to gain time. The decree-holder is bound to certify an adjustment, and the judgment-debtor is also given a right to apply to the Court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment-debtor, and he does not deserve the consideration of the Court if he fails to take the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court. We can see no reason why this should not apply also in the case of an alleged fraud. It is perfectly true no doubt that the Courts should not readily lend themselves to assist fraud in any shape or form, but the judgment-debtor upon whom such fraud may have been practised is not without remedy. He may sue for damages for the fraud committed and recover any payment made twice over or he may take action in the Criminal Courts. The Legislature must have considered the various arguments on either side and deliberately included this provision. It is not for a Court of Justice to refuse to observe the provision because hardship may result in consequence. The Court has merely to interpret and apply the law as laid down by the Legislature, and we should not be doing our duty if we acted otherwise. Even if an enquiry were held and the fraud was

(4) 12 Ind. Cas. 562; 36 M. 857; 10 M. L. T. 396; (1911) 2 M. W. N. 473; 24 M. L. J. 541.

(5) 53 Ind. Cas. 443; 135 P. R. 1919; 57 P. L. R. 1920.

established, the provision of clause (3) of r. 2 of O. XXI would not be affected. But it is open to the Court to oppose a fraud so far as if can do so within the law, and where an application for execution is opposed on the ground of payment or satisfaction or adjustment, the Court may rightly treat the objection so taken as an application to the Court to certify the alleged payment or adjustment, provided that the objection be taken within the period of limitation allowed by law.

The fraud, if any, was committed in the present case on 27th February 1920, the appellant waited until 90 days from that date had expired, and a few days later the application to execute was filed. The objection which we are asked to treat as an application under O. XXI, r. 2 (2) was not filed within 90 days, it was not in fact filed until the 23rd November 1920 but it was filed 83 days after the respondents became aware of the alleged fraud. It is, however, claimed that they are entitled to the benefit of section 18 of the Limitation Act, and it is admitted that if they can rely on the provisions of that section, their application would be within time. Regarding the matter from that point of view, it is necessary to consider what allowance section 18 grants. It lays down that where any person having a right to make an application has by means of fraud been kept from the knowledge of such rights, the time limited for making the application shall be computed from the time when the fraud first became known to him. The respondents in the present case had the right of making an application to have the adjustment certified It cannot be said, and it is not urged, that they were not aware of the right that they had, but it is argued that they were under the belief that the adjustment had been certified, and that the appellant by the fraudulent assurance to them that the petition contained all the terms of the agreement arrived at had concealed from them, or had caused them to be in ignorance of the right to move the Court to correct the prayer of that petition. That appears to us to be an entirely different matter altogether. If we treat the objection to the petition for execution as an application it is to be regarded as an application under clause (2) r. 2 of O. XXI, and section 18 only deals with the knowledge of their right to make such an application. Their argument really is that they were prevented from exercising the right of which they were fully aware by the fraud of the appellant. Section 18 does not deal with the exercise of the right but with the knowledge of the right, and we agree with the learned Judges of the Calcutta High Court in *Biroo Gorain's case* (3) which we have quoted above.

Respondents chose to rely, if their allegations were true, on what the appellant told them. They never adopted the ordinary precaution of having the petition interpreted to them before signing it. They had Counsel who appeared at the presentation of that petition on their behalf; they never attempted to find out from him what the petition contained. When the prayer of that petition was amended, they again never attempted to find out what the petition set forth though they were undoubtedly consulted as to the amendment of the prayer. They had ample opportunity of stultifying the fraud, if fraud there was, and they declined to avail themselves of it. But, however that may be, we are compelled to the conclusion that the alleged fraud cannot now be enquired into under section 47 because of the special provisions of O. XXI, r. 2 (3). We are further of opinion that they are not entitled to the benefit of section 18 of the Limitation Act, and that, therefore, even if their objection to the petition for execution were treated as an application under O. XXI, r. 2 (2), it is barred by time.

We must, therefore, accept the appeal and reverse the order of the Court below with costs throughout.

N. H. & W. C. A. *Appeal accepted.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 147 OF 1921.

February 3, 1922.

Present:—Justice Sir William Ayling, KT.

MUTHAYYA CHETTY—DEFENDANT No. 1—PETITIONER

versus

P. R. S. SOMASUNDARAM CHETTY BY AGENT S. NARAYANASAMI AIYENGAR—PLAINTIFF—RESPONDENT.

Partnership—Suit by one of surviving partners respecting partnership transaction, whether maintainable,

ARUNACHALLAM CHETTY v. SOMASUNDARAM CHETTY.

A suit by one of two surviving members of a partnership, after dissolution of the partnership, in respect of a transaction with the partnership, is not maintainable.

Alagappa Chetti v. *Vellian Chetti*, 13 M. 33; 4 M L. J. 283; 6 Ind. Dec. (N. S.) 373, followed.

Vaidyanatha Ayyar v. *Chinnasami Naik*, 17 M. 108; 6 Ind Dec. (N. S.) 74, distinguished.

Petition, under section 25 of Act IX of 1882, praying the High Court to revise a decree of the Court of the District Munsif, Ariyalur, in Small Cause Suit No. 2034 of 1919.

Mr. *S. Sankara Iyer*, for the Petitioner.

Mr. *R. Kesava Aiyengar*, for the Respondent.

JUDGMENT.—This is a suit brought to recover a debt due to a partnership which consisted of three partners Somasundaram Chetty, Arunachalam Chetty and Muthiah Chetty; of these three Muthiah Chetty is dead and as a consequence the partnership dissolved. This suit is instituted by one of the surviving partners of the late firm Somasundaram Chetty. The question is whether it is maintainable by him.

As far as I can gather the District Munsif appears to have decided this point under the misapprehension that the plaintiff, Somasundaram Chetty, was the only survivor of the partnership of two; under that impression relies on the ruling in *Vaidyanatha Ayyar* v. *Chinnasami Naik* (1). That ruling is of course inapplicable to the present case where one of the two surviving partners brings a suit. This case is governed by the ruling in *Alagappa Chetti* v. *Vellian Chetti* (2), which, so far as I can understand, has never been dissented from or questioned and wherein it is clearly laid down that, as a general rule, all the members of a partnership firm ought to be joined as plaintiffs in a suit in respect of a transaction with the partnership. The learned Vakil for the respondent has referred to section 263 of the Contract Act which says that, after dissolution of partnership the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership. But if a single one of the partners could not sue during the continuance of the partnership, still less can one of two surviving partners sue after the dissolution of the partnership.

(1) 17 M. 108; 6 Ind. Dec. (N. S.) 74.
(2) 18 M. 33; 4 M. L. J. 283; 6 Ind. Dec. (N. S.) 373.

Attention was also drawn to the provision of O. XXX of the Civil Procedure Code but they only apply to cases in which two or more persons claiming to be partners sue.

I am forced to the conclusion that the suit brought by the plaintiff in this case is not maintainable. The suit must, therefore, be dismissed with costs in both Courts.

V. N. V. *Petition dismissed.*

W. C. A.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 174 OF 1920.

May 15, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Macgregor.

R. M. A. R. R M. ARUNACHALLAM CHETTY—APPELLANT

versus

V. E. R, M. N. SOMASUNDARAM CHETTY—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 85—Mutual, open and current account—Test of mutuality—Shifting balance.

Where one party only makes payments to, or for, or on account of, the other and that other only from time to time makes payment in re-payment, the accounts cannot be said to be mutual within the meaning of Art 85 of Schedule I to the Limitation Act. [p. 930, col. 1.]

The test of mutuality is the presence in the accounts of a shifting balance sometimes in favour of one side and sometimes in favour of the other, but its absence is not conclusive proof against mutuality. The fact that the balance no longer shifted is not in itself sufficient to justify the conclusion that the account had ceased to be a mutual, open and current account. [p. 930, col. 1]

Ebrahim Ahmed Mehter v. *Abdul Huq*, 27 Ind. Cas 879; 8 L. B. R 149; 8 Bur. L. T. 116, *Ram Pershad* v. *Harbans Singh*, 6 C. L. J. 58, *Hirada Basappa* v. *Gadigi Muddappa*, 6 M. H. C. R. 142, *Ganesh* v. *Gyanu*, 22 B. 6 6; 1 Ind Dec. (N. S.) 986, *Chittar Mal* v *Behari Lal*, 4 Ind. Cas. 261; 32 A. 11; 6 A. L. J. 21, referred to and considered.

First appeal against the judgment passed by Mr. Justice Rigg, on the Original Side.

Mr. *Lentaigne*, for the Appellant.

Mr. *Das*, for the Respondent.

JUDGMENT.—The sole question for decision in this appeal is whether the case falls within the purview of Art. 85 of the Limitation Act or not.

ARUNACHALLAM CHETTY v. SOMASONDARAM CHETTY.

The 1st defendant formed a partnership with three members of the K P. K. Firm who are defendants Nos. 2, 3 and 4. Defendant No. 3 was sent to Rangoon as agent for this firm. He is a relative of the plaintiff who had also a firm in Rangoon. Plaintiff sought defendant's permission to defendant No. 3 acting as his agent in Rangoon as well as agent for the defendant. Defendant agreed to this and defendant No. 3 carried on the business of both firms. He submitted copies of his accounts to the defendant from time to time, but in 1913 he ceased doing so. This naturally aroused the suspicions of defendant No 1, who thereupon withdrew the power-of-attorney he had granted him and dissolved the partnership. Plaintiff came to Rangoon to inspect his business. He found that the accounts showed that the defendant firm owed him a large sum of money and he induced defendant No 3 to execute three promissory notes in his favour covering this amount. Plaintiff brought three suits on these three promissory-notes Defendants not having received any accounts did not know what their position was and denied owing plaintiff anything. They further pleaded that defendant No. 3's power-of-attorney having been cancelled, and the partnership dissolved to the knowledge of the plaintiff, the suits should be dismissed.

I heard the cases on the Original Side myself and decided them in defendant's favour. An appeal against that decision was dismissed. During the pendency of the appeal plaintiff filed the present suit, claiming to recover the balance due on a mutual, open and current account where there had been reciprocal demands between the parties. The learned Judge on the Original Side held that the account was one to which Art. 85 of the Limitation Act applied, and this appeal is against that decision

It is necessary to consider what was the course of dealings between the parties. It is not denied that for several years at any rate plaintiff from time to time advanced moneys to the defendants and defendants from time to time advanced moneys to the plaintiff. Defendant No. 3 kept an account of these mutual loans. When plaintiff made a loan to defendant he credited plaintiff with that sum and debited defendant with a like amount in their respective books. On numerous occasions, generally at the end of each month, he would total up the position and show the amount at debit or credit in each firm's books. On at least three occasions he calculated interest on the loans made, calculating interest on the amounts lent by plaintiff and on the amounts lent by defendant, deducting one from the other, and adding the credit for interest to whichever party was entitled to it. In the earlier days of these dealings the credit rested sometimes with plaintiff and sometimes with defendant. The last occasion on which the credit rested with the defendant was in March 1913. Subsequent to that date the balancing of the mutual accounts always showed an ever increasing credit in favour of the plaintiff.

On these facts Mr. Lentaigne for the appellant argues that there was no mutual, open and current account, because there were no payments made by plaintiff on defendant's account to third parties. He argues that there was no equitable right of set off which is the foundation on which the theory of mutual, open and current accounts is based, and that there were no reciprocal demands between the parties. He further argues that even if the account could properly be considered to be a mutual, open and current account, it ceased to be so after March 1913, because from that time onwards the balance in favour of the plaintiff was always very large and any payments made by defendant would be merely payments in reduction of this balance and would give rise to no demand on the part of the defendant.

The Tamil year, it is agreed, ends in April. The present suit was filed in March 1917 and the period of limitation under Art. 85 would run from the close of the year in which the last item, admitted or proved, is entered in the account. The learned Judge in the Court below has calculated the three years from April 1914, and, therefore, holds the suit to be within time. It is urged that on the second branch of his argument limitation should have been calculated from April 1913 and that, therefore, the suit would be barred, even though Art. 85 applied.

Great reliance has been placed on the rulings of this Court in the case of *Ebrahim*

Ahmed Mehter v. *Abdul Huq* (1). The question there was whether the account was a mutual account. It was held that a mutual account means "not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account." It was found that the plaintiff was acting merely as agent of the defendant, and that the defendant throughout the dealings had done nothing for and on behalf of, or on account of, the plaintiff, and that, therefore, there was no mutual account. That authority has, it appears to us, no real bearing on the present case. He further relied on the case of *Ram Pershad* v. *Harbans Singh* (2). So far as the ground of mutuality is concerned, we agree entirely with both these decisions. In the latter case it was held that "mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits." Where one party only makes payments to, or for, or on account of, the other and that other only from to time makes payments in re-payment, it is perfectly clear that the accounts cannot be said to be mutual within the meaning of Art. 85. Reference is made to the case of *Hirada Basappa* v. *Gadigi Muddappa* (3) where the learned Judge observed that "in order that accounts might be mutual, there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." In this case also, as in many others, it is pointed out that "a shifting balance sometimes in favour of one side, and sometimes in favour of the other, is a test of mutuality, but its absence is not conclusive proof against mutuality." With that expression of opinion we also agree.

The same view was taken in the case of *Ganesh* v. *Gyanu* (4) and in the case of *Chittar Mal* v. *Behari Lal* (5). In the Calcutta case to which we have referred, it was lastly held that "the mere circumstance that on one solitary occasion...there was a sum...to the credit of the defendants in the books of the plaintiffs, does not make the account between the parties a mutual account in which there has been reciprocal demand between the parties."

The present case is one of mutual loans, and as an authority for such a case, we have the decision in *Ganesh* v. *Gyanu* (4) cited above. It is there pointed out: "The dealings between the parties in the present case were admittedly in the nature of mutual borrowings, and where the transactions are of that character, the test of a shifting balance, sometimes in favour of one party, and sometimes in favour of the other, though valuable as an index of the nature of the dealings, is not always decisive." It was held that in a case of mutual borrowings interest being charged on such loans, the account was a mutual, open and current account creating independent obligations.

In the present suit, defendant No. 3, as the agent for both parties, lent money on behalf of one firm to himself as agent for the other firm. Each of these loans gave rise to a right of set off or claim against the borrower, and as both plaintiff and defendant were on occasions the lenders, these transactions gave rise to reciprocal demands from time to time. The accounts were never settled. The fact that defendant No. 3 for his own convenience totalled up the position and made entries of the result in each firm's books did not close the account. It was continuous and was, therefore, an open and current account, and having regard to the mutual loans, it was also a mutual account.

If we consider the case as it stood at the end of March 1913 there can be no question that at that time either party could have said to the other: "I have a claim against you" and could have demanded that the accounts be gone into and these mutual claims set off one against the other; that interest should be calculated not merely on the final balance found due after the set off was made, but on each loan as it was made.

It remains, therefore, to consider whether the position was altered after March 1913, because, after that date, defendant was always in debit. The accounts were continued in exactly the same form. There is nothing

(1) 27 Ind. Cas. 879; 8 L. B. R. 149; 8 Bur. L. T, 116.
(2) 6 C. L. J. 159.
(3) 6 M. H. C. R. 142.
(4) 22 B. 606; 11 Ind. Dec. (N. S.) 986.
(5) 4 Ind. Cas. 261; 32 A. 11; 6 A. L. J. 921.

to show that any loans made by the defendant to the plaintiff subsequent to that date were made merely as payments in partial discharge of the debit balance against him. They continued to be made as loans, and defendant No. 3 in his evidence clearly so states. This being so we are unable to see that there is any ground for saying that they were merely discharges and not loans as heretofore. This being so, the mutual dealings between the parties were continued in exactly the same way as they had been previously carried on. The fact that the balance no longer shifted is not in itself sufficient to justify us in holding that the account had ceased to be a mutual, open and current account.

We are, therefore, of opinion that the decision of the learned Judge on the Original Side was correct and that the appeal must be dismissed with costs throughout, the decision of the Court below being confirmed. We remand the case to the lower Court in order that the Commissioner may now take the accounts in order to ascertain what sum is due by either party.

Appeal dismissed.

W. C. A.

MADRAS HIGH COURT.

REFERRED CASE No. 6 OF 1921.

August 23, 1922.

Present :—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Kumaraswami Sastri.

PENDURTI JOSEPH—PETITIONER

versus

PENDURTI RAMAMMA AND ANOTHER—RESPONDENT.

Divorce Act (IV of 1869)—Divorce, suit for—Husband or wife, uncorroborated evidence of, if sufficient—Adultery, charge of, against known person—Necessary co-respondent.

In an action for divorce under the Divorce Act, the evidence of the husband or wife alone ought never to be accepted without corroboration either by witnesses, or at least by strong surrounding circumstances. [p. 932, col. 1.]

Where charges of adultery are made against a known person, that person must be made a co-respondent unless the Judge otherwise directs. [p. 932, col. 1]

Case referred by the District Judge, Godavari at Rajahmundry, in his Letter No. 1930, dated the 8th April 1921 for confirmation by the High Court under section 17 of the Divorce Act (Act IV of 1869) of the decree *nisi* passed in Original Suit No. 35 of 1920 on the file of the District Court, Godavari at Rajahmundry.

JUDGMENT.

SCHWABE, C. J.—This is an application to confirm a decree for divorce given by the District Court of Godavari. It involves questions of considerable importance and questions our views upon which it is most desirable should become public property. The suit was a simple one. The petitioner claimed divorce from his wife on the ground, as shown in his petition, of adultery with two persons, the first a man called T. Jeevaratnam who is not cited as a co-respondent in the suit, and the second Boyi Guruvalu, who is cited as a co-respondent in the suit. The co-respondent did not appear and the evidence except the formal proof of the marriage consisted entirely of the evidence of the petitioner, and that evidence was a statement that two weeks after the marriage the respondent was found by him to be in adultery with one Jeevaratnam, and that she admitted her guilt before the elders of his Church.

As regards the second case against the respondent, his evidence was that the co-respondent contracted intimacy while she was at Pittapore and that she is now living at Bezwada with this co respondent. Further he produced a letter in which she said that he could marry any girl whom he liked according to his pleasure and added "this is the deed of relinquishment caused to be written and given with my free will."

By section 7 of the Indian Divorce Act of 1869, "the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." In this case the learned

Judge expressed the view that, as she was *ex parte* and he saw no reason to disbelieve the petitioner's evidence, a decree should be granted. That is absolutely contrary to the principles and rules on which the Court of Divorce and Matrimonial Causes in England acts. There is a definite established practice there that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances, and the reason for that rule is that, but for it, there would be nothing easier than a collusive divorce, there would be no necessity for the respondent to appear and the petitioner need only go into the witness-box and say that the respondent committed adultery. In this case there was no corroboration of any kind—I doubt if there was any evidence of adultery, because what the petitioner said was that he discovered that she was committing adultery. He says that she is living in the house with the named co-respondent. He does not say how he knows or whether it is hearsay, or give any facts. It must be understood that it is absolutely essential that there should be corroboration.

Secondly, there is a rule in England that where charges of adultery are made against a known person, that man must be made a co respondent unless the Judge shall otherwise direct. It has been put in the shape of a rule in England—Divorce Rules No. 4. "A husband filing a petition for dissolution of marriage on the ground of (alleged) adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge ordinarily shall otherwise direct." Under that provision if the name is unknown the Judge can dispense with that co-respondent. In this case the first alleged act of adultery is with a known man. He is not added as a co respondent nor is there any application to the Court for dispensing with his being made a co-respondent. The result is that we cannot confirm this decree.

As regards the evidence in respect of Jeevaratnam, he not having been a party to the suit, that evidence ought not have been admitted. As regards the evidence against the co-respondent there is no corroboration as I have pointed out. That corroboration in a case of this kind can in all probability easily be obtained. It is only necessary for some one who knows the respondent by sight to give evidence that he has been to the place where it is alleged that she is living in adultery with the co-respondent and that he has seen them living together under conditions that lead to presumption that they are guilty. If there is no person available such as a relative of the petitioner who knows her by sight, the petitioner himself must go with somebody else *e. g.*, the local Police and identify the person living with the co-respondent as being his wife.

The proper course in this case is to set aside this decree and remand the case to the District Court so as to enable the petitioner to adduce corroborative evidence in respect of the charge against the co-respondent, or if so advised, and he finds that course necessary, to join the other alleged adulteror as a co-respondent and adduce evidence in respect of that act of adultery.

COUTTS TROTTER, J.—I am of the same opinion. This difficulty arises because people do not take the trouble in this country to get up divorce cases properly, and do not appreciate that the Courts of this country are bound of themselves to guard against the possibility of collusive litigants. I agree that this case should be re-tried in the way suggested by my Lord.

KUMARASWAMI SASTRI, J.—I agree with my Lord the Chief Justice.

Decree set aside and case remanded.

V. N. V.

W. C. A.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1713 OF 1918.

April 11, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

BICHHIA LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUNSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 284—Partnership, dissolution of—Notice, absence of, effect of—

BICHHIA LAL v. MUNSHI RAM.

ersons dealing with firm," meaning of—Retirement partner—Liability.

Section 264 of the Contract Act is an illustration of a particular form of estoppel by conduct, and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of notice excited in him a belief which caused him to do something that he would not otherwise have done. The section must not be construed as an absolute proposition of law but must be read with section 115 of the Evidence Act [p. 936, col 2]

Rahimtulla Ishak v. *Jhamatmal Chainrai*, 3 Ind. Cas. 445; 3 S. L. R. 140, relied upon.

The expression "persons dealing with a firm" in section 264 of the Contract Act, indicates only such persons who have been in the habit of dealing with the firm previously. The section does not contemplate such persons who deal with a firm for the first time after the retirement of some of the partners. [p 936, col. 1.]

Chand Mal v. *Ganga Ram*, 78 P. R. 1903, *Giovani Gorio* v *Vallabhdas Kalianji*, 30 Ind. Cas. 864; 17 Bom. L. R 782, relied upon.

Where a partner retires from the partnership and the remaining partners carry on the business of the firm under the old name and style, the fact that the business is so carried on does not make the partner who has retired liable for the transactions entered into subsequent to his retirement [p. 935, col 2]

Rahimtulla Ishak v *Jhamatmal Chainrai*, 3 Ind. Cas. 445; 3 S. L. R. 140, *Chand Mal* v. *Ganga Ram*, 78 P. R. 1903, relied upon.

First appeal from a decree of the Subordinate Judge, First Class, Multan, dated 22nd March 1918.

Mr. *Raj Krishen* for Mr. *Manohar Lal* and Mr. *Shamair Chand*, for the Appellants.

Bakhshi *Tek Chand* and Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of Rs. 6,000 on book account against two sets of defendants. The claim was thus stated in the plaint :—

That the plaintiff No. 1 along with his brother, plaintiff No. 2, with his father, Seth Gopal Sahai, formed a joint Hindu family and that Seth Gopal Sahai having died the plaintiffs were his surviving heirs; that Shib Dyal, father of defendant No. 1, defendant No. 1 and Hira Lal, the defendant No. 2, (son of defendant No. 1), were members of a joint Hindu family and carried on their business jointly; that the said Shib Dayal having died the defendants Nos. 1 and 2 were his surviving heirs, that the defendants Nos 3 to 9 were members of a joint Hindu family and carried on their business jointly; that the family of the defendants Nos. 1 and 2 and the family of the defendants Nos. 3 to 9 had a joint firm named 'Shib Dayal-Jai Dayal' at Multan, that the firm belonging to the defendants borrowed money from the firm of the plaintiffs between the 18th April 1910 and the 27th June 1911; that the defendants made payments between the 17th April 1910 and the 21st September 1910; and that, according to the account detailed in paragragh 5 of the plaint, the amount due to the plaintiffs from the defendants was Rs. 6,000. The deceased Shib Dayal was stated to have been the manager of the firm 'Shib Dayal-Jai Dayal' and Jai Dayal was stated to have represented the members of the joint family to which he belonged. It was stated that Jai Dayal died sonless more than twenty years before the institution of the suit. The pedigree table given in the plaint makes it clear that all the members of Jodha Mal's family were impleaded as defendants, and were sought to be made liable for the debt. The suit was resisted by both sets of defendants. The defendant No. 1 for himself and for his minor son, the defendant No. 2, among other things, said that he had separated from his father in his lifetime and had a separate business of his own and that he was, therefore, not liable for the debt which was due from him. The other defendants said that they had no concern with the debt; that Jai Dayal did not carry on the business for the other members of Jodha Mal's children. They also alleged that the firm of 'Shib Dayal-Jai Dayal' had been dissolved and had ceased to exist long before the debt in question had been incurred. Two dates were mentioned as the dates of dissolution of the partnership. In the first place it was stated that the partnership dissolved on the death of Jai Dayal and in the second place it was urged that the partnership was dissolved in the year 1903 when a deed of relinquishment was executed by Shib Dayal in favour of all the surviving members of the family of Jodha Mal. This deed is dated the 17th of *Sawan Sambat* 1965, and is printed at pages 27—28 of the printed paper book. It may be mentioned that previous to this suit a suit was instituted by the present plaintiffs for the recovery of the amount then due on the same account. In that suit only two defendants were impleaded, namely,

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Munshi Ram, son of Shib Dayal, the defendant No. 1 in this case, and Ram Saran Das, the defendant No. 5 in the present case, who was described as the son of Jai Dayal, though admittedly he was a son of Wazir Chand, the defendant No. 4 in the present case. He was stated to have been adopted by Jai Dayal, and was sued in his representative character as Jai Dayal's son. That suit was, however, withdrawn and the present suit was instituted against all the members of the two joint families who were said to be jointly interested in the firm of Shib Dayal-Jai Dayal. The real object by the institution of the present suit was to make each and every surviving member of the family of Jodha Mal liable for the debt.

A good deal of evidence was called on behalf of the plaintiffs to prove that all the defendants Nos. 3 to 9, along with the deceased Jai Dayal, formed a joint Hindu family and that they were all interested in the joint firm of 'Shib Dayal-Jai Dayal' and that even after the death of Jai Dayal the business of the firm was carried on in partnership with the surviving members of the family of Shib Dayal, deceased.

The Trial Court recorded the following findings:—

(1) that the defendants Nos. 3 to 9 formed a joint Hindu family;

(2) that there was no reliable evidence to show that Jai Dayal had joined the partnership with Shib Dayal on behalf of his family or that after his death the surviving members of the family had carried on the business as partners of Shiv Dayal or the surviving members of his family;

(3) that the partnership was dissolved in law on the death of Jai Dayal, and that in any case it had been dissolved by the agreement dated the 17th *Sawan Sambat* 1965 (1908), which is described as a deed of relinquishment. This deed was challenged by the plaintiffs as a forgery but the Court found that the execution and genuineness were established by the evidence of Mela Mal, its scribe, and Labbu Ram and Chhajju Mal, its marginal witnesses; and

(4) that the defendant No. 1 was joint with his father, Shib Dayal, and along with his son, Hira Lal, the defendant No. 2, was liable for the claim.

On the above findings the suit was decreed against the defendants Nos. 1 and 2 and dismissed against the defendants Nos. 3 to 9.

The plaintiffs have, therefore, came up in appeal to this Court. The decision of the appeal has been made easy by the course adopted at the argument by the Counsel of the parties. The deed of relinquishment has not been challenged before us as a forgery by the Counsel for the appellants. In fact he has relied upon the document as a strong piece of evidence establishing the liability of all the defendants Nos. 3 to 9 as it purports to be a relinquishment in favour of all the surviving members of the joint family to which Jai Dayal belonged. It is executed by Shib Dayal, son of Narain Das, and as a good deal depends upon the terms of this deed we think it necessary to quote it *in extenso*.

It runs thus:—

"I, Shib Dayal, son of Narain Das, caste Khatri resident of Basti Sheikh *Tahsil*, Jullundur, do hereby declare as follows:—

"Lala Ram Saran Das, son of Wazira Mal, and Lala Wazira Mal, son of Jodha Mal, caste Sud, residents of Phagwara, and I had two joint shops situate in Lahore and Multan, which were known as 'Hamir Chand-Shib Dayal' and 'Jai Dayal-Shib Dayal' respectively. The shop situate in Lahore was closed some seven or eight years ago. The entire account relating to the profits and losses of the said two shops was adjusted, and a sum of Rs. 3,462-4-0 was found due from me and a separate entry was made in the *bahi*. Out of the shops the shop situated in Lahore has already been closed. The shop situate in Multan still exists. In future Lala Ram Saran Das, son of Lala Wazira Mal, shall have no concern with the profits or losses of the said shop From this date I shall be considered proprietor of the said shop. I, as proprietor, shall be responsible for all the profits or losses of the said shop. I shall be responsible for the previous dealings of all sorts. Similarly, in future too I shall be responsible for the dealings. In future the shop shall not, bear the name of Lala Jai Dayal Mal. I shall style the shop as I think proper.

" have, therefore, drawn up these few words by way of a deed of relinquishment

in the form of an agreement relating to the shops in Lahore and Multan, so that it may serve as an authority.

"Dated the 17th *Sawan Sambat* 1965 (1908)."

Mr. Tek Chand, for the respondent, has contended that, assuming that all the members of Jodha Mal's family formed a joint family and were partners with Shib Dayal, the partnership must be taken to have been dissolved in 1908 under the deed of relinquishment and the claim must fail against them as the debt was incurred after the firm had ceased to exist. It is admitted that the dealings on which the claim was based began in April 1910 when Shib Dayal was the sole proprietor. It is admitted by Mr. Raj Krishen, who has argued the case before us for the appellants, that the plaintiffs had had no dealings before that date with either the old or the new firm. Mr. Tek Chand has called our attention to the following evidence on the record to show that the old firm 'Shib Dayal Jai Dayal' had ceased to exist and that its old name had been changed and a new name under the style of "Narain Das-Shib Dayal" had been given to it.

At page 39 is to be found the translation of a *hundi* dated *Sawan Badi* 14th *Sambat* 1967, executed by Bhag Mal Sri Ram of Jalalabad in favour of Bhai Bir Singh-Bata Mal for Rs. 200. This *hundi* was negotiated in due course, and it was endorsed in the name of B. Narain Das-Shib Dayal. The endorsement is to be found at the top of page 40 of the paper book in these words "*hundi* sold by Jagan Nath-Chandar Sein to *Bhai* Narain Das-Shib Dayal If the "*hundi* is not honoured (by the drawer) it should be presented for payment to *Bhai* Matwala Mal-Thakur Das."

At page 41 is to be found a *hundi* for Rs. 171-8-0, executed by Sawai Ram-Shiv-Ji Ram of Ferozepore in favour of Tansukh Das-Basheshar Das, and it was sold in due course by Jagan Nath-Chandar Sein, to *Bhai* Narain Das Shib Dayal Mal. The account of these two *hundis* is to be found at page 11 of the paper-book. The account is thus stated at lea[st] No. 52 of *roknr bahi*: —

"Dated *Sawan Sudi* 3, *Sambat* 1967, Debited to Shib Dayal Mal-Jai Dayal Mal on account of three *hundis* for Rs 571-8-0 payable at Delhi."

Among these three *hundis* are to be found the two *hundis* referred to above. At pages 31—37 of the paper book are printed certain letters which go to show that after the alleged dissolution correspondence was carried on in the name of the new firm "Narain Das-Shib Dayal."

Ram Saran Das, the defendant No. 5 in this case, was examined as plaintiff's witness before the local Commissioner appointed in the previous case and he made the following statement on this point:—

"The style of the shop was changed after the dissolution of the partnership. It was newly styled as 'Narain Das Shib Dayal,' and we have been receiving letters from Shib Dayal addressed to the said name. Panna Lal, the general agent of the plaintiffs, carried on joint business with Shib Dayal."

Taking this evidence along with the evidence relating to the purchase of the *hundis* above mentioned there can be no reasonable doubt on the point that the old firm of Shiv Dayal-Jai Dayal had ceased to exist, and that the shop had assumed a new name of 'Narain Das-Shib Dayal,' and that it was carried on solely by Shib Dayal himself. The defendants Nos. 3 to 9 have no concern with it. Even if it be admitted for a moment that the business of the new firm was carried on by Shib Dayal under its old name the retiring partners cannot be made liable for any transaction entered into after the dissolution In the case of *Rahimtulla Ishak* v. *Jhamatmal Chainrai* (1) it was held that "where *A* and *B* carried on business as partners under the name and style of *A B*, and *B* subsequently retired from the partnership, but the business was continued by *A* under the old name the fact that "the business was carried on in the old name did not make *B* liable for the transactions subsequent to his retirement." A similar rule was laid down in the case of *Chand Mal* v. *Ganga Ram* (2) where it was held that "the mere fact that the continuing partner was allowed to carry on business in the old firm's name,... would not render the retired partner liable...for debts contracted by the firm long after his retirement therefrom."

(1) 3 Ind. Jas 145; 3 B. L. R. 140,
(2) 78 P. R. 1903.

In fact Mr. Raj Krishen has not seriously contested the correctness of the argument of Mr. Tek Chand on this point. He has, however, argued that as no notice was given to the plaintiffs of this dissolution they continued to deal with Shib Dayal under the impression that the old firm continued and that, therefore, the defendants, Nos. 3 to 9 are liable for the debt in accordance with the provisions of section 264 of the Indian Contract Act. We have, therefore, to decide whether the rule contained in the above section helps the plaintiffs under the circumstances of the present case. The wording of section 264, however, does not support this contention. The section provides that "persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution." The expression "persons dealing with a firm" indicates only such persons who have been in the habit of dealing with the firm previously. The section does not contemplate such persons who deal with a firm for the first time after the retirement of some of the partners. This view of the section is supported by the view expressed by a Division Bench of the Punjab Chief Court in *Chand Mal* v. *Ganga Ram* (2), where the learned Judges held that "section 264 of the Contract Act does not cover the case of a person dealing with a firm for the first time after a change from its original constitution, so as to make a partner who had already retired liable." The same rule was laid down by Mr. Justice Beaman of the Bombay High Court in the case of *Giovani Gorio* v. *Vallabhaas Kalianji* (3). The rule is summed up in the head-note thus:—

"The expression 'persons dealing with a firm' in section 264 of the Indian Contract Act, means persons who have been in the habit of dealing with, and at the time of the dissolution were contemplating further dealing with, the firm on the faith of the firm remaining the same as that with which their dealings commenced."

On the authorities, therefore, the defendants Nos. 3 to 9 cannot be made liable for the debt in suit for want of notice as contemplated by section 264 of the Indian Contract Act. In this case, moreover, there is evidence that the plaintiffs had notice of the dissolution of the partnership. Admittedly Panna Lal was the sole manager of the firm, and he had full knowledge that the dissolution of the partnership had taken place. Their own witness, Rala Ram, stated in his deposition before B. Mula Ram, local Commissioner, on the 5th October 1916, that "in the month of *Sawan* 1908 or 1909 I along with Shib Dayal went to Chint Puri to attend the fair of goddess. From the fair I came back to the shop of Shib Dayal Jai Dayal at Multan Cantonment. But Shib Dayal reached Multan Cantonment *via* Phagwara two or three days after my arrival. When I enquired of Shib Dayal about the reason for the delay (in his arrival) he said that he had stayed at Phagwara owing to the work connected with the partition of the shop at Multan Cantonment. On an enquiry by me from Shib Dayal about the partition he said that he had effected a partition. At that time Panna Lal, agent of the plaintiffs, was also present at the shop 'Shib Dayal Jai Dayal'. Two or three other men whose names I do not remember were there as well. In my presence Panna Lal enquired of Shib Dayal as to how he had made a settlement about partition. Shib Dayal then replied that that was a private matter, and that a partition was effected as was considered proper." This is to be found printed at page 91 of the paper-book. In this case it is, therefore, idle to contend that no notice was given. Moreover, as laid down in the case of *Rahimtulla Ishak* v. *Jhamatmal Chainrai* (1) "section 264 of the Contract Act is an illustration of a particular form of estoppel by conduct, and...a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of notice excited in him a belief which caused him to do something that he would not otherwise have done. The section must not be construed as an absolute proposition of law, but must be read with section 115 of the Evidence Act." Nothing has been established in this case to show that the defendants Nos. 3 to 9 are estopped form asserting that they are not liable for the debt which was admittedly incurred by Shib Dayal after the dissolution.

After a careful consideration of all the facts of the case and the law applicable to it we have come to the conclusion that the firm of Shib Dayal-Jai Dayal was dis-

(3) 30 Ind. Cas. 864; 17 Bom. L. R. 762.

solved in 1908, and from that time onward, Shib Dayal had become the sole owner of the new firm and that Panna Lal, the general agent of the plaintiffs, had full knowledge of the dissolution, and that in all probability the plaintiffs had notice of the fact through him. We further have come to the conclusion that the plaintiffs never had had any previous dealings with the firm of 'Shib Dayal Jai Dayal.' In this view we must uphold the decree of the Court below. We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 947 OF 1920.

June 1, 1922.

Present :—Justice Sir Thomas Richardson, Kt., and Mr. Justice Suhrawardy.

Raja BHUPENDRA NARAIN SINHA BAHADUR—PLAINTIFF—APPELLANT

versus

MIDNAPORE ZEMINDARY COMPANY, LIMITED—PRINCIPAL DEFENDANT AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Cess Act (IX B. C. of 1880), s. 41, power of parties to contract themselves out of—Kabuliyat, *construction of*—*Ambiguity*—*Conduct of parties*—"Rajaswa," *meaning of*—*Bengal Tenancy Act (VIII of 1885), ss. 3, 158*—*Rent, whether includes cess*—*Dispute as to amount of cess annually payable*—*Appeal, second.*

The plaintiff was the proprietor of a Zemindari in the entirety of which the defendant held a Putni lease evidenced by a *kabuliyat* executed by his predecessor in 1858 the terms of which were confirmed and ratified by the defendant in 1904. The *kabuliyat* contained a clause to the following effect:—"If there be any demand on the Zemindari for any amount on account of '*Rajaswa*' or if any order is passed, then I shall without any objection abide by it and pay my rent along with it." Under section 41 of the Cess Act of 1880 the total amount of cess payable by the Zemindar to the Government was Rs 95 and odd while the amount annually payable by the *putnidar* to the Zemindar was under the same section Rs. 80 and odd. The defendant had regularly paid the latter amount to the Zemindar In a suit to recover the difference between the larger and the smaller sum :

Held, (1) that as the provisions of section 41 of the Cess Act were subject to any special provisions contained in a contract between the parties the defendant as *putnidar* was liable to pay to the Zemindar the whole amount payable by the latter to the Government: [p 938, col]

2 that the word "*Rajaswa*" as used in the *kabuliyat* was wide enough to include any imposition or levy payable to the State and was, therefore, wide enough, in its natural meaning in the context in which it was found, to include cess payable under the Cess Acts of 1880 and 1881. [p 939, col 2]

3 that the dispute between the parties was one as to the amount of rent annually payable within the meaning of section 158 of the Bengal Tenancy Act, and consequently a second appeal was not barred under that section. [p. 939, col .]

Where there is any real ambiguity in a clause contained in a document, it is open to the Courts to have regard to the conduct of parties and to the construction of the clause upon which they have acted during a long course of years. [p 939, col 1.]

Apart from any question of ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule, that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. [p. 939, col. 1.]

A "demand from the Zemindar" is not necessarily the same thing as "a demand on the Zemindari" But a demand from the Zemindar of an impost payable by him as the superior landlord in respect of the lands comprised in his estate is a demand on the Zemindari. [p. 939, col. 2.]

Rent as defined in section 3 of the Bengal Tenancy Act includes cess Therefore, where a dispute between the parties relates to the amount of cess annually payable, second appeal is competent under section 153 of the Bengal Tenancy Act. [p. 939, col 2.]

Appeal against a decree of the District Judge, Murshidabad, dated the 28th of January 192 , affirming a decree of the Munsif, Second Court at Berhampore, dated the 23rd of June 1919.

FACTS appear from the judgment.

Mr. *U N Sen Gupta* (with him Babu *Kshitish Chandra Chakrabarty*, for Babu *Probodh Kumar Das*), for the Respondents, took a preliminary objection that no second appeal lay under the provisions of section 153 of the Bengal Tenancy Act as the claim was only for rupees sixty-five and odd.

Babu *Nalendra Nath Roy* (with him Babu *Pramatha Nath Bandopadhya*, for Babu *Priya Sankar Mazumdar*), for the Appellant —There is no substance in the preliminary objection, for my claim is for cesses on the basis of a

kabuliyat. Under the Bengal Tenancy Act rent includes cesses. The present suit is thus one in which the amount of rent annually payable is in dispute. It, therefore, comes within the terms of the proviso to section 153 of the Bengal Tenancy Act and the present appeal is perfectly competent.

As regards the merits, the decision of the point in dispute depends on the correct interpretation of the terms of the *putni kabuliyat*. Under the terms of the contract the respondent undertook to pay anything which might be payable in future by the Zemindar on account of *Rajaswa*. Reads section 41 of the Cess Act. The provisions of this section are subject to any special provisions contained in the contract between the parties. The *putnidar* can contract himself out of his rights under the section. See *Gobinda Chandra* v. *Lalit Mohan Roy* (1). The word '*Rajaswa*' as used in the *kabuliyat* is wide enough to include cess payable by the Zemindar under the Cess Acts of 1871 and 1880.

Mr. *U. N. Sen Gupta*, for the Respondent.—The question is, was it possible for the executant of the *kabuliyat* in 1858 to contract anything about the Cess Act before the Act came into existence? Obviously at the time of the execution of the *kabuliyat* nothing about cesses was in contemplation of the parties and consequently no question of contracting out of the rights under section 41 of the Cess Act can arise. The next question is whether *Rajaswa* can mean anything other than revenue. I submit not. Even if it be assumed that there is some ambiguity as to the meaning of the word as used in the *kabuliyat*, the conduct of the parties is the most important element to help us to arrive at a correct interpretation of the document. Refers to *Umesh Chandra Roy* v. *Surendra Chandra Dutta* (2). Lastly, "a demand from the Zemindari" is not necessarily the same thing as "a demand on the Zemindari" within the meaning of the clause in the *kabuliyat* in dispute.

Babu *Mohendra Nath Roy* was not called upon to reply.

JUDGMENT.—The plaintiff in the second appeal is the proprietor of a Zemindari, in the entirety of which the defendant Company holds a *putni* lease. The lease is evidenced by a *kabuliyat* executed by the predecessor of the Company in the year 1858. The terms of the lease were confirmed and ratified by the Company by an *ekrarnamah* executed on its behalf on the 2nd Falgoon, 1314, (February 1908), by which the Company agreed to abide by and conform to the terms and conditions embodied in the *pattah* and *kabuliyat* of the original *putni* settlement. The suit was brought for the recovery of an amount alleged to be due as the balance of Road and Public Works cesses payable for the four years 1322 to 1325. Under section 41 of the Cess Act of 1880 the total amount of the cess payable by the Zemindar to the Government is Rs. 95-9-6 while the amount annually payable by the *putnidar* to the Zemindar is under the same section Rs. 80-6-3. The Company has regularly paid the latter amount to the Zemindar and the suit is for the balance still due if the Company ought to have paid the larger sum.

It is conceded that it is open to the parties to a *putni* lease to contract themselves out of the provisions of section 41 of the Cess Act: in other words, the provisions of that section are subject to any special provision contained in the contract between the parties. The point at issue and the arguments advanced on either side are clearly and concisely stated by the learned Judge in the judgment from which this appeal is brought. "The main question in appeal," he says, "is that of the correct interpretation of the terms of the *putni kabuliyat*. The *kabuliyat* was executed by a predecessor in-interest of the Company in favour of the then Zemindar in the year 1858, that is, about 13 years before the passing of the Cess Act." The learned Judge was referring to the first Cess Act which was passed in 1871. He continues: "The clause relied on by the plaintiff has been translated thus: 'If there be any demand on the Zemindari for any amount on account of *Rajaswa* or if any order is passed, then I shall without any objection abide by it and pay my rent along with it (the new amount that is)'". It is conceded before us that this is a substantially correct translation of the clause in the *kabuliyat*, which is in Bengali. The learned Judge goes on,—"The plaintiffs' contention is that the annual demand of Rs. 59-9-6

(1) 33 Ind. Cas. 352; 22 C. L. J. 571.
(2) 49 Ind. Cas. 8; 29 C. L. J. 6 at p. 10.

imposed under the Cess Act on the Zemindar was the demand for a new amount on account of *Rajaswa* within the meaning of the above clause, and as such payable in its entirety by the *putnidar*. On behalf of the defendant Company it is contended that a demand from the Zemindar is not the same thing as "a demand on the Zemindari," that the latter term includes all demands on the various subordinate interests comprised in the Zemindari and that in its application to the parties in the present suit it must be confined to the demand that may lawfully be made by the Zemindar from the *putnidar*. It is also contended that the term *Rajaswa* does not cover a demand under the Cess Act."

The learned Judge does not himself express any opinion as to the meaning of the term '*Rajaswa*.' He agrees, however, with the Trial Court in the view that the clause as a whole is ambiguous. Approaching the case in that way the learned Judge like the learned Munsif has attached great importance to the fact that for over 40 years the plaintiff and his predecessor were content to accept from the Company and their predecessor the smaller amount due under the provisions of section 41 of the Act. I quite agree that if there is any real ambiguity in the clause as it stands in the *kabuliyat*, it is open to the Courts to have regard to the conduct of the parties and to the construction of the clause upon which they acted during this long course of years. Such construction hardly amounts to "*contemporanea expositio*" because it does not go back to the creation of the *putni* but relates to a state of things which came into existence some years later at a time when the terms of the original agreement might have been forgotten or overlooked. Nevertheless if the meaning had been doubtful, assistance might have been sought from the conduct of the parties. But apart from any question of ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnished in itself no reason why the Courts should not follow the general rule, that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. It is not suggested that the Company has acquired a right by limitation, or by anything in the nature of binding agreement to pay cess at the lower figure.

The question then is whether there is any real ambiguity in this clause and it turns in the main on the import of the word *Rajaswa*'. The Munsif says: "Taking it literally it has the wide sense of anything payable to the King, although it is commonly used in the sense of rent or revenue payable." In my opinion—and I understand my learned brother is of the same opinion—the word *Rajaswa* as used in the document is wide enough to include any imposition or levy payable to the State and is, therefore, wide enough in its natural meaning in the context in which it is found to include cess payable under the Cess Acts of 1871 and 1880. It must be borne in mind that the *putni* tenure held by the Company extends to the whole of the estate in respect of which revenue and cesses are payable by the Zemindar to the Collector on behalf of the Government. It may well have been the intention of the parties that the *putnidar* should relieve the Zemindar of all additional burden in the nature of a tax imposed on the estate as such.

As to the contention that "a demand from the Zemindar" is not necessarily the same thing as "a demand on the Zemindari" within the meaning of the clause in dispute, that is no doubt true, but not in a relevant sense. Income tax, for instance, might be a demand from the Zemindar, but not a demand on the Zemindari. On the other hand, a demand from the Zemindar of an impost payable by him as the superior landlord in respect of the lands comprised in his estate is, as it seems to me, a demand on the Zemindari.

It follows that, in my opinion, the Company, as *putnidar*, is liable to pay to the Zemindar the whole amount payable by the latter to the Collector. That seems to me to be the meaning of the clause and I can see no reason why we should not give effect to that meaning.

I should add that the preliminary objection suggested rather than argued that no second appeal lay in this case under the provisions of section 153 of the Bengal Tenancy Act is concluded by the terms of the section and by authority. Rent as defined in the Bengal Tenancy Act includes cess and the dispute between the parties to this suit is,

therefore, a dispute as to amount of rent annually payable.

The result is that, in my opinion, this appeal succeeds. The judgment and decree of the Court below should be set aside and the suit should be decreed with costs throughout.

B. N.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 37 OF 1921.

August 29, 1922.

Present:—Mr. Koval, A. J. C.

RAM SINGH RAJPUT—DEFENDANT—APPELLANT

versus

MURTIBAI—PLAINTIFF—RESPONDENT.

Probate and Administration Act (V of 1881), ss. 67, 77—Probate, grant of—Additional District Judge acting as District Judge, powers of—Probate application—Verification, whether essential—Will, executor not appointed under—Probate grant of—Letters of Administration.

Under the Probate and Administration Act there can be no District Delegate except by appointment by a High Court an Additional District Judge, in the absence of such appointment, cannot act as a District Delegate and grant Probates in a contentious case. But when he is exercising powers as a District Judge he can grant Probate or Letters of Administration in all cases whether there is contention or not [p. 940, col 2: p. 941, col. 1]

The provision about the verification of an application for Probate by an attesting witness is directory and not mandatory and an omission of the verification is not fatal to the Probate proceedings. [p. 944, col 1.]

If no executor is appointed under a Will, Probate should not be granted but only Letters of Administration with the Will annexed as provided in section 77. [p. 941, col. 1.]

Appeal against the decision of the Additional District Judge, Chhindwara, dated 9th September 1921, in Miscellaneous Judicial Case No. 38 of 1919.

Mr *A. V. Wazalwar*, for the Appellant.

Mr. *M Gupta*, for the Respondent.

JUDGMENT.—The lower court has granted Probate to Murtibai, the respondent, in respect of Will of his immoveable property executed by one Tekchand, a petition writer of Chhindwara. It has also held an oral Will by Tekchand in respect of his moveable property in favour of Murtibai proved and decided that she has a right to obtain the moveables left her under that Will. The appellant Ramsingh had opposed the application. He objected that the application was not in proper form, not being subscribed by the appellant's Pleader or verified by the attesting witness. He denied that the written Will was executed by the deceased while in his proper senses and sound state of health and mind. The oral Will was understood by the parties to have been denied, though there is no express denial on the record. The appellant alleged that he was the illegitimate son of Tekchand who, though a Vaishya, had become degraded to a Sudra and that he was entitled to succeed to Tekchand's property. Later on he pleaded that Tekchand's mother was a Sudra and, therefore, Tekchand was of that caste. He himself applied for Letters of Administration in respect of the immoveable property of Tekchand. Murtibai denied that the appellant was the illegitimate son of Tekchand or that Tekchand was a Sudra. The lower Court has held the oral and written Wills proved. It has found that the appellant is not the illegitimate son of Tekchand and that Tekchand was not a Sudra.

The first objection urged in appeal is that there was no special prayer for Probate of the written Will. The application is artistically worded but it is clear that Murtibai sought Probate of the Will with respect to the immoveable property. The second of the first set of issues refers to the written Will.

It is next argued that the additional District Judge had no jurisdiction, as being a District Delegate he had no power to grant Probate or Letters of Administration in contentious cases. This contention is based upon the premise that as a District Judge or a District Delegate alone can grant Probate, the Additional District Judge who is not a District Judge must have been exercising powers as a District Delegate. There can be no District Delegate except by appointment by the High Court, and it is not shown that the Additional District Judge was appointed such. He was exercising powers as a District Judge and could

grant Probate or Letters of Administration in all cases whether there was contention or not.

It is next contended that the petition was not verified by an attesting witness as required by section 67 of the Probate and Administration Act. No authority is cited to show that the proceedings of the lower Court are invalidated by this omission. The section requires such verification if the witness is procurable. This shows that the provision is directory and not mandatory and the omission can be cured. If the matter had been pressed the omission could have been supplied by taking the witness's attestation on the Will. I do not consider the omission a fatal one.

It is next said that the application does not mention that the petitioner is appointed the executor and that Murtibai is not appointed executor by the Will. This is true. The lower Court should not have granted Probate but only Letters of Administration with the Will annexed as provided in section 77.

It is urged that the execution of the oral Will has not been proved. The evidence to prove this Will is not of the very best kind but as far as it goes it proves that Tekchand wished to give his moveables after his death to Murtibai. I see no reason to distrust Ramji (A. W. No. 1) and Sheikh Miya (A. W No. 2) who depose to this fact. Sheikh Miya states that Tekchand repeated his wishes more than once, the last time being a month or a month and a half before his death. A. W. No. 1 has said that the disposition was made six months before Tekchand's death and that Sheikh Miya was then present. It is possible that Sheikh Miya has got mixed up about the dates and that there is no real discrepancy between the two witnesses as regards the date. The Judge of the lower Court before whom the witnesses were cross-examined has believed them and I see no reason to differ from him.

As regards the written Will it is not now disputed that Tekchand executed it, but it is contended that it is not proved that he was of sound disposing mind at the time. It is true Murtibai's witness No. 3, Chunnilal, in cross-examination says that the brain of Tekchand was deranged, that he could not identify persons on the date of the Will and that he was scarcely able to hold the pen. But it seems to me that the witness had entered the box determined to go against Murtibai, and it appears to have been settled beforehand that statements adverse to her should have the appearance of having been extracted from him against his Will in his cross-examination. The witness has himself in his signature on the Will stated in English that the executant had signed before him in good health. The man is a bit of a medical practitioner and if his evidence in Court is true he deliberately added a false statement to his signature on the Will. Narayanrao (A. W. No. 4) in Ramsingh's case is another attesting witness. He, too, like Chunnilal, though in a lesser degree, attempts to damage Murtibai's case in his cross-examination. This witness also has said in his signature that Tekchand signed the Will before him in possession of his senses. Witness Waman Kondu Phatak, a medical practitioner who was examined by Ramsingh, attended Tekchand in the illness which ended in his death. He states that he was suffering from influenza and pneumonia from the 3rd to the 9th October 1918 when he died and was under his treatment all along. According to him Tekchand was alright up to the 5th October and was talking with him On the night of the 5th October brain symptoms set in. From the 2nd to the 5th he was quite in his senses and his mind and brain were good. The witness produced his prescription to show that it contained no medicine for the brain till the 6th. I prefer this witness's evidence and the statements of Chunnilal and Narayanrao in their signatures on the Will to the statements of the two persons last mentioned as witnesses. There is also no reason to disbelieve Mohanlal, the scribe who states that the testator dictated the contents of the Will and was conscious and in a state of mind and health to understand what he was doing. I hold that it has been proved that Tekchand was of sound disposing mind when he executed the Will.

The last point urged is that it should have been held that Tekchand was a Sudra. It is said that the evidence of A. W. No 4 Thamiabai, A. W. No. 3 Gadiram and N. A. W. No. 1 Noshekhan proves that Tekchand's mother was a Sudra. Thamiabai very

casually states that Tekchand's mother was an Ahiran. She is not corroborated on the point. Witness Gadiram states that Tekchand's father was a Bania and his mother was of a different caste. Nosherkhan states that he does not know what caste Tekchand's mother belonged to but that she was of a different caste Neither of the two witnesses last mentioned state that Tekchand's mother was a Sudra. This evidence is wholly insufficient to prove that Tekchand himself was a Sudra. Ramsingh is, therefore, not the heir of Tekchand.

The Probate is cancelled. The case is remanded to the District Judge to grant Letters of Administration with the Will annexed as provided by section 77 of the Probate and Administration Act. As the appeal has for all practical purposes failed the appellant will pay the respondent's costs and bear his own. Pleader's fee Rs. 50.

G. R. D.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 134 OF 1922.

June 6, 1922.

Present :—Mr Justice Coutts and Mr Justice Adami.

BASDEO NARAIN SINGH AND OTHERS—DEFENDANTS—PETITIONERS

versus

HARAKH NARAIN SINGH AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 8—Plaintiff appearing when case first called for hearing—Adjournment for short while—Plaintiff not appearing when case again taken up—Dismissal of suit—Law, applicable.

Where on a date of hearing the plaintiff and his Pleader both appear and ask for a little time which is granted but fail to put in appearance when the case is again taken up on the same date, and the suit is dismissed, the dismissal is one under O. IX, r. 8 of the Code of Civil Procedure, there being no appearance on behalf of the plaintiff,

Lalji Sahu v. *Lachmi Narain Singh*, 47 Ind. Cas. 27; 3 P. L. J. 355 and *Ramdhan Tewari* v. *Bishun Pragash Narain Singh*, 54 Ind. Cas. 715; 5 P. L. J. 17; 1 P. L. T, 156, followed.

Civil Revision.

Mr. *Mahabir Prasad*, for the Petitioners.

Mr. *Shiveshwar Dayal*, for the Opposite Party.

JUDGMENT.

COUTTS, J.—The facts of this case shortly are that on the date fixed for hearing the plaintiff and his Pleader were present in Court and an application was filed for time. This was rejected whereupon the Pleader who was the junior Pleader saying that he had no instructions asked for time to go and consult his senior. The Court granted half an hour's time and again took up the case. No one appears to have been present and the suit was dismissed. Subsequently an application for restoration under O. IX, r. 9 was made and rejected. An appeal was preferred to the Subordinate Judge and the application allowed and the suit restored.

This application in revision has been made by the defendant and the contention is that the dismissal was not under O. IX, r. 8. The question for decision is whether in the circumstances there was an appearance of the plaintiff or not. Similar cases to the present case decided in this Court are the cases of *Lalji Sahu* v. *Lachmi Narain Singh* (1) and *Ramdhan Tewari* v. *Bishun Pragash Narain Singh* (2) in which it was held that the plaintiff had not appeared. The present case is on all fours with the above decisions and the application is dismissed with costs.

Hearing fee two gold *mohurs*.

ADAMI, J.—I agree.

R. N. *Application dismissed.*

(1) 47 Ind. Cas. 27; 3 P. L. J. 355.

(2) 54 Ind, Cas. 715; 5 P. L. J. 17; 1 P. L. T, 156.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 24 OF 1921.

December 6, 1921.

Present :—Justice Sir William Ayling, KT., and Mr. Justice Venkatasubba Rao.

DAKOJU SUBBARAYUDU—APPELLANT

versus

MUSTI RAMA DASU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r.

DAKOJU SUBBARAYUDU v. MUSTI RAMA DASU.

3, 10—*Preliminary decree in mortgage-suit—Death of decree-holder—Application to bring representative on record—Limitation—"Right to sue," meaning of.*

Where after obtaining a preliminary decree in a mortgage-suit, the plaintiff dies, an application to bring his legal representatives on to the record must be made within the period prescribed by sub-r. 1 of r. 3 of O. XXII of the Civil Procedure Code, otherwise the suit will abate under sub-r. (2) of that rule. Such a case does not fall within the purview of r. 10 of that Order.

Bhugwan Das Khettry v. *Nilkanta Ganguli*, 9 C. W. N. 171, explained and distinguished.

The right to sue mentioned in sub-r. (1) includes the right to proceed with the suit until the latter terminates, and, in a mortgage-suit the right to sue includes the right to obtain a final decree after the passing of a preliminary decree.

Appeal against an order of the Court of the Subordinate Judge, Cocanada, dated 23rd February 1920, in Appeal Suit No. 37 of 1919, preferred against an order of the Principal District Munsif, Cocanada, in Execution Appeal No. 1528 of 1919.

FACTS appear from the judgment.

Mr. *C. Rama Rao*, for the Appellant.—The suit abated when no application was made by petitioner to bring himself on record within the time allowed. O. XXII, r. 3 applies. The petitioner took no action for nearly three years after the passing of the preliminary decree. The right to sue means the right to continue the suit. In this case petitioner must have applied for a final decree within time.

Mr. *G. Lakshmanna*, for the Respondent, relied on *Bhugwan Das Khettry* v. *Nilkanta Ganguli* (1) for the position that the application was not barred.

JUDGMENT.—In this suit one Venkamma sued on a mortgage and obtained a preliminary decree. Subsequent to this she died on 28th April 1916 leaving a Will by which the present petitioner claims to be entitled to succeed to her interests in the mortgage. The preliminary decree was passed on 30th March 1916 and the period for redemption expired on 30th July 1916. No action was taken by the petitioner till 26th March 1919 when he filed the present petition asking to be brought on record as the legal representative of Venkamma and to be given a final decree. The question is, whether the application can be dismissed as time-barred.

(1) 9 C. W. N. 171.

The District Munsif held that it should be on the ground that the suit has abated under O. XXII, r. 3. The Subordinate Judge, on appeal, held that r. 10 of the same Order applied and that the application was not time barred. In our opinion, the District Munsif is right and the subordinate Judge is wrong. R. 10 of O. XXII admittedly only applies to cases which do not fall under the preceding rules of the same Order and the matter, therefore, turns on whether the case falls under r. 3. This rule runs as follows (omitting superfluous words): "Where a sole plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Where within the time limited by law no application is made under sub-r. (1) the suit shall abate ..." It seems to us that every one of these words applies to the present case. The plaintiff died after obtaining a preliminary decree and the respondent must contend that the right to sue survived to him; otherwise he has no *locus standi* in the matter at all. The right to sue, obviously from the terms of the rule, includes the right to proceed with the suit until the latter terminates, and, in the case of a mortgage suit, where a preliminary decree and a final decree are both necessary the right to sue must include the right to obtain a final decree after the passing of a preliminary decree. The case, therefore, clearly falls within the purview of the section, and as the plaintiff admittedly did not apply to be made a party as provided in sub-r. (1) within the time allowed, the suit must be held to have abated under sub-r. (2).

We have been referred on respondent's behalf to the judgment in *Bhugwan Das Khettry* v. *Nilkanta Ganguli* (1). The facts of the case are distinguishable in that there a final decree had been passed and we need only say that, if any of the remarks in the judgment were intended to conflict with the view of the applicability of the rules which we have just enunciated, we must respectfully dissent from them.

We must, therefore, set aside the order of the Subordinate Judge and direct the

dismissal of the application with costs throughout.

W. C. A.

Order set aside.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 146 OF 1921.

May 2, 1922.

Present:—Justice Sir Jwala Prasad, KT., and Justice Sir John Bucknill, KT.

LACHMAN LAL PATHAK—DECREE-HOLDER—APPELLANT

versus

BALDEO LALL THATHWARI—JUDGMENT DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (f)—Jatri Bahis of Gayawal—Attachment and sale.

The *Jatri Bahis* of a Gayawal merely contain entries as to the names and addresses of the pilgrims who deal with him and can be used only by him in order to perform personal service to them. As such, they come well within the provisions of section 60 *(f)* of the Civil Procedure Code as property not capable of attachment or sale in execution of a decree.

The *Jatri Bahis* are the stock-in-trade and appertain to the *Gaddi* of a Gayawal and may be heritable but are not attachable or saleable for that reason. The mere fact that they possess a market-value does not necessarily mean that they are saleable.

Lachman Lal Pathak v. *Baldeo Lal Thathwari*, 42 Ind. Cas. 478 2 P. L. J. 705; 3 P. L. W. 186; (1918) Pat. 50, followed.

Appeal against an order of the District Judge, Gaya.

Mr. *Kailaspati* for the Appellant.

Mr. *Haribhuan Mukherjee*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—There does not seem to be any substance in this appeal. The *Jatri Bahis* of the judgment debtor are evidently not saleable. They contain merely entries as to the names and addresses of the pilgrims who deal with the judgment-debtor and as such they can be used only by him in order to perform personal service to the pilgrims. The entries in the books also enable the judgment debtor to claim that the pilgrims mentioned therein or their family members and relations should utilise the service of the judgment-debtor while visiting Gaya on religious pilgrimage. Therefore, these books embody the right or claim of the judgment-debtor of personal service. Beyond that the book is of no use, and as a record of the claims of personal service they seem to come well within clause *(f)* of section 60 as property not capable of attachment or sale in execution of a decree. These books are, no doubt, as held in the case between the parties in *Lachman Lal Pathak* v. *Baldeo Lal Thathwari* (1), stock-in trade and appertain to the *gaddi* of the Gayawal judgment-debtor who carries on the office or business of a Gayawal, namely, priest to the pilgrims who visit Gaya on pilgrimage. The contention of the learned Vakil on behalf of the appellant that, as these books have been held in the aforesaid case between the parties as valuable assets and as such heritable, they must be deemed to be attachable also. I do not think there is any force in this contention. The priestly office may be and is generally heritable, but is not saleable or attachable for that reason.

Then it is contended that these particular books have got marketable price and it is strongly urged that the fact that the decree-holder-appellant is willing to pay fancy price for them, they must be held to be saleable in the present case. That obviously is no criterion to determine whether a particular article is saleable or not. In the present case it is certainly not, for behind this anxiety to purchase the *Bahis* there is the previous litigation between the same parties in which these books along with the Gayawali *Gaddi* in question were claimed by the decree-holder as well as by the judgment-debtor. The decree-holder was not given the *Bahis* and now he wants to seize the *Bahis* in execution of his decree in order to deprive the judgment debtor of his right of enjoying the benefit of the office by means of these books.

Agreeing with the views of the Court below I dismiss the appeal with costs.

BUCKNILL, J.—I agree.

N. K.

Appeal dismissed.

(1) 42 Ind. Cas. 478; 2 P. L. J. 705; 3 P. L. W. 183; (1918) Pat 50.

EMPEROR *v.* ABDUL HAMID.

PATNA HIGH COURT.
SPECIAL BENCH.

GOVERNMENT APPEAL No 4 OF 1922.

August 3, 1922.

Present:—Justice Sir S. M. Mullick, KT., Mr. Justice Coutts and Mr. Justice Das.

EMPEROR—APPELLANT

versus

DR. ABDUL HAMID—ACCUSED—RESPONDENT.

Police Act (V of 1861), ss. 30, 30A, 32, scope of—Penal Code (Act XLV of 1860), s 145, conviction under—Essentials—General notification prohibiting procession without license—Notification by Executive Authority, whether law—"Resistance", meaning of—Power to prohibit procession whether incident to power to regulate—Power of Police to prohibit procession—Rule and enactment, difference between—"Law," meaning of—"Execution of law," meaning of Offence created by Statute—Indictment under general law.

Section 30A of the Police Act only applies where there is a violation of the conditions of a license granted under section 30 3 of the Act, not where a procession is formed without a license. [p. 948, col. 2.]

Per *Mullick and Coutts, J.*—In order to secure the conviction of an accused under section 145 of the Indian Penal Code, some formal evidence should be given to prove a common object to resist the execution of an order promulgated by a lawful authority, and the accused should be given an opportunity of meeting the case in the Trial Court [p 947, col 2.]

The words of section 30 of the Police Act are sufficiently general to enable a Superintendent of Police to issue a general notification containing a prohibition, without any limit of time, against convening or collecting assemblies or directing or promoting processions without a license and any person contravening the terms of such notice is punishable under section 32 of the Act A person is free to join an assembly or a procession, which has already been collected, if he has no notice that the convener or promoter has omitted to take out a license but if, after becoming aware of this fact, he persists in remaining with the assembly or procession he will be said to share the common object of such person to resist the execution of the notification [p. 946, col. 2; p. 947, col. 1.]

When a notification is issued by an Executive Authority in exercise of a power conferred by Statute, that notification is as much a part of the law as if it had been incorporated within the body of the Statute at the time of its enactment. A notification, issued in compliance with section 30 of the Police Act, is a law and certainly a legal process. It is immaterial if the wording of the notification is not in the exact language of the section so long as there is, on the whole, a substantial compliance and the public are in no error or doubt as to its purport. [p. 947, cols. 1 & 2.]

Resistance connotes some overt act: mere words without any intention of carrying them into effect, are not sufficient to prove an intention to resist. [p. 947, col. 1.]

Per *Das, J.*—Section 30 of the Police Act does not prohibit the common rights of a subject to form a procession on a public road or in a public street or a thoroughfare. [p. 949, col 2.]

A power to prohibit a procession is not incident to a power to regulate The power of licensing is a power to regulate not a power to prohibit. [p. 951, col 2.]

Rossi v. *Edinburgh Corporation*, (1905) A. C. 21; 91 L. T. 668 and *Toronto (Municipal Corporation of the City of)* v. *Virgo*, (1896) A. C. 88; 65 L. J. P. C. 4; 73 L. T. 449, referred to.

Under sections 30 and 30A of the Police Act, the Police have no power to prohibit a procession where the persons directing and promoting such procession decline to apply for a license, although there is such power where such persons take out a license and violate its conditions But the Police have no power to issue an order to have operation for a certain period, each case must be dealt with as it arises and discretion must be exercised by a District Magistrate on each occasion. [p. 952, col 2]

There is no difference between a rule and an enactment where there is a provision in the enactment that the rules shall be of the same effect as if they were contained in the Act; there is a wide difference between the two when there is no such provision. An order issued by a Superintendent of Police, under section 30 of the Police Act, cannot be regarded as law as there is no provision in the Act giving to such order the same effect as if it were contained in the Act. [p 951, col. 1.]

"Law" means something which is enforceable and not capable of being rejected by a Court as unreasonable or repugnant to the law of the land. Rules, regulations and bye-laws, which cannot be canvassed in a Court of Law on any ground, have the character of law and are in fact law. [p. 950, col. 1.]

"Execution of the law" means enforcing it, and to be lawful it must follow the procedure laid down in an Act. [p 955, col. 1.]

Resistance on the part of a person forming a procession must not be to the law but to the execution of the law. It means something more than non-submission and consists of an overt act showing an intention to make opposition to the execution of the law. [p. 955, col 2.]

Queen-Empress v. *Alibhai*, Rat. Un Cr. Cas. 412 and *Queen-Empress* v. *Husain*, 15 B. 564; 8 Ind. Dec. (N. S.) 380, referred to.

A person cannot be convicted under the Penal Code for an offence under the Police Act. Where a Statute creates a new offence which is not an offence at Common Law and imposes a penalty in respect of such offence, a person committing such offence can only be proceeded against under the Statute which creates the offence and cannot be indicted under the general law. [p. 956, col. 2; p. 957, col. 2.]

Reg. v. *Hall*, (1891) 1 Q. B. 747; 60 L. J. M. C. 124; 64 L. T. 394; 17 Cox C. C. 278, *Saunders* v. *Holborn District Board of Works*, (1895) 1 Q. B. 64; 64 L. J. Q. B. 01; 15 R. 25; 71 L. T. 519; 43 W R.26 59 J. P. 453 and *Clegg, Parkinson & Co.* v. *Early Gas Co.*, (1896) 1 Q. B. 592; 65 L. J. Q. B. 339; 44 W. R. 606, referred to.

Appeal by the Local Government under section 417 of the Criminal Procedure Code

against an order of acquittal passed on appeal by Mr. Foster, Judicial Commissioner, Chota Nagpur, setting aside the conviction under section 145, Indian Penal Code, and substituting therefor conviction under section 32 of the Police Act.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Appellant.

Messrs. *Athar Husain* and *Devaki Prasad Sinha*, for the Respondent.

JUDGMENT.

MULLICK, J.—This is an appeal preferred by the Local Government against the acquittal of Sheikh Abdul Hamid who was sentenced by the Deputy Magistrate of Palamau to 6 months' rigorous imprisonment for an offense under section 145, Indian Penal Code, but was acquitted on appeal by the Judicial Commissioner of Chota Nagpur. The learned Judge set aside the conviction under section 145, Indian Penal Code, but sentenced the accused to a fine of Re. 1 for an offence under section 32 read with section 30A of the Indian Police Act. It is admitted that the learned Judicial Commissioner has misconceived the facts and that section 30A has no application to this case. There is no question here of the disobedience of the conditions of any license issued by the Superintendent of Police.

What appears to have happened is this. On the 3rd January 1922 the Officiating Superintendent of Police issued a notice in the following terms:—

"Notice under section 30 of Act V of 1861.

"In pursuance of the powers vested under section 30 of Act V of 1861, I do hereby prohibit any processions, associations or assemblies started or formed by any person or any class of persons within the Municipal and Union area of this District (Palamau) other than under license granted by me, for a period of three months, as I consider such prohibition to be necessary for the preservation of the public safety".

That notice was duly served by proclamation and beat of drum, but on the 21st of January some 250 persons formed a procession through one of the streets of Daltonganj, which is the head quarters of the Palamau District, carrying flags and singing songs in disregard of the order of the Superintendent. A Sub-Inspector of Police directed the crowd to disperse and upon refusal to do so he arrested 24 persons of whom the accused was one.

The Deputy Magistrate, who tried the case, framed a charge under section 145, Indian Penal Code, but did not set out the common object of the unlawful assembly of which the accused was alleged to be a member.

The learned Assistant Government Advocate who appears on behalf of the Crown contends that, notwithstanding this omission, the accused had full notice at the trial of the common object upon which the charge was based and that the facts proved established a clear case under section 145, Indian Penal Code. He contends that the common object was to resist the execution of a law or legal process which is one of the common objects enumerated in section 141, Indian Penal Code. Now, section 30 of the Police Act, though not very happily worded, appears to mean this. The Superintendent of Police has to be satisfied that an assembly or a procession is, in the judgment of the District Magistrate, likely to cause a breach of the peace. He may then issue a notice upon the person convening or collecting the assembly or directing or promoting the procession to apply for a license.

It is contended that the Superintendent is not authorised to issue a general order but must call upon the convenor or promoter of the assembly or procession to take out a license for each occasion. In my opinion, the words are sufficiently general to enable the Superintendent to issue a general notification containing a prohibition against convening or collecting assemblies or directing or promoting processions without a license. The terms of the section are also wide enough to cover a prohibition without any limit of time. If the person or persons against whom the notice is directed convenes or collects an assembly or promotes or directs a procession without license, he or they will be punishable under section 32 of the Act. There is nothing in the Act which renders a person liable to punishment for joining an assembly or procession which has already been convened or collected if he has no notice that the convenor or promoter has omitted to take out a license; but if, after becoming aware that the person whose duty it was to take out a license has failed to

do so, he persists in remaining with the assembly or procession then it may, I think, be said that he shares the common object of such person to resist the execution of the Superintendent's order.

In the present case the evidence shows that the accused Abdul Hamid joined the procession after it had been directed to disperse; there is no evidence that he was aware that any breach of the notification had been committed; but if it could have been shown that he and four others of the assembly or procession were acting together with the common object that the person who had convened or collected the assembly, or directed or promoted the procession, should resist the execution of the Superintendent's order, then, I think, he would have come under the operation of section 141, Indian Penal Code. In my opinion this aspect of the case was not presented to the Deputy Magistrate at the trial and we cannot, under the circumstances, convict upon the evidence on the record.

But apart from this defect in the evidence three objections have been taken to the application of section 141, Indian Penal Code, which call for notice.

The first objection is that resistance implies something more than disobedience and that a mere intention to disobey will not suffice. I agree that resistance connotes some overt act and that mere words, when there is no intention of carrying them into effect, will not be sufficient to prove an intention to resist; but in the present case the conduct of the mob and their refusal to disperse at the command of the Police clearly constitute overt acts and establish a common object to resist the orders within the meaning of clause (2) of section 141, Indian Penal Code.

The next objection is, that the order of the Superintendent of Police cannot be called a law or legal process. The reply is that when a notification is issued by an executive authority in exercise of a power conferred by Statute, that notification is as much a part of the law as if it had been incorporated within the body of the Statute at the time of its enactment. The command is in every respect a command by the appropriate legislative authority. In the present case if the notification was in compliance with section 30 of the Police Act, then, in my opinion, it was a law and certainly a legal process.

This leads me to the third objection which is that the notification did not comply with section 30 of the Police Act. In my judgment, although the wording of the notification did not follow the exact language of clause (1) of section 30, there was on the whole a substantial compliance and the public of Daltonganj were in no error or doubt as to its purport.

In these circumstances I do not doubt that the accused might have been convicted under section 145, Indian Penal Code, if sufficient evidence had been given to prove a common object to resist the execution of the order; but there was no evidence on this point and the charge framed against him by the Trial Court did not even set out the common object of the unlawful assembly; and it is impossible to say that the accused had notice of the precise case which the prosecution were making against him.

Our attention has finally been drawn to section 127, Criminal Prosedure Code, and we have been asked to infer that the procession was likely to create a disturbance and to find that on refusal to disperse it became an unlawful assembly. Here again some formal evidence should have been given and the accused should have had an opportunity of meeting his case in the Trial Court.

We asked the learned Counsel for the Crown whether there was any evidence upon which it could be held that the common object of the unlawful assembly was to disobey such a lawful order as is contemplated by section 188 of the Indian Penal Code, but the learned Counsel's reply was in the negative.

The result is that owing to the irregular and defective manner in which the prosecution was conducted in the Trial Court, I must decline to restore the conviction under section 145, Indian Penal Code, nor do I think that having regard to the circumstances I ought to order a re-trial. The appeal will, therefore, be dismissed.

COURTS, J.—I agree with the judgment which has just been delivered by my learned brother.

DAS, J.—The material facts are these. On the 3rd January last, the Officiating Superintendent of Police of Palamau issued the follow-

ing notice under section 30 of the Police Act (Act V of 1861):—

"In pursuance of the powers vested under section 30 of Act V of 1861, I do hereby prohibit any processions, associations or assemblies started or formed by any person or any class of persons within the Municipal and Union area of this District (Palamau) other than under license granted by me, for a period of three months, as I consider such prohibition to be necessary for the preservation of the public peace and public safety."

On the 21st January a large number of persons, of whom the respondent was one, formed a procession without having taken out a license for the same, and refused to disperse though the Police repeatedly ordered them to disperse. The Police thereupon arrested a large number of persons including the respondent, and the learned Magistrate in due course convicted them under section 145, Indian Penal Code, and sentenced them to various terms of imprisonment. He sentenced the respondent to undergo rigorous imprisonment for six months and to pay a fine of Rs. 50 and further required him to execute a bond for Rs. 100 with two sureties, and in default to undergo simple imprisonment for six months. The respondent appealed to the Court of the Judicial Commissioner of Chota Nagpur, and that learned Judge set aside the conviction under section 145, Indian Penal Code, and the order under section 106, Criminal Procedure Code, but convicted the respondent under section 32 of the Police Act and sentenced him to pay a fine of Re. 1. The Local Government, being dissatisfied with the order of the learned Judicial Commissioner, has appealed to this Court.

The learned Judicial Commissioner, before whom the Crown was not represented, was obviously in difficulty in understanding how the respondent could be convicted under the Code for an offence committed under the Police Act. He assumed that the position of the Crown was that the procession having neglected or refused to obey the order to disperse given by the Police, became an unlawful assembly under section 30A (2) of the Act and could be proceeded against under the Code for being, or continuing to be members of an unlawful assembly. Assuming that to be the position of the Crown, the learned Judge came to the conclusion that though the procession might be "deemed" to be an unlawful assembly, the persons forming the procession could not be punished under the Code as members of an unlawful assembly. The learned Judicial Commissioner had probably in his mind that class of cases which has decided that where a person or a thing in a Statute is "deemed" to be something else he or the thing can only be regarded as that something else by a statutory fiction, but that in truth and in reality he is not that something else and consequently you can have recourse to the fiction for the purpose of the Statute which creates the fiction and for no other Statute. I confess that there is much to be said for the view of the learned Judicial Commissioner, but, in truth the question does not arise. Section 30A (1) of the Police Act only applies where there is a violation of the conditions of a license granted under section 30 (3), not where the procession was formed without a license. The learned Assistant Government-Advocate accepts the position that section 30A (2) of the Police Act has no application whatever, and it is, therefore, unnecessary to discuss whether the view of the learned Judicial Commissioner is right.

But it was insisted by the learned Assistant Government Advocate that the conviction under section 145 of the Indian Penal Code was nevertheless right, and that the respondent was a member of an unlawful assembly of five or more persons whose common object was, first, to resist the execution of a law, and secondly, to commit an offence. The form of the argument addressed to us by the learned Assistant Government Advocate raises a question of grave public importance; for no less a claim than this is put forward on behalf of the Crown, that a District Superintendent of Police or an Assistant District Superintendent may, by purporting to act under section 30 of the Police Act, prohibit an assembly or a procession, if the assembly declines to take out a license for such collection or procession and that the members of the procession by refusing to disperse, if ordered to disperse by the Police, make themselves liable not only under the Police Act for which the maximum sentence is

a fine of Rs. 200, but also under section 145 of the Indian Penal Code for which the maximum sentence is rigorous imprisonment for two years with a fine. So far as I know, the claim has never yet been put forward in any case that a person can be convicted under the Code for an offence under the Police Act; and before I accede to the argument which involves the personal liberty of the subject, I must be satisfied that the argument is well founded and that it rests on principle or is covered by authorities.

It was argued, in the first place, that the common object of the assembly was to resist the execution of the law. In order to succeed, the prosecution must establish, first, that there was a law which could be executed, secondly, that there was execution of that law, and thirdly, that there was resistance to the execution of that law. Now what was the law that was being executed? By "law" I understand

"a rule of civil conduct prescribed by the supreme power in a State commanding what is right, prohibiting what is wrong, and regulating matters in themselves indifferent" (Blackstone).

Now, is there any law, that is to say, a rule of civil conduct prescribed by the supreme power in the State, prohibiting a procession on the public roads, or in the public streets or thoroughfares? According to the learned Assistant Government Advocate there is, and he contends that it is to be found in section 30 of the Police Act. Section 30 of the Police Act, is in these terms:—

"(1). The District Superintendent or Assistant District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads, or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass".

"(2). He may also, on being satisfied that it is intended by any persons or class of persons to convene or collect an assembly in any such road, street, or thoroughfare, or to form a procession which would, in the judgment of the Magistrate of the District, or of the sub-division of a District, if uncontrolled, be likely to cause a breach of the peace, require by general or special notice that the persons convening or collecting such assembly or directing or promoting such procession shall apply for a license."

Now, I fail to see how section 30 of the Police Act can be read as constituting a prohibition of the common rights of the subjects to form a procession on the public roads or in the public streets or thoroughfare. No doubt it vests a discretion in the District Superintendent or the Assistant Superintendent to require the persons convening or collecting an assembly or directing or promoting a procession to apply for a license, though, at the same time, it imposes as a condition precedent for the use of the discretion the exercise of the judgment of the Magistrate of the District or of the sub-division of the District that the procession, if uncontrolled, is likely to cause a breach of the peace. But it is one thing to say that the Act itself constitutes a prohibition, it is another thing to say that the Act gives a limited and a conditional discretion to the Superintendent of Police, not to prohibit an assembly or a procession without a license—for that there is no authority in the Act, as I shall presently show—but to require the persons convening or collecting such assembly or directing or promoting such procession to apply for a license. In my opinion, "law" is one thing and an act done or an order issued under the law is another thing. One is the result of the discretion exercised by the Legislature; the other is the result of the discretion exercised by the Superintendent of Police; and in construing the term "law" in the second clause of section 141 of the Indian Penal Code, I cannot substitute the discretion exercisable by the Superintendent of Police for the discretion exercisable by the Legislature.

It was then argued that there is nothing to prevent the Legislature from reposing confidence in a particular person or a body of persons, and any order issued by such a person or body of persons if authorised by the Legislature, has the character of law and, is, in fact, law. We were indeed invited to treat the order of the Superintendent of Police as a bye-law or a regulation sanctioned and authorised by the Police Act. The argument is a weighty one, and it is necessary to deal with the subject with some care.

Now whether "law" means the expression of the exercise of the discretion by the Legislature or whether it includes the expression of the exercise of the discretion by a person or body of persons under the sanction and the authority of the Legislature, this, at any rate, is clear that when we speak of law, we mean something which is enforceable and which is not capable of being rejected by the Courts as uncertain, as unreasonable, or as repugnant to the law of the land The Courts may construe any particular provision of law; but the Courts cannot quash any provision of law nor treat it as unenforceable.

Now there are rules, regulations, and bye-laws, enacted not by the Legislature, but by some authority by delegation, which, to appropriate an expression used by Lord Herschell, cannot be canvassed in the Courts of law on any of the grounds which I have mentioned. In my opinion, these rules, regulations, and bye-laws have the character of law and are, in fact, law. But there are other rules, regulations and bye laws which may be rejected by the Courts of law as unenforceable on various grounds. They cannot, in my opinion, be called law, for the essence of the law is that it is enforceable, provided circumstances exist which would make it enforceable. But, where the Court is not bound to enforce it, though circumstances may exist which would make it enforceable, it has not the character of law, and cannot be called law.

Now "delegated." legislation falls under two main heads; first, rules, regulations, and bye-laws under the Statute which provides that they shall have the same effect as if enacted therein: and secondly, rules, regulations and bye-laws made under the Statute which does not in terms provide that they shall have the same effect as if enacted therein. The first usually consists of statutory rules, bye laws and regulations made by responsible authorities concerned with Local Government; the second usually consists of bye-laws and regulations made by persons, societies or corporations who are conducting commercial or other enterprises, whether of a public character or not. Now the distinction between the two is this: that where the Statute, under the authority of which the rules, regulations or bye-laws are promulgated, itself declares that they shall have the same effect as if enacted in the Statute, the validity of the rules, regulations or bye-laws cannot be questioned in any Courts of Law, nor can the Courts quash them or reject them on the ground that they are uncertain or unreasonable. But where the Statute does not so provide, their validity can be canvassed in the Courts of law, and the Courts can reject them as unenforceable on the ground that they are uncertain or unreasonable.

The distinction is pointed out in the case of *Institute of Patent Agents* v. *Lockwood* (1). The first section of the Patents Designs and Trade Marks Act of 1888 provided that a person should not be entitled to describe himself as a Patent Agent unless registered as such in pursuance of the Act, and that the Board of Trade should from time to time make such rules as were, in the opinion of the Board of Trade, required for giving effect to the section. The Act also provided that the rules to be framed by the Board of Trade were to be dealt in the same manner, and subject to the provision contained in the 101st section of the previous Act, the Act of 1883, of which the Act of 1888, in many particulars, was an amendment. Now section 101 of the previous Act provided that the rules were to be laid before Parliament and remain before Parliament for consideration for forty days, and, during these forty days, they might be annulled by a resolution of either House, and that "they shall be of the same effect as if they were contained in the Act and shall be judicially noticed."

The question arose whether many of the rules were not unreasonable and invalid. Lord Herschell, in the course of his speech, drew attention to the terms of section 101 of the previous Act, and then said as follows:—"My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to its provisions, and, if in such case a penalty be imposed, any person who does

(1) (1894) A. C. 347 at p. 331; 63 L. J. P. C. 74; 21 R. (Ct. of Sess.) 61; 31 Sc. L. R 942; 2 Sc. L. T. 103.

not comply with the provisions, whether of the enactment or the rule, becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas, apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament". This is a clear authority for the view that, though there is no difference between a rule and an enactment where there is a provision in the enactment that the rules shall be of the same effect as if they were contained in the Act, there is a wide difference between the two when there is no such provision; and the difference is this that though you may not canvass an Act of Parliament, you may canvass a rule.

Bye-laws which are not made part of the Act by the express provision of the Act may be attacked in England on five different grounds; first, on the ground that they are not made, sanctioned and published in the manner prescribed by the Statute which authorises the making; secondly, on the ground that they are repugnant to the laws of England; thirdly, on the ground that they are repugnant to the Statute under which they are made; fourthly, on the ground that they are uncertain; and lastly, on the ground that they are unreasonable—(See Craies on Statute Law, page 290). Can it be said for a moment that a bye-law which, unlike the law, may be attacked on various grounds which the Court may refuse to enforce, stands on the same footing as the law? I think not; for the essence of the law is that it is enforceable as law, and that, though the Courts may construe the law, the Courts cannot reject it nor quash it.

If I am right in my view as to the distinction that exists between the law, and a bye-law framed under a Statute but not made part of the Statute by the express provision of the Statute, it must follow that an order issued by the Superintendent of Police under section 30 of the Police Act, cannot be claimed as the law. That order may be a valid order or an invalid order; but, as there is no provision in the Police Act giving to the orders issued by the Police under section 30 of the Police Act the same effect as if they were contained in the Act, they cannot be regarded as the law for any purpose whatsoever.

But I am quite willing to assume that the order of the Superintendent of Police is "law" within the meaning of the first clause of section 141 of the Indian Penal Code; I have still to enquire whether it is enforceable as the law; that is to say, whether it is sanctioned and authorised by the Police Act or whether it does not constitute an undue interference with the liberty of the subject in the garb of an order under the Police Act. In order to determine this question, it is necessary to examine the provisions of section 30 and 30A of the Police Act. The first clause of section 30 gives to the District Superintendent or the Assistant District Superintendent the power to direct the conduct of all assemblies and processions on the public roads or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass. This is a power to regulate public assemblies and processions, not a power to prohibit such assemblies and processions. The second clause gives him power to require by general or special notice that the persons convening or collecting such assembly or directing or promoting such procession shall apply for a license, provided he is satisfied that it is intended by any person or class of persons to convene or collect an assembly in any such road, street or thoroughfare or to form a procession such as in the judgment of the Magistrate, if uncontrolled, be likely to cause a breach of the peace. A power of licensing is a power to regulate, not a power to prohibit; and it is necessary to point out that there is nothing in section 30, either in the first or in the second clause, which gives the Police an express power to prohibit an assembly or procession, if the persons convening or collecting such assembly or directing or promoting such procession decline to apply for a license. I shall presently discuss the question whether a power to prohibit is incident to a power to regulate and license. It is sufficient here to point out that there is no express power to prohibit given in section 30 of the Act. Section 30 A of the the Act, however, gives a power to the Police to order an assembly or procession to disperse; but, section 30 A applies and applies only where there is a violation of the condition of a license.

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Sec'ion 30A, therefore, has no application to this case; for it is admitted that the persons directing or promoting the procession did not apply for a license. On an interpretation of sections 30 and 30A of the Police Act, it would appear that there is no power in the Police to prohibit a procession where the persons directing and promoting such procession decline to apply for a license, although there is such power where such persons take out a license but violate the conditions of such license.

It may be urged, however, that a power to prohibit is incident to a power to regulate, for without such power it may be difficult, if not impossible, for the Police to regulate the public assemblies and processions. The argument overlooks the provision of section 32 of the Act which imposes a penalty upon every person for opposing or not obeying the order issued under section 30, section 30A and section 31 of the Act. It is at least significant that the Act, though it expressly vests in the Magistrate or in the Police the power to stop any procession which violates the conditions of a license and to order it to disperse, gives no such power to the Police, at least expressly, where the person convening or collecting an assembly or directing or promoting a procession declines to apply for a license. The power is expressly given in section 30A of the Act and is expressly withheld in section 30 of the Act. It must follow that there is no power by implication to prohibit an assembly or a procession in the event of the persons in charge of the same declining to apply for a license.

But it may be urged that the power to regulate a public assembly or a procession would be a barren power, if the Police have not by implication a power to prohibit such assembly or procession, and that the true rule is that, if the Legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is absolutely indispensable for the purpose of carrying out the purpose in view. I entirely accept the validity of the rule, but I wholly deny that it is indispensable for the purpose of carrying out the purpose in view to prohibit an assembly or procession. Where the Act imposes a penalty upon every person for opposing or not obeying the orders issued under the Act, it seems to me that the purpose in view is carried out by enforcing the provision of the Act against such persons. At any rate the question has been discussed in England whether a power to prohibit is incident to a power to regulate and license, and a clear and decisive answer has been given. In *Rossi* v. *Edinburgh Corporation* (2) the question was whether the conditions of a license granted by the corporation were or were not *ultra vires*. By section 30 of the Edinburgh Corporation Act, 1900, as amended by Edinburgh Corporation Order Confirmation Act, 1901, any person selling ice-cream (except in a duly licensed hotel) without a license from the Magistrates who were, by that section, empowered to grant the same, for the house, building or premises, where such ice-cream was kept for sale, was liable to a penalty; provided, as the Statute declared,

"that such license shall run from the date of issue until the 15th day of May next ensuing and upon renewal from the date of expiry of the license so renewed to the 15th day of May succeeding such expiry, unless the same shall be sooner forfeited, revoked or suspended".

The Statute also provided that "every person licensed to sell ice-cream under the provisions of this Act who shall sell ice-cream, except during the hours between eight of the clock in the morning and eleven of the clock at night on any lawful day.....shall be liable to the penalties in the Act provided". No form of license was annexed to the Statute. In pursuance of the Statute, the Magistrates drew up a license on the following terms to be issued to the ice-cream vendors licensed by them, namely.

1. That the said licensee shall not keep open the said premises or sell or permit the sale of ice-cream therein on Sunday or on any other day set apart for public worship by lawful authority.

2. That the said licensee shall not keep open the said premises or sell or permit the sale of ice-cream therein before eight o'clock in the morning or after eleven o'clock at night.

3. That the said Magistrates, or any of them, may at any time suspend or revoke this license.

(2) (1905) A. C. 21; 91 L. T. 668.

It will be noticed that though the Act, while enabling the Magistrates to issue licenses for the purpose of regulating the sale of ice-cream and assuming that they had the power to forfeit, revoke or suspend the license, gave them no power either to forfeit, revoke or suspend the license or to prohibit the carrying on of the trade, the Magistrates, purporting to act in pursuance of the Statute, probibited the carrying on of the trade except on the terms of the license and reserved to themselves the liberty of suspending or revoking the license. The House of Lords came to the conclusion that each of the conditions of the license was bad and that the license was wholly *ultra vires*. The Lord Chancellor, dealing with the argument that the Magistrate had the implied power to do everything for the purpose of carrying out the purpose of the Act, made these pregnant observations. "But when it is argued that because they are given the power to restrict, within certain hours, the sale of ice-creams, therefore, they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice-creams shall be sold, it seems to me the argument entirely fails. What is sought to be done, whether directly by bye laws, or indirectly by the language of the license that is issued, is something that can only be done by the Legislature. It is a restraint of a common right which all His Majesty's subjects have —the right to open their shops and to sell what they please subject to legislative restriction—and, if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature has contemplated."

Lord Davey, in the course of his judgment, dealing with the power reserved by the Magistrates to suspend or revoke the license, observed as follows:—"Now I confess that I have not heard from the learned Counsel and I took the liberty of pressing the learned Counsel on this point, on any power in the Magistrates either to revoke or to suspend this license. It is said that the words which I have read, 'unless the same be sooner forfeited, revoked or suspended' give the power. My Lords, that construction of the Act of Parliament seems to me to be entirely contrary to principle. The utmost that you can say is that the words seem to assume that the corporation either have already, or may at some future time acquire a power to forfeit, revoke or suspend the license. That it does not give the power seems to me plain from a consideration of the words, because the words are, as your Lordships will observe, 'forfeited revoked, or suspended'. Now 'forfeited' has a clear and definite meaning when you are speaking of licenses of this description. It means that if the licensee does or omits certain acts his license will be forfeited. That is the plain meaning of it. Well, my Lords, you will look in vain in this Statute or in this provisional order for anything that defines the conditions upon which the license is to become forfeited. It is plain, then, that this clause does not make any provision for the licensee forfeiting his license and it is equally plain to my mind that it does not contain any power either to revoke or suspend the license."

The point established in the other case to which I propose to refer—the case of *Toronto (Municipal Corporation of the City of)* v. *Virgo* (3) is this; that a statutory power conferred upon a Municipal Council to make bye-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner. The Statute gave power to the Council to pass bye-laws for licensing, regulating and governing hawkers or petty chapmen and other persons carrying on petty trades. Stopping here for a moment, it will be noticed that section 30 of the Police Act gives power to the Police, as the marginal note shows, to regulate public assemblies and processions and license the same. There is no prohibition on the face of the Police Act, just as there is no prohibition on the face of the Statute which I am now considering. The bye laws framed by the Council prohibited the hawkers from prosecuting their calling or trade in certain streets in the

(3) (1896) A. C. 88; 65 L. J. P. C. 4; 73 L. T. 449.

city of Toronto. The Privy Council held that the bye-law complained of was *ultra vires*. Lord Davey, in delivering the judgment of the Board, conceded that the regulation and governance of a trade might involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place, but he pointed out that there was a marked distinction to be drawn between the prohibition of a thing and the regulation or governance of it, for, as His Lordship made clear, "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." And the conclusion at which His Lordship arrived may be stated in his own words: "a municipal power of regulation or of making bye-laws for good Government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner"

The point is put very clearly and forcibly in Halsbury's Laws of England: "Generally speaking, the function of a bye-law is to regulate and not prohibit"—Volume 27, page 124, foot note (*k*).

It will now be convenient to turn to the actual order issued by the Superintendent of Police on the 3rd of January 1922. The order on the face of it is a prohibition. It prohibits all processions, associations, or assemblies for a period of three months except under a license, and it prohibits such processions, associations or assemblies, not only in a public road, street or thoroughfare, but anywhere within the Municipal or Union area of Palaman. A more absolute prohibition it is difficult to imagine; and the reason for this extraordinary order constituting, as it does, a very serious inroad upon the liberty of the subject is that the Officiating Superintendent of Police considers such prohibition to be necessary for the preservation of the public peace and public safety. It is, in my opinion, only necessary to state the terms of the order to reject it as utterly beyond the power of the Officiating Superintendent of Police. In the first place, the order is on the face of it a prohibition; and, if Lord Davey is right in his view, a power to prohibit is not incident to a power to to regulate and license. In the second place, there is no power to issue an order to have operation for three months.

The language of the section makes it perfectly clear, to my mind, that the Police have to deal with each case as it arises, and that the District Magistrate has to exercise his judgment on each occasion. This was the view which was taken of section 30 of the Police Act in this Court in the case of *Emperor* v. *Shami Kandu* (Criminal Reference No. 32 of 1917 unreported). That view seems to me to be the right view, and the only view which can be taken of the section. In the third place, the Police have no power whatever to prohibit association or assembly anywhere within the Municipal and Union area of Palaman, assuming that they have a power to prohibit at all. Under the order as issued, a number of people could not meet together in a private house for a lawful purpose, and it has been held that you cannot reject that which on the face of it is *ultra vires* and support the order on the ground that any Court can construe it so as not to infringe the liberty of the subject. In the last place, the order is bad in so far as the Officiating Superintendent of Police arrogates to himself a power not conferred by the Police Act on him. The Act requires that the judgment shall be exercised by the Magistrate of the District or of the sub-division of a District. The order not only does not show that any judgment has been exercised by the Magistrate of the district, but it shows that such judgment has been exercised by the Officiating Superintendent of Police. If the order is to be regarded as a bye-law then it is well established that the Courts of law will not give effect to it, unless it is satisfied that all the conditions precedent to the validity of the bye-law have been fulfilled. If the Legislature has given a power to the Superintendent of Police to legislate in the manner, it has for the safety of the public imposed as a condition precedent that the Magistrate shall be satisfied that there is necessity for the legislation. It is a power conditional upon an event, and the exercise of the power will not be upheld unless it is established that the condition has been fulfilled. I hold that the order of the Officiating Superintendent of Police cannot be regarded as the law within the meaning of the term as used in section 141

of the Indian Penal Code. I hold further that, if that be so regarded, we are bound to deny it for the reasons which I have already given.

I now come to the next branch of the argument, namely, whether there was any execution of the law. Execution means enforcing, carrying into effect. Now it is well established that execution, to be lawful, must follow the procedure laid down in the Act. The law in this case is the order of the Officiating Superintendent of Police prohibiting all assemblies, associations and processions except under a license. I will assume that the order was a lawful one and that it could be executed. I will assume that there was a violation of that order by the persons who formed the procession. But assuming all these, how could the law, that is to say, the order of the Officiating Superintendent of Police be executed? The learned Assistant Government Advocate contends that it could be executed only by ordering the procession to disperse. In my opinion, on an interpretation of sections 30, 30A and 32, the contention is an impossible one. Section 30A which does not apply to this case does give the Police a right to stop a procession and to order it to disperse. Section 30 which does apply to this case gives no such power to the Police. Section 32 provides a penalty for opposing or not obeying the orders that may be issued either under section 30 or section 30A. In my opinion, the orders under section 30 could be executed only by proceeding against the persons opposing or not obeying such orders under section 32 of the Act, whereas, where section 30A applies the orders could be executed first by stopping the procession and ordering it to disperse, and secondly, by proceeding against the persons opposing or not obeying such orders under section 32 of the Act. It is not suggested that the assembly was in itself an unlawful assembly. In my opinion, the Police had no power either under the Criminal Procedure Code or under the Police Act to stop the procession or order it to disperse. It follows, therefore, that they were not executing the order of the Officiating Superintendent of Police in a lawful manner.

The last point in connection with this argument is whether there was resistance on the part of the persons forming the procession. Resistance, we were informed, is to withstand, or stand against, or make opposition to, and it was argued that in so far as the persons forming the procession refused to disperse when they were ordered to disperse by the Police there was clear resistance on their part. Now it must be remembered that the resistance must be not to the law, but to the execution of the law; in other words, the prosecution must establish that the persons forming the procession withstood or stood against or made opposition to the carrying into effect of the law, that is to say, the order issued by the Officiating District Superintendent of Police. Now, in the first place if there was no power in the Police to stop the procession or to order it to disperse, there was clearly a right in the accused persons to withstand or stand against or make opposition to the order of dispersal. In the next place, resistance means something more than defiance or disobedience. One does not, in my opinion, withstand or stand against or make opposition to an execution by merely not submitting to the order. Resistance is something more than non-submission. It consists of an overt act showing an intention to make opposition to the execution of the law.

This undoubtedly has been the view of the Bombay High Court. In the case of *Queen-Empress* v. *Alibhai* (4) it was held that the mere refusal by the accused person to make over to a bailiff money alleged to be in his pocket is not a resistance to the taking of that money within the meaning of section 183 of the Indian Penal Code. In that case the bailiff made a demand for the money and the accused replied that the bailiff was not legally entitled to take the money and that he would not give it to him. It was held that there was nothing more than a refusal to submit and that there was no resistance within the meaning of section 183, Indian Penal Code. The same view was taken in the case of *Queen-Empress* v. *Husain* (5). In this case the bailiff went to attach two tonga tops belonging to the judgment debtor. Thereupon the accused said that the tonga tops

(4) Rat. Un. Cr. Cas. 412.
(5) 15 B. 564; 8 Ind. Dec. (N. S.) 280.

were his and that he would not let the bailiff take them away unless he entered them as his property. It was held that a mere verbal direction to the bailiff not to remove the property could not be regarded as a resistance. I cannot distinguish these cases from the present case. The accused persons in the present case did nothing more than refuse to obey the order of dispersal given by the Police When the Police laid their hands on the accused persons and arrested them they did not in any way make any attempt to resist the arrest. They submitted to the arrest and in so doing submitted to the execution of the law, however, illegal the execution might have been. I hold that there was no resistance on the part of the accused persons to the alleged execution of the alleged law. It follows therefore, that the case does not fall within the second clause of section 141 of the Indian Penal Code.

It was faintly argued by the learned Assistant Government Advocate that the common object of the procession might have been to commit an offence under section 151 of the Indian Penal Code. It is sufficient to say that there is no evidence that the accused persons were likely to cause a disturbance of the public peace. Such evidence is essential for an offence under section 151 of the Indian Penal Code. The argument was not a serious one and I do not think it necessary to deal with it at greater length.

I now turn to another aspect of the case and it is this: whether a person can be indicted under the general law for an offence commited under the Police Act? Now, in order to understand the point it is necessary to state that it is no offence under the general law for any persons or class of persons to convene or collect an assembly in any road, street or thoroughfare or to form a procession in such road, street or thoroughfare. Under the general law it is not necessary to apply for a license in order to enable persons to convene or collect an assembly in a road, street or thoroughfare or to form a procession in such road, street or thoroughfare. Nor is it an offence under the general law not to apply for a license if such persons are directed by an executive order to apply for such license. The offence is created for the first time by the Police Act which imposes a penalty upon every person opposing or not obeying the orders issued under section 30, 30A and 31 of the Police Act. It is a new offence, not an offence under the general law. It has been held in numerous cases that where a Statute creates a new offence which was not an offence at Common Law and imposes a penalty in respect of such offence, a person committing such an offence can only be proceeded against under the Statute which creates the offence and cannot be indicted under the general law. The principle is stated with clearness and precision in Hawkins' Pleas of the Crown, Book 11, Ch. 25, section 4 and is as follows:—"Also where a Statute makes a new offence which was in no way prohibited by the Common Law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, etc, without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because mentioning the other methods of proceeding seems impliedly to exclude that of indictment." This passage was regarded in the case of *Reg.* v. *Hall* (6) as a full statement of the principle which should guide the Courts in regard to the decision of the cases. That was a case where the defendant was charged in the seventeen counts of the indictment with crimes which might be classified into three divisions: first, he was charged with the wilful omission of the names of qualified persons from the electoral lists. Secondly, he was charged with the wilful insertion of the names of unqualified persons in the electoral lists. Thirdly, he was charged with an attempt to prevent the course of justice by taking steps to place false evidence before the Revising Barrister, who was in a certain sense a judicial Tribunal. He was also charged with tampering with the lists of voters and also with tampering with the register itself. These charges were made against him as an Overseer of the Poor and the offences were alleged to have been committed by him in the course of the

(6) (1891) 1 Q. B. 747; 60 L. J. M. C. 124; 64 L. T. 394; 17 Cox C. C. 278.

duty which was imposed upon him by the Parliamentary Registration Act of 1843. It is necessary to point out that the Parliamentary Registration Act of 1843 provided a penalty for violation of the duties imposed upon him by that Act.

It was contended on his behalf that there was no remedy by indictment as the Act which created the offence provided a penalty for such offences. The Court gave effect to the argument advanced on behalf of the defendant and quashed the indictment This is the view which has been taken in numerous cases in England. See *Institute of Patent Agents* v. *Lockwood* (1), *Saunders* v. *Holborn District Board of Works* (7) and *Olegg, Parkinson & Co.* v. *Early Gas Company* (8). I do not propose to discuss all these cases, but the observations of the Lord Chancellor in the first mentioned case are so appropriate to the present proceedings that I think it desirable to set them out, "You have here" said His Lordship, "For the first time, a new offence created, the offence of practising as a Patent Agent without being on the register. But for the enactment creating that offence, the defender had done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it, namely, a penalty of £ 20. Can it possibly under these circumstances be open to bring the individual, not before the summary Court at small expense to determine the question of his liability to a £ 20 penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which, the Legislature has said, subjects him to a penalty and then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him with this result, that if he were to offend again he would not be subject to the summary procedure and the £20 penalty, but would be liable to imprisonment for breach of the interdict? My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to show that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that the party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison".

As I have said, the passage cited is most appropriate to the question which has been debated in this Court. Here also, for the first time, a new offence has been created. But for the enactment creating that offence, the respondent has done nothing of which any body would have a legal right to complain either civilly or criminally. The Legislature having created that new offence, has prescribed the punishment for it, namely, a penalty of Rs. 200. If, as the Lord Chancellor pointed out, the mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, can it be doubted for a single moment that the proper procedure was to proceed under the Act and not by an indictment under the general law? In my opinion, the respondent could not be convicted under the Indian Penal Code for an offence committed under the Police Act.

I have thought it necessary to deal with the case at some length for the reason that the issue raised by the Crown in this appeal goes far beyond the actual facts of the case and, indeed affects the liberty of the subject in relation to what he may lawfully do in a lawful manner. I must not be understood, however, as sanctioning any breaches of law and order. Where there are breaches of law and order, it is the duty of this Court to relentlessly apply the law, and

(7) (1895) 1 Q. B. 64: 64 L. J. Q. B. 101; 15 R. 25; 71 L. T. 519: 43 W. R. 26; 59 J. P. 453.

(8) (1896) 1 Q. B. 592; 65 L. J. Q. B. 339; 44 W. R. 606.

look neither to the position nor the motive of the persons committing or encouraging breaches of law and order. But while this is so, it is equally our duty to assert from time to time and as often as it may be necessary that the subject has his rights as well as his duties, and to assert further that this Court, as the guardian of the rights and the liberties of the subject, will sternly repress any attempt on the part of the Executive Government to tamper with such rights and liberties; and that an order, in the garb of an order for the maintenance of law and order, will not be allowed to stand, if its object is not to maintain law and order but to make, to quote the memorable words of Lord Halsbury, "a very serious inroad upon the liberty of the subject".

I would dismiss this appeal.

N. K. *Appeal dismissed.*

PATNA HIGH COURT.

FIRST CRIMINAL APPEAL No. 176 OF 1921.

December 20, 1921.

Present:—Mr. Justice Das and Justice Sir John Bucknill, Kt.

BAZARI HAJAM AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT

Thumb impression—Corroborative circumstances, absence of—Conviction based on comparison of thumb impressions, legality of.

It is most unsafe, without any corroborative circumstances, to convict a person of a serious crime solely and entirely upon similarity of thumb marks or finger prints [p. 958, col 2.]

The practice of taking the finger print impression of an accused person in a Court of Law strongly condemned. [p. 958, col. 2.]

First appeal against the judgment of the Officiating Sessions Judge, Shahabad, dated the 30th of September 1921.

Mr *P. P. Varma*, for the Appellants.

Mr. *H. Nandkeolyar*, Assistant Government Advocate, for the Respondent.

JUDGMENT.

BUCKNILL, J.—This is an appeal by two persons named Bazari Hajam and Barhmdeo Kahar who were convicted by the Officiating Sessions Judge of Shahabad on the 30th of September of this year and sentenced respectively to three years' rigorous imprisonment: the first accused for false impersonation under section 82 (*c*) of the Indian Registration Act and the second accused under section 82 (*d*) of the same Act.

The circumstances under which these convictions were recorded are somewhat unusual and both the Assessors thought that the evidence was not sufficient to justify the accused being condemned.

In the first place, it must be admitted, and is indeed admitted by the Officiating Sessions Judge, that, with one exception, there was no material against either of the accused. The story upon which the prosecution was based was that a certain deed purporting to have been executed by one Ram Prasad Pande at the Koilwar Sub-Registry Office at the end of March of this year, was not, in fact, executed by that individual but was executed by the first accused who represented this Ram Prasad Pande and incidentally placed his thumb impression upon the document. That is all. Now, when the accused was brought before the Court—both in the Magistrate's Court and in the Sessions Court, an altogether unusual practise, and one which I cannot but too strongly deprecate, was followed by (in some way or other, I do not understand how) obtaining a thumb print of the accused; and, then, after having done so, a gentleman from the Finger Print Criminal Department was called in each Court, who thereupon, by means of his codes of finger prints, declared to the Magistrate and to the Officiating Sessions Judge that the thumb marks on the deed and on the paper which had been marked by the accused in Court were identical. This is the only piece of evidence of any cogency whatever against the accused. I think that, apart from the fact that I should be rather sorry without any other corroborative circumstances, to convict a person of a serious crime solely and entirely upon similarity of thumb marks or finger prints, the very fact of the taking of a thumb impression from an

accused person for the purpose of possible manufacture of the evidence by which he could be incriminated, is, in itself, sufficient to warrant one in setting aside the conviction upon the understanding and upon the assumption that such was not really a fair trial.

I know of no law by which an accused person can be either by words or by gestures or by exposing himself to certain physical treatment, made to implicate himself in the crime with which he is charged. When he is on trial such an idea is highly repugnant to all thoughts of the proper administration of justice in this or in any other British country. I think, therefore, that it is impossible that these convictions and sentences should be supported, that they must be set aside and the accused must be enlarged.

DAS, J.—I agree. I ought to add that the balance of the evidence, in my opinion, is entirely in favour of the appellants. It is not denied that Ram Prasad had, in fact, executed a sale-deed in favour of his step-mother, *Musammat* Anandja, and his wife, *Musammat* Etwaro Kuer. It is of course suggested that the document was taken from him by undue influence or by force; it does not matter which, but the important fact is that the execution of the document by Ram Prasad, is not denied.

The sole question which the learned Sessions Judge had to try was, did Ram Prasad himself present the document for registration before the Registration authority; or, the appellant Bazari impersonated Ram Prasad before the registration authority. The prosecution case is based on two important facts, first, that Ram Prasad was minor and that it is highly improbable that any Registration authority would have registered a document presented (as it must have been) by a minor; and, secondly, that Ram Prasad was so ill at that time that it is highly improbable that he could have presented the document before the Registration authority. The learned Sessions Judge discussed both these points. On the first point, he came to the conclusion that the evidence on behalf of the prosecution was unsatisfactory and that it did not establish that Ram Prasad was, in fact, a minor on the 29th of March 1921. On the second point again, the learned Sessions Judge has recorded a finding that the prosecution evidence is unconvincing. Therefore, it seems to me that it was dangerous to convict the appellants on the sole testimony of the finger print expert.

Now the learned Sessions Judge considered the point whether the evidence of the finger print expert received any corroboration. He conceded that the appellants could not be convicted without such corroboration but he has recorded a finding to the effect that the evidence of the finger print expert had received corroboration. Now the view of the learned Sessions Judge is this: He says, first of all, that the accused are residents of the village with which the executants of the document, that is to say, Ram Prasad and Ram Chandra Pande, are connected. The learned Sessions Judge thinks that this evidence corroborate the testimony of the finger print experts Secondly, the learned Sessions Judge was impressed by the fact that the complainant mentioned the name of the accused very early in the proceedings. He also took that as another corroborating circumstance.

I wholly disagree with the view of the learned Sessions Judge. This evidence, in my opinion, does not at all corroborate the evidence of the finger print expert. I agree with my learned brother that it was extremely dangerous to take the finger print impression of an accused person in a Court of Law. I agree that the convictions are unsustainable and that the convictions and sentences of the accused persons must be set aside.

W. C. A. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 42 OF 1922.

July 4, 1922.

Present:—Mr. Wazir Hassan, A. J. C.

SHEOPAL AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Sureties—General repute, hearsay evidence of, inadmissible.

SHEOPAL v. EMPEROR.

A Court is not justified in refusing as "unfit" persons who are offered as sureties under section 110 of the Criminal Procedure Code, on mere hearsay evidence of general repute, especially where the sureties offered are men of means and have sufficient influence to exercise control over the persons required to furnish security.

Application against an order of the Sessions Judge, Fyzabad, dated the 22nd March 1922, upholding an order of the Magistrate, First Class, Sultanpur, dated the 27th February 1922.

Mr. *Niamat Ullah*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—A First Class Magistrate exercising jurisdiction in a sub-division of the District of Sultanpur issued a notice to the applicants under section 110 of the Code of Criminal Procedure to show cause why they should not be ordered to execute a bond with reliable sureties for their good beheaviour for a period of one year. The applicants in pursuance to the notice above mentioned appeared before the Magistrate and after the necessary enquiry having been gone into, the Magistrate confirmed his initial order prepared under section 112 of the Code. Two persons, Pateshri and Sita Ram, appeared before the learned Magistrate to execute the necessary bond as sureties for the applicants. It appears that the Police protested against the acceptance of these persons as sureties for the applicants. Thereupon the learned Magistrate instituted an elaborate enquiry recording evidence produced by the Police in support of their protest and also evidence tendered by the sureties, vindicating their fitness to stand as sureties. By his order dated the 27th February 1922 the Magistrate accepted the objection raised by the Police and rejected the sureties as "unfit." These applicants aggrieved by the order just now mentioned went in revision to the Court of the Sessions Judge of Fyzabad. That Court recorded the following order:—"The lower Court has given very good grounds indeed for refusing the sureties. Rejected."

The application before me is directed against the last mentioned order. The Magistrate's order of the 27th February 1922 sets down the following tests for determining the fitness or otherwise of the sureties as required by section 122 of the Code of Criminal Procedure. (1) Their pecuniary means to cover the amount: (2) good character and (3) ability to supervise. He finds that the tests Nos. 1 and 3 are established. But with regard to test No. 2 he has on the evidence produced by the Police come to the conclusion that the sureties are "proved to be men of bad character." To my mind this finding of his clashes with his finding on point No. 3. If the sureties are themselves men of bad character it is difficult to conceive how they would supervise the behaviour of the applicants in checking them from indulging in the practices of a robber, a house breaker or a thief.

Apart from that the nature of the evidence produced by the Police in support of the allegation that the sureties themselves are men of bad character is admittedly hearsay and the sureties not being accused persons under section 110 of the Code of Criminal Procedure hearsay evidence of general repute was clearly not admissible as against them. Besides, the evidence which the sureties produced is to my mind convincing enough to establish their fitness to stand as sureties in this case, more so, when we take into consideration the finding of the Magistrate himself that these persons are men of means and have sufficient influence to exercise control over the behaviour of the applicants.

I, therefore, set aside the order of the Magistrate dated the 27th February 1922, accept the sureties offered as fit and direct that the Court should accept the bonds executed by them as required by Schedule V, Form II, of the Code of Criminal Procedure and as soon as these bonds are properly executed the applicants, who are in jail, shall be released.

W. C. A.

Application accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 3 OF 1920.

June 21, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SRI GANGAJI COTTON MILLS Co., Ld. —PLAINTIFF—APPELLANT

versus

EAST INDIAN RAILWAY Co.— DEFENDANT—RESPONDENT.

Railway Company—Delivery of goods—Consignee, inspection by—Damage to goods—Delivery Register, note in—Register, signing of, if constitutes "clear receipt"—Unconditional offer to pay damages—Liability, acknowledgment of.

A consignee of goods by Railway has no right to demand that the goods shall be opened and inspected on the Railway premises before he can be called upon to take delivery. [p 963, col. 2.]

Jwala Pershad & Co. v *G. I. P Railway Co*, 21 Ind. Cas. 4 8; 11 A. L. J. 772, relied on.

There is no provision of law, nor any statutory rule which obliges a Railway Company to make, or allow to be made, in its Delivery Register any note alleging that goods are in a damaged condition, and the refusal by a Railway Company to make such an entry in their books is no justification for refusing to take delivery. [p 964, col. 1]

Koka Mal v *G. I. P Railway*, 21 Ind. Cas. 428; 11 A. L. J. 775*n*., relied on

Where a consignee of goods by Railway signs the Delivery Register of the Company, such signature does not constitute a "clear receipt" so as to bar a suit against the Company for damages. [p 964, col. 1.]

East Indian Railway Co. v *Sispal Lal*, 12 Ind. Cas. 596; 39 C. 311; 14 C. L. J. 472; 16 C. W. N. 329, relied on

Where goods travel over the systems of several Railways, compensation for damages is only recoverable from that Railway on which damage is proved to have been caused [p 964, col 2; p 965, col .]

G. I. P. Railway Co v *Sham Manohar*, 4 Ind Cas. 803; 34 A. 422; 9 A. L. J. 412, relied on

An unconditional offer by a Railway Company to compensate a consignor of goods for damage caused, amounts to an acknowledgment of liability on the part of the Company for such damage. [p. 965, cols. 1 & 2.]

First appeal from the decision of the Subordinate Judge, Mirzapur.

JUDGMENT.

LINDSAY, J.—The suit which has given rise to this appeal was brought against the East Indian Railway Company by the Sri Gangaji Cotton Mills Company, Limited, carrying on business at Mirzapur and the claim was for Rs. 23,908 6 *plus* interest at Rs. 6 per cent. per annum, making a total of Rs. 25,364 6 6.

The suit has been dismissed *in toto* by the Subordinate Judge and the plaintiff Company appeals.

The facts of the case are that in May, 1918, a consignment of 103 bales of cotton was booked, at Jaipur, on the Bombay Baroda and Central India Railway, for delivery to the plaintiff Company at Mirzapur. A portion of this consignment consisting of 54 bales, was delivered to the plaintiff Company at Mirzapur, on the 22nd May, 1918.

On that date, it appears, the plaintiffs handed over to the East Indian Railway the Railway Receipt for the entire consignment of 10 bales, and paid the full freight due, amounting to Rs. 437-1-0.

The rest of the consignment, 54 bales, was delayed in transit and did not arrive at Mirzapur till the 2nd of July, 1918, on which date notice of arrival was given to the plaintiffs. The latter, after some inspection of the goods on the Railway premises, objected to take delivery on the ground that the bales were damaged, and on the 3rd July they sent a letter (Exhibit Q). They asked the Goods Clerk to keep the goods at the Railway goods-shed pending inspection by a Railway Officer. A telegram to the same effect was sent to the District Traffic Manager at Cawnpore on the same date and this was confirmed by letter (Exhibits 10 and 22 respectively).

In this letter they informed the District Traffic Manager that from outward appearance it seemed that the bales had been neglected and exposed to rain and that each bale had been more or less damaged. Plaintiffs said they wanted inspection before taking delivery.

The Railway Company agreed to have an inspection made and this was carried out on the 21st July, by a Traffic Inspector, Mr. Robinson. It is not denied that Robinson, after inspection, offered the plaintiffs Rs. 10 per bale by way of compensation, an offer which the plaintiffs rejected as inadequate [see their letter to the District Traffic Manager, dated 30th July, 1918 (Exhibit 11)].

The plaintiffs pressed their claim for compensation at a higher rate and the Railway Company then deputed an Assistant Traffic Manager, Mr. Dyer, who examined the goods on the 9th August 1918 and

made an offer of compensation at the rate of Rs. 20 per bale. This second offer the plaintiffs also refused by their letter of the 9th August (Exhibit 4). The plaintiffs in that letter said they were willing to accept Rs. 30 per bale and would take delivery if damages were paid at that rate. The Railway Company then arranged with the Upper India Chamber of Commerce for inspection by an expert, Mr. Vernon, the Superintendent of the Elgin Mills at Cawnpore. He proceeded to Mirzapur and examined the goods on the morning of the 18th August. No representative of the plaintiffs was present at this inspection though notice had reached the plaintiffs on the evening of the 17th August.

Vernon, who has been examined as a witness in the case, reported that the damage was insignificant, that 48 out of the 54 bales were in good condition and that 6 bales were slightly damaged. He estimated the damage at 10 lbs of cotton per damaged bale and recommended compensation on this scale.

There is no evidence on the record to show that this report was actually communicated to the plaintiffs, though it was stated in paragraph 34 of the defendant's written statement that an offer in accordance with Vernon's report was made to the plaintiffs on the 7th September which was refused. The matter is not of much importance, for as the plaintiffs had already refused compensation at Rs. 20 per bale, it can hardly be imagined that they would have been willing to accept the much lower rate of damages which Vernon had assessed.

The next thing we find is that on the 9th September 1918, the plaintiffs sent in a claim to the Agent of the Railway in a letter (Exhibit 14). They demanded the cost of the 54 bales at the rate of Rs. 80 a maund, a total of Rs. 20,837. To this was added a claim for Rs. 2,925 for damages caused by the delay in delivery which has led to the closing down of the plaintiffs' Mills on account of shortage of cotton. This claim, it may be observed, was the re-iteration of a claim put forward on the 28th June 1918 and related to the delay which had taken place in the carriage of the goods prior to the 2nd of July 1918. The third item of the claim made on the 9th September 1918 was for Rs. 218-8-6, this being one-half the freight of the whole consignment. The plaintiffs had paid the whole sum due for freight on the 22nd May.

It is evident from the language of this letter of the 9th September that the plaintiffs had made up their minds to claim compensation on a scale they had not hitherto contemplated; in fact they were advancing a claim for the total loss of the goods. We find them stating that the goods had been seriously neglected, that "they had been lying in the open rain water pouring upon them freely for months and weeks together". The plaintiffs further stated that after "minute examination of the stuff" they had arrived at the conclusion that the quality of the cotton had become seriously deteriorated.

It does not appear when this "minute observation" was made and it seems rather to be the fact that no such examination was ever made by the plaintiffs.

The Agent of the Railway acknowledged receipt of this claim and promised inquiry and, thereafter, a good deal of correspondence passed between the parties without any settlement being arrived at.

On the 9th November 1918 the Railway Company served a notice on the plaintiffs to say that if the goods were not removed by a date mentioned in the notice, they would be sold at the plaintiffs' risk. The plaintiffs refused to comply with this notice, and eventually the Railway sold the goods at the rate of Rs. 117 per bale. At the hearing of the appeal we were told by the Counsel for the Railway Company that this sale took place in March 1919, and this, no doubt, is correct.

The correspondence between the parties closed with a letter from the Agent to the Railway to the plaintiffs dated the 28th April 1919. The Railway Company refused to consent to further arbitration and offered payment to the plaintiffs of the sale proceeds of the goods less any amount due to the Railway.

The plaintiffs filed their suit on the 18th June 1919; and this, as has been said, has been dismissed by the Court below.

In substance the findings of the Subordinate Judge are that the plaintiffs had no right to recover and that the Railway Company was justified in selling the goods. The

Court held that the plaintiffs were in default, that they had wrongfully refused delivery and that it had exercised its statutory right to sell the goods in accordance with law.

The Subordinate Judge was also of opinion that the plaintiffs had no right to compensate for damage to the goods as the plaintiffs had failed to prove that any damage took place on the defendant Company's line and had omitted to sue the B. B. and C. I. Railway Company to which the goods had been made over by the consignor.

He also held that the item of Rs. 2,925 claimed by the plaintiffs on account of damages resulting from the closing of their mills by reason of the delay in the carriage of the second instalment of the goods, could not be awarded, as this was a false claim on the part of the plaintiffs.

It may be observed here that this portion of the claim is no longer pressed nor indeed could it be, for the Railway Company, defendant, was able to establish conclusively in the Court below that if the plaintiffs' mills were closed down, the reason was that there was a shortage of coal and not because of any delay in the transit of the bales of cotton.

To come now to the appeal, it is complained that the Court below did not rightly appreciate the nature of plaintiffs' claim which, it is said, was in reality a claim based upon the wrongful conversion of the plaintiffs' goods by the defendant Railway Company.

Speaking for myself, I do not see that the Judge of the Court below was under any misapprehension regarding the nature of the case which the plaintiffs set up, though considering the manner in which the case was set out in the plaint, he might, with some excuse, have been led into doubt.

He has, however, in my opinion, dealt with the case on the right lines as a whole and has definitely found that the Railway Company was justified in selling the plaintiffs' goods in exercise of the power conferred by section 56 of the Indian Railways Act (IX of 1890) which authorizes a Railway Administration, in certain circumstances and on certain conditions, to sell unclaimed goods.

In this connection the whole question is whether the Railway was in the circumstances entitled to treat the 54 bales of cotton as unclaimed goods.

The argument urged for the plaintiffs, in substance, is that it was not so entitled. It is contended that in the first instance the Railway Company wrongfully put obstructions in the way of the plaintiffs' taking delivery, and it is further argued that because the plaintiffs had put in a claim for damages, the Company had no right to sell pending a settlement of the claim. In my opinion neither of these arguments can be accepted. To take first the plea that the Railway Company obstructed taking of delivery.

What is the case of the plaintiff Company on this point?

It is set out in paragraphs 7 and 8 of the plaint where it is alleged that the plaintiffs sent their men to the Railway Station and discovered that the bales were wet and damaged, and that thereupon the plaintiff Company "refused to take delivery without an inspection and a note as to the condition of the goods by the defendant Company's servants at the Mirzapur Station which they refused to do." If this means that the inspection referred to was inspection by the plaintiffs themselves, then the allegation is not true, for it is clear on all hands that the plaintiffs had ample opportunity to inspect the goods and did, as a matter of fact, inspect them. On the other hand, if it means that the inspection was to be inspection by the Railway Company, then the answer to the plaintiff's case is that they had no right to insist upon an examination of the goods by the defendant Railway. There seems to have been some argument in the Court below about the right to what is called "open inspection" and the Subordinate Judge seems to have thought that the plaintiffs were insisting upon some such right though that is denied in the third paragraph of the memorandum of appeal.

It has been definitely settled in this Court that a consignee has no right to demand that the goods shall be opened and inspected on the Railway premises before he can be called upon to take delivery. *Jwala Pershad & Co.* v. *G. I. P Railway Co.* (1).

But it is argued (see the plea in the 12th paragraph of the memorandum of appeal) that the plaintiffs had a right to have a note

(1) 21 Ind. Cas. 448; 11 A. L. J. 772.

made in the Railway Company's Delivery Register recording that the goods were in a damaged condition and that if the Company's servants refused to make such an entry or allow such an entry to be made, there was an obstruction amounting to wrongful refusal to deliver. Much stress has been laid upon the fact that the plaintiffs had handed over the Railway receipt to the defendant Company before the second lot of bales arrived and it is said that if the plaintiffs had signed the Delivery Register without recording that the goods were damaged, they would have been precluded thereafter from claiming damages on the ground that they had given a clear receipt. This argument does not appeal to me. In the first place, I have not been shown any provision of law or any statutory rule which obliges a Railway Company to make or to allow to be made in its Delivery Register any note alleging that goods are in a damaged condition. In the next place, it has been definitely decided by a Bench of this Court that the plaintiff cannot refuse to take delivery because the Railway Company refuses to make an entry in their books. There the plaintiffs' case was that there was a shortage in the weight of the goods. The Bench held that the plaintiff could not insist upon an entry. If he had any complaint, he was entitled to make his representation to the Company in any other way. *Koka Mal* v. *G. I. P. Railway* (2), and, lastly, it is not correct to say that the plaintiffs would have been barred from a suit if they had signed the Delivery Register so as to constitute what is called a "clear receipt," *East Indian Railway Co.* v. *Sispal Lal* (3).

I am satisfied, therefore, that the plaintiffs cannot maintain that anything done by the defendant Railway's servants on the 2nd July 1918 amounted to a wrongful refusal to deliver the goods.

As for anything which happened after that date, I can find no evidence of wrongful retention of the goods by the defendant Railway. It is true they kept the goods in their custody but that was at the plaintiffs' own request. The Railway Company in order to satisfy the plaintiffs consented to have the goods inspected by their own officers and by Mr. Vernon but the plaintiffs cannot be heard to say that this was, in any way, a wrongful act on the part of the Railway Company. After the inspections had been made and compensation had been offered to the plaintiffs, it was their duty to remove their goods and no hindrance to removal was placed in their way.

The argument put forward on behalf of the plaintiffs seems to imply that they had a right to call upon the Railway Company to ware out their goods until such time as the Company was prepared to offer them damages which they would accept. There is, in my opinion, no warrant for such a proposition, and it may be added that even if there were, the plaintiffs abandoned the position completely when they wrote to the Agent, on the 9th September 1918 claiming not damages but the full price of the goods.

I hold, therefore, that the suit for damages for wrongful conversion fails and that the decision of the Court below on this point is correct. The only question which remains to be considered is whether the plaintiffs should be awarded any compensation for damage to the goods.

That the goods were damaged, there is no reason to doubt. On the other hand, it is clear that the damage was inconsiderable and that the claim put forward by the plaintiffs is grossly exaggerated. This is apparent from the fact that they were willing to accept compensation at the rate of Rs. 30 per bale.

In dealing with this matter it has to be borne in mind that the goods were carried over the systems of several Railways. They were made over at Jaipur to the B. B. & C. I. Railway and they travelled first over the line under the Railway's control, then over the lines of the Bengal North-Western Railway and of the Oudh and Rohilkund Railway before they came upon the line of the defendant Company at Mogal Sarai which is only a short distance from Mirzapur.

The B. B. & C. I Railway Company with which the goods were booked is no party to the suit nor has any other of the above-named administrations been impleaded as the defendant. The sole defendant is the East Indian Railway Company.

In these circumstances the plaintiffs could only recover damages from the East Indian Railway Company by proving that the

(2) 21 Ind. Cas. 428; 11 A. L. J. 775*n*.
(3) 12 Ind. Cas. 596; 39 C. 311; 14 C. L. J. 472; 16 C. W. N. 329.

damage was caused on its system. This is clear from the provisions of section 80 of the Indian Railways Act (IX of 1890) and the law has been so interpreted in the case of *G. I. P. Railway Co.* v. *Sham Manohar* (4).

The plaintiffs have not produced any direct evidence to show that the defendant Railway Company is responsible for the damage to their goods.

The only evidence which has any bearing on this question is the statement of Krishna Gopal Das, a witness called for the defendant. He is a clerk on the O. & R. Railway and deposes that the 54 bales were received at Benares Cantonment Station, on the 26th June 1918 from the Bengal North-Western Railway (a mater gauge line) and were transhipped the same day into a waggon on the broad-gauge system of the O & R. Railway for despatch to Mirzapur *via* Mogal Sarai. He deposes that the bales were in good condition at the time of transhipment and that they were placed in a sealed waggon.

If this statement be true, then all that can be said is that any damage which was caused to the goods must have been caused between the 26th June and the 2nd July, 1918, either on the O.&R. Railway system or on the system of the defendant Company. That evidence would not suffice to fasten liability upon the East Indian Railway Company. Apart from this, there remains only the fact that the defendant Company did, on three occasions subsequent to the 2nd July 1918 offer compensation to the plaintiffs. I have stated above that Rs. 20 per bale was offered by Robinson, one of the defendant Company's inspectors. Later on, another employee of the defendant Railway, Mr. Dyer, offered Rs. 20 per bale, and, lastly, there was the very much reduced offer made after the inspection by Mr. Vernon on the 18th August.

The question is whether these offers constitute an acknowledgment of liability on the part of the Railway Company which would justify an award of damages.

In paragraph 9 of the written statement the plea of the defendant Company is that these offers were made in order to lead to a settlement out of Court, but neither Robinson nor Dyer has been examined; so it is not possible to say whether the offers were made "without prejudice" nor have we been referred to any documentary evidence on the point. I have considered this point carefully and am disposed to hold that the Railway Company has acknowledged liability.

As to the amount of damages I think a fair sum is at the rate of Rs. 20 per bale offered by Dyer It is true that the expert evidence of Mr. Vernon would, if accepted, show that this offer was in excess of what was really claimable. But Vernon's inspection was not made till the 18th August, more than six weeks after the goods had arrived at Mirzapur—a fact which must be taken into account when estimating the value of his report.

I would, therefore, allow the plaintiffs damages to the extent of Rs. 1,080. The plaintiffs are not entitled to return of the freight, for the goods were carried to their destination. They are entitled to the sale-proceeds of the goods at the rate of Rs. 117 per bale.

There should, therefore, be judgment for Rs. 7,398 in all but the plaintiffs having been in the wrong throughout, must be made to pay the defendant Company's costs in both Courts.

Allowing the appeal in part, I would substitute for the decree of the Court below a decree for Rs. 7,398 and direct that the plaintiffs do pay the costs of the defendant Company in both Courts.

KANHAIYA LAL, J.—I agree in the order proposed.

BY THE COURT.—The appeal is allowed. A decree for Rs. 7,398 will be prepared in favour of the plaintiff-Company. The plaintiff Company will pay the Costs of the East Indian Railway Company in both Courts.

W. C. A.

Appeal allowed.

(4) 14 Ind. Cas. 803; 34 A. 422; 9 A. L. J. 492.

SAHEB BAKHSH SINGH *v.* THAKUR DIN SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 61 OF 1922.

July 14 1922.

Present:—Mr. Simpson, A. J. C.

SAHEB BAKHSH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THAKUR DIN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Perpetual under-proprietary lease—Rent reserved exceeding Government revenue—Nature of transaction—Lease or sale.

Where a grantor reserves no right of re-entry, whether the document is described as a lease or a sale, the test applied to determine its real nature is whether any rent was reserved to the grantor over and above the Government revenue, which he himself had to pay on the land. This applies only to deeds executed by the superior proprietor whereby an under-proprietary right is created in the grantee. [p. 968. col. 1.]

A transaction, therefore, called a *pattah istimrari matahti*, that is, a perpetual under-proprietary lease, which reserves an annual rent, a portion of which is payable by the lessee as Government revenue and the remainder to the lessor, is a lease not giving rise to a right of pre-emption.

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 30th November 1921, setting aside a decree of the Munsif, Musafirkhana, dated the 5th July 1921.

Mr. *K. P. Misra*, for the Appellants.

Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—This is a second appeal arising out of a suit for pre-emption. The sole point for decision is whether the transaction is a sale such as to give rise to a right of pre emption.

A sale is defined in section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised, or part paid and part promised." A lease is defined in the Transfer of Property Act (section 105), as "a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or, promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

Now in the present transaction the defendant No. 2 executed a deed in favour of defendant No. 1. She called it a *pattah istimrari matahti*, that is, a perpetual under-proprietary lease. The property leased is a fractional share of a 1 anna 4 pies in a certain *mahal*. There is a *nazarana* of Rs. 1,000. The annual rent reserved is Rs. 86-6-0, out of which the lessee was to pay Rs. 66-6-0, being the Government revenue. The remaining Rs. 20 she was to pay to her lessor. Except this rent the lessor reserved nothing. There is no right of enhancement of rent or ejectment of the lessee or of re-entry in case the rent is not paid. The position of the lessee for practical purposes will be that of an under-proprietor. On these facts the Court of Trial, the learned Munsif, decided that a right of pre-emption arises in favour of the plaintiff.

On first appeal the learned Subordinate Judge reversed this decision.

The plaintiff comes here on second appeal.

There can be no question at all that the transaction is a lease as defined in the Transfer of Property Act, but this does not, as might be supposed, amount to a decision that it is not a sale. If the definition of a lease is considered with care it will be seen that it is possible for one transaction to be both a sale and a lease.

The first distinction between a sale and a lease is that in a sale ownership passes while in a lease it does not pass; but this distinction fails us where a superior proprietor carves out of his title an under proprietary right and transfers that for a price paid. It has been held that an under-proprietor may be a sharer under section 9 of the Oudh Laws Act in such a way that a sale by him of his under-proprietary right will give rise to pre emption. It has further been held that when a holder of a superior right carves out an under-proprietary right and sells it, this also amounts to a sale and gives rise to a right of pre-emption. Yet such a transaction certainly falls under the definition of a lease, for it is a transfer of a right to enjoy the property.

Another distinction between a sale and a lease is that in a sale the transfer is

an exchange for a price; but this distinction also fails us because a lease may also be in consideration of price. A perpetual lease, such as the present one, is very difficult to distinguish from the sale of an under-proprietary right. At this point I take up the decided cases:—

Ram Faqir v. *Sheo Ratan* (1). This is an important decision in which it was laid down by a Bench of this Court that a superior proprietor can carve out and sell an under-proprietary right and that such a transaction will give rise to pre emption. I distinguish that case from the case before me on two grounds. First, that in that case the deed was not described as a lease but as a *bai birt* that is a sale of under-proprietary right. No doubt the Court will look to the substance of the transaction and will not construe a document which is plainly a sale to be anything else. But at the same time in construing the document the Court will not overlook the terms which the parties themselves used in describing the deed. Secondly, that was a case in which transferor reserved to himself a rent equivalent to the Government revenue only. Stress is not laid on that point in the judgment, but stress has been laid on the same point in subsequent decisions.

Ram Autar v. *Drigpal* (2). This was not a case of pre-emption but the point had to be decided whether the document was a sale of under-proprietary right or a lease. In this case there was no reservation of rent and it was mentioned that the lessee was to pay the Government revenue. The document was held to be a sale-deed.

Data Ram Tewari v. *Deokali Tewari* (3). This is a difficult case. There were two documents which were called *patta birt shankalap*. There was a *nazrana* or premium paid and there was an annual rent reserved. The Bench which decided the case said:—

"There is nothing to show the amount of revenue payable in respect of the plots in dispute." The Court, therefore, was not aware whether the rent was exactly equivalent to the revenue or whether it exceeded the revenue. The decision appears to have proceeded on two grounds, first, that an annual rent was reserved whether it was or was not in excess of the Government revenue, and secondly, that the transaction was rather in the nature of a gift than a sale. That decision, however, has been construed as a decision that the transaction was a lease proceeding on the ground that an annual rent was reserved.

It was so construed in *Ram Suchit* v. *Sheo Sewak Singh* (4). In that case the transaction was described as *shankalapnama* and the rent reserved was said to be on account of the Government revenue, and the decision proceeded on a finding that no rent over and above the Government revenue was reserved. Similarly in *Zulfan Khan* v. *Sant Bakhsh Singh* (5) it was said with regard to *Data Ram Tewari* v. *Deokali Tewari* (3): "The true ground of distinction in that case is not that the deed was granted to a Brahman from religious motives—the motive of the grant has nothing to do with the nature of a transaction—but that the rent reserved was a real rent, reserved, as the learned Judges say, ostensibly to provide the holder with a means of subsistence—*vide* page 30[*] of the report. (The word 'not' in this sentence appears to be either a mis-print or a clerical error)." As I have said, the construction of that document is not so clear to me as it was to the Judges who have commented on it. It is quite true that the motives of the grant will not determine the nature of the transaction. But if the grant is a gift and not a sale, it will not give rise to pre-emption. I do not put the same construction on the sentence relating to the rent reserved. (I agree that the word 'not' is a mistake. I have verified this from the original record). The sentence is as follows:—

"The tenure was granted by way of *birt* in lieu of a premium paid and an annual rent reserved ostensibly to provide the holder with a means of subsistence." The last clause qualifies the word "*birt*" or the word "tenure," not the word "rent". It was the holder who was to pay the rent. The rent could not provide him with

(1) 8 O. C. 121.
(2) 8 Ind. Cas. 725; 14 O. C. 41.
(3) 25 Ind. Cas. 855; 17 O. C. 299; 1 O. L. J. 463.
(4) 56 Ind. Cas. 629; 23 O. C. 50.
(5) 65 Ind. Cas. 97; 24 O. C. 310.

[*] Page of 17 O. C.—[*Ed.*].

subsistence. It was the grant itself, the land, which was to be a means of subsistence for him.

But leaving this case out of account, there is sufficient authority to support the proposition laid down in *Zulfan Khan* v. *Sant Bakhsh Singh* (5) "where the grantor reserves no right of re-entry, whether the document is described as a lease or a sale, the test applied to determine its real nature has been whether any rent was reserved to the grantor over and above the Government revenue, which he himself had to pay on the land. This applies only to deeds executed by the superior proprietor whereby an under-proprietary right is created in the grantee." Applying that test the present transaction must be regarded as a lease not giving rise to a right of pre-emption. The decree of the lower Court is right.

The appeal is dismissed with costs.

Appeal dismissed.

W. C. A.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1010 OF 1920.

February 1, 1922.

Present :—Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

C. D. SARANGAPANY IYENGAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SADAGOPA NAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Easement—Right to go on another's land to gather fruit—Right unknown to law.

The right to go on to a neighbour's land to collect the fruit of a tree which falls therefrom from such portion of a tree which belongs to the asserter of such right is not an easement within the meaning of the Easements Act. Such a right is unknown to the law.

Second appeal against a decree of the Court of the Subordinate Judge, Chingleput, in Appeal Suit No. 49 of 1920, preferred against a decree of the Court of the Principal District Munsif, Chingleput, in Original Suit No. 377 of 1918.

FACTS appear from the judgment.

Mr. *V. Viswanatha Sastri*, for the Appellants.—The fruits belong to plaintiff though it fell on his neighbour's land. The right to enter on my neighbour's land for the purpose of gathering the fruits arises by severance. By the act of severance a right of servitude was created.

Mr. *P. V. Ramachandra Rau*, for the Respondents.—The right cannot be claimed as an easement as understood in the Easements Act. It can only arise by contract.

JUDGMENT.—The appellants in this case are the plaintiffs who sought in no less than three Courts to get a declaration that they are entitled to go on to their neighbour's land to gather the fruits that fall there from such portion of a tree which belongs to the plaintiffs. It is not pretended that this right can be acquired by prescription, but it is said that it arises by severance and that the necessary implication is that a servitude was created *ipso facto* by the act of severance. In our own opinion, the right claimed is not an easement within the meaning of the Act, and when it is claimed, as it is put here, as an easement and not as a creation of an express agreement or contract between the parties, we are of opinion that the claim is a right which is unknown to law, as pointed out in *Lemmon* v. *Webb* (1).

We, therefore, think that the appeal fails and must be dismissed with costs.

M. C. P.

W. C. A.

Appeal dismissed.

(1) (1895) A. C. 1; 64 L.J. Ch. 206; 11 R. 116; 71 L. T. 647; 59 J. P. 564.

ANNAN v. DUBAR.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 47 AND 48 OF 1922.

April 24, 1922.

Present:—Pandit Kanhaiya Lal, J. C.

ANNAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Sheikh DUBAR—PLAINTIFF—RESPONDENT.

ALLABANDU—DEFENDANT—APPELLANT

versus

Sheikh DUBAR—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 78—Sale—Specific or ascertained goods—Seller and buyer, position of.

Where specific goods are sold and agreed to be delivered wholesale at a certain rate, it is for the buyer to get the goods weighed and delivered to him and the latter cannot by delay in weighing the goods prevent the transfer of the ownership to him.

The sale of an entire heap of bark stored in a godown approximately of a certain weight, is, practically, a sale of specific or ascertained goods within the meaning of section 78 of the Contract Act, and the seller is entitled to claim the price, less earnest-money, if any, already paid therefor.

Second appeal from a decree of the Subordinate, Judge, Barabanki, dated the 23rd December 1921, modifying that of the Munsif, Fatehpur, dated the 30th May 1921.

Messrs. *M. Wasim* and *Anant Prasad*, for the Appellant.

Mr. *Haidar Husain*, for the Respondent.

JUDGMENT.—On the 19th August 1920 the defendants agreed to purchase 446 maunds of Babul bark from the plaintiff at 24 seers per rupee and paid Rs. 70 as earnest-money. The bark was stored in a godown at Zaidpur belonging to the plaintiff. The defendants had seen the bark and had agreed to take delivery on payment of the balance of the price on the 21st August 1920. They did not, however, take delivery as promised. The present suit was, therefore, brought by the plaintiff for the recovery of the remainder of the price which the Courts below decreed.

The main question for consideration in these appeals is whether the sale was a sale of ascertained goods within the meaning of section 78 of the Indian Contract Act (IX of 1872). The statement of the defendants was that they had agreed to purchase the bark according to the sample, but the Courts below found that that was not so, that the godown contained about 446 maunds of bark and that the defendants had agreed to purchase the whole stock. The question of weighment was only material for the purpose of ascertaining the price to be paid, if the weight of the stock was found to correspond with that mentioned by the plaintiff. Section 80 of the Indian Contract Act (IX of 1872) provides that where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done. There is, however, a distinction between a case where something remains to be done by the seller to the goods for the purpose of putting them into a state in which the buyer is to take them and a case in which the buyer has for his own satisfaction to get the goods weighed for the purpose of ascertaining the amount of the price. Where specific goods are sold and agreed to be delivered wholesale to a certain person at a certain rate, it is for the buyer to get the goods weighed and delivered to him or, as pointed out in *Abdul Aziz Bepari* v. *Jogendra Krishna Roy* (1), the weighment is only for the consideration of the buyer and the latter cannot by delay in weighing the goods prevent the transfer of the ownership to him. As the contract was for the sale of the entire heap of bark stored in the godown, which approximately amounted to 446 maunds, it was practically a sale of specific or ascertained goods. The sale was complete and the plaintiff was entitled to claim the remainder of the price. The defendants were responsible for their failure to get the goods weighed and delivered on the due date.

The appeals are dismissed with costs.

W. C. A.

Appeals dismissed.

(1) 36 Ind. Cas. 119; 44 C. 98 at p. 115; 20 C. W N. 1224.

ABDUL KARIM KHAN v. MUHAMMAD JAN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1481 OF 1920.

May 10, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

ABDUL KARIM KHAN—DEFENDANT—APPELLANT

versus

MUHAMMAD JAN—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), O. II, r. 2—Annuity, suit for arrears of—Suit dismissed in default—Appeal—Fresh suit for arrears of subsequent instalment—Appeal withdrawn during pendency of suit—Third suit claiming all arrears, whether maintainable.

Plaintiff was entitled to an annuity to be paid to him by the defendant on the 1st January and 1st July of each year. On 28th June 1917 he instituted a suit to recover instalments which had fallen due from 1st January 19 4 to st January 1917: on 8th July 1917 the suit was dismissed in default, and on 10th November 1917 the Court refused to set aside the order of dismissal: an appeal was preferred against this latter order but was withdrawn on 2nd March 1918. In the meantime, the instalment for 1st July 1917 fell due, and plaintiff obtained a decree for that particular instalment on 2nd April 1918. He then brought the present suit to recover arrears for the period 1st January 1914 to 1st July 1919:

Held, that under the provisions of O. II, r. 2 of the Civil Procedure Code the suit, so far as the arrears for 1st January to 1st July 1917, were concerned was barred, and that any protection which might have accrued to the plaintiff by reason of his appeal was taken away when the appeal was withdrawn. [p. 971, col 1.]

Second appeal from a decree of the District Judge, Moradabad.

Mr. *Peary Lal Banerji*, for the Appellant,

Dr. *S. M. Sulaiman* and Mr. *Mukhtar Ahmad*, for the Respondent.

JUDGMENT.—We are concerned in this case with a claim which was brought by the first respondent Munshi Muhammad Jan for the recovery of arrears of an annuity of Rs. 600 per annum.

The annuity was payable in equal moieties on the 1st January and the 1st July of each year and the period covered by the present suit ran from the 1st of January 1914 to the 1st of July 1919.

The Courts below have decreed the claim in full and the question raised before us is whether or not in view of certain proceedings between the parties the items from the 1st of January 1914 up to and including that of the 1st of January, 1917 are claimable in this suit.

In order to explain the matter which arises for decision, it is necessary to refer to the following facts:—

On the 28th of June 1917, the plaintiff, Munshi Muhammad Jan, brought a suit against these defendants to recover the instalments of the annuity which had fallen due from the 1st of January 1914 up to the 1st of January, 1917. This suit was Suit No. 166 of 1917, and on the 31st of July 1917 the parties were absent. The Subordinate Judge wrote a judgment dismissing the suit. In his order of that date he mentions that the parties were absent. He also went on to say that because an appeal was pending with respect to a certain sale-deed, the suit appeared to him to be premature, and he purported to dismiss the suit not on the ground of absence of the parties but on the ground that the suit had been brought before time.

The plaintiff after this order of dismissal had been passed made an application to the Subordinate Judge to have the order of dismissal set aside. Clearly that was an application made to the Court in accordance with the provisions of O. IX, r. 4.

That application for setting aside the order of dismissal was rejected on the 10th of November 1917.

Against that order of rejection the plaintiff filed an appeal in the Court of the District Judge, and on the 2nd of March 1918 that appeal was withdrawn and dismissed on the application of the present plaintiff.

Meantime the instalment of the annuity which fell due on the 1st of July 1917, had become payable and a suit to recover that particular instalment was brought in the Court of the Munsif on the 22nd of December 1917. That suit was tried out and the plaintiff got his decree on the 2nd of April 1918.

The point which has been made here on behalf of the defendants and which was raised unsuccessfully by them in the Courts below is that when the plaintiff brought this claim on the 22nd of December 1917 in respect of the half-yearly instalment of the annuity which had become payable on the 1st of July 1917 he was bound to include in his claim a claim for all other instalments which had become due up to that date and with

respect to which a claim would have been within limitation.

O. II, r. 2, is consequently put up as a bar by the defendants.

The plaintiff seeks to avoid the operation of O. II, r. 2 in this way. He says that at the time he filed his suit on the 22nd of December 1917, an appeal was still pending in the Court of the District Judge, an appeal relating to the suit in which the claim was for the arrears of the earlier years, that is to say, from the 1st of January 1914 up to the 1st of January 1917. It is argued that while that appeal was pending when the second suit was filed, it was not open to the plaintiff to include the earlier claim in the second suit.

There are two answers to this contention. In the first place, it is obvious that after the plaintiff's application to have the order of dismissal in default set aside was rejected, he had no right of appeal at all. In the next place even if he assumed mistakenly that he had a right of appeal, it is clear that that appeal was withdrawn from the Court of the District Judge on the 2nd of March 1918, that is to say, a full month before the decree was passed in the second suit which was brought on the 22nd of December 1917. In other words, the appeal was withdrawn while the second suit was still pending. In these circumstances, we think, the plaintiff cannot be heard to say that he is in any way protested against the operation of O. II, r. 2 by the fact that he had an appeal pending in the Court of the District Judge at the time the second suit was filed. After the appeal was withdrawn any protection which might have accrued to the plaintiff by reason of the appeal having been filed, was taken away and his proper course then was to apply to the Court in which the suit was pending and to ask for amendment of the claim and permission to include in the claim a claim for the years 1st January 1914 to 1st January 1917. We hold that the view taken by the Court below on this point of law is erroneous and the appeal must, therefore, be allowed to this extent. The result is that, allowing the appeal, we direct that the claim of the plaintiff regarding the items accruing due prior to the 1st of January 1918 is dismissed. The rest of the claim is decreed with proportionate costs against the defendants. The defendant-appellant is entitled to proportionate costs in all three Courts.

W. C. A.

Decree modified.

MADRAS HIGH COURT.

ORIGIAL SIDE APPEAL No. 116 OF 1921.

August 2, 1922.

Present:—Sir Walter Schwabe, KT., Chief Justice, and Mr. Justice Wallace.

R. A. ARUNACHALA AIYAR—APPELLANT

versus

C. SUBBARAMIAH—RESPONDENT.

Civil Procedure Code (Act V of 1908, O IX, r. 13 —'Sufficient cause', meaning of—Party unable to be in Court in time.

A Court should set aside an *ex parte* decree if it is satisfied that the defendant did his best to attend Court in time and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, mulcting, in proper cases, the delinquent in costs. No person should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or which cannot be put right, so far as the other side is concerned, by making the person to blame pay for it. [p. 972, col. 1.]

Appeal from the judgment and order of Mr. Justice Phillips, dated the 19th October 1921, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 578 of 1920

Mr. *K. Jagannatha Aiyar*, for the Appellant.

Messrs. *K. Bashyam Aigangar* and *V. V. Devanathan*, for the Respondent.

JUDGMENT.

SCHWABE, C. J.—I have expressed myself on this subject in fairly strong language before and I propose to do so again.

When, for some reason, a man has not attended a case in Court, and there is no sufficient explanation of his absence, the case by reason of his absence, is allowed to go *ex parte*. If he comes to Court afterwards and asks that his case may be restored to file, the question to be considered by Court is not whether by some human possibility, being wise after the event, he could not have got there in time or whether a man who

studied his Railway Guide a little better, would not have got in another train or taken another route. but whether the man honestly intended to be in Court and did his best, though in his own stupid way, to get there in time: and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an irevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment, mulcting, in proper cases, the delinquent man in costs. In all those cases, this universal panacea for healing all wounds, as it has been called in England, will properly be applied. It is not right in cases of this kind that the man should have his case disposed of without being heard These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerned, by making the man to blame pay for it.

The proper order in this case should have been that the case should be restored to the list and the judgment set aside on payment of all costs thrown away by the defendant, and that is the order that I propose to make. The costs of this appeal will be paid by the respondent. The costs of the application to set aside the judgment before Phillips, J., will be costs in the cause.

WALLACE, J.—I agree. Whether there was negligence precedent or not does not affect the case. Under ordinary conditions, if the appellant had started from Trichinopoly by the evening train on the 12th, he would have been in time for the hearing of this case on the 13th, and the breach on the Railway line is obviously a sufficient cause for his not appearing, and that is the question which the Court had to decide. I am quite clear that there is sufficient cause for his not appearing, and I, therefore, agree with the judgment of the learned Chief Justice.

M. C. P.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 42 OF 1922.

July 17, 1922.

Present:—Mr. Simpson, A. J. C.

MOHKAM—DEFENDANT—APPELLANT

versus

BANSIDHAR AND ANOTHER—PLAINTIFFS

Musammat BHAGWANTA AND OTHERS—DEFENDANT—RESPONDENTS.

Appeal—Plea, new, involving questions of fact, admission of—Hindu Law—Widow—Surrender to reversioner, validity of—Bona fides—*Question of fact.*

A plea which involves questions of fact which ought to have been decided in the Trial Court and are not decided because the plea was not raised there, cannot be raised at any later stage of the case. [p. 973, cols 1 & 2.]

In the case of a surrender by a Hindu widow in favour of the next reversioner the question whether an undertaking by the reversioner to discharge the existing debts of the widow would invalidate the surrender depends upon the circumstances of each case, the test to be applied being to see whether the transaction is a *bona fide* surrender or a mere devise to divide the estate with the reversioner. [p 973, cols. 1 & 2]

Appeal from a decree of the Subordinate Judge, Fyzabad, dated the 24th October 1921, upholding a decree of the Munsif, Fyzabad, dated the 24th June 1921.

Messrs. *Bisheshwar Nath* and *J. K. Banerji*, for the Appellant.

Mr. *Nian at Ullah*, for Respondents Nos. 1 and 2.

Mr. *A. P. Sen*, for Respondent No. 1.

JUDGMENT.—This second appeal is confined to a single point and the appellant cannot take that point because he did not plead it in the Court of Trial.

The suit was one by two remote reversioners brought against a Hindu widow, *Musammat* Bhagwanta defendant No. 1, her donee Thakur Ram defendant No. 2, the next reversioner Taluqdar Misra defendant No. 3, another reversioner intermediate between the next reversioner and the plaintiff Ram Dutt defendant No. 4, and the vendee of the donee Mohkam defendant No. 5. The suit was one for a declaration that the deed of gift and the donee's sale-deed are both invalid as against the reversioners when *Musammat* Bhagwanta shall die.

The suit was contested by Mohkam defendant No. 5 only. He denied that the plaintiffs were reversioners at all. He further denied that *Musammat* Bhagwanta held the property as a Hindu widow. He also raised a plea of

MANINDRA CHANDRA NANDI v. RAM KUMAR LAL BHAGAT.

limitation and a plea of legal necessity for earlier mortgages which he paid off. He also asserted that there is an heir existing in the family in the person of a daughter's son. Lastly, he claimed the benefit of section 41 of the Transfer of Property Act.

Issues were framed on these points and along with the issue of legal necessity there was added an issue as to the consent of the next reversioner. All these issues were decided against the defendant and the plaintiff's suit was decreed. The defendant appealed.

The judgment of the lower Court is mainly devoted to various points which had already been considered in the Court of Trial. At the end of the judgment the question whether this gift was valid as an acceleration in favour of a reversioner is discussed. It was raised in the second ground of appeal. I am of opinion that the lower Appellate Court ought not to have allowed the question to be raised at that stage. This appears from the judgment of the lower Appellate Court itself. The plea was repeated on two grounds. First that the transfer is not a transfer of the whole of the husband's estate inasmuch as part of a plot is not covered by the deed of gift. It is argued before me that the lower Appellate Court made a mistake here and that the widow was owner of only one fourth of that plot and she transferred the whole of that one-fourth share. It is admitted that the deed itself contains no statement that the whole of the husband's estate is gifted, but it is said that a comparison between the *khewat* and the deed of gift will show that nothing was left out. I do not propose to decide the point, but it is plain that the plea of acceleration raised questions of fact which ought to have been decided in the Court of Trial and were not decided because the defendant did not raise the plea there.

The other ground on which the lower Appellate Court proceeded was that the gift was subject to the condition of payment of the donor's debts. It was held by a Bench of the Madras High Court in *Rajagopala Surya Rao Bahadur Garu* v. *Suryanarayana Jagapathi Bahadur Garu* (1), that the question whether an undertaking by the reversioner to discharge the existing debts of the widow would invalidate the surrender depends upon the circumstances of each case, the test to be applied being to see whether the transaction is a *bona fide* surrender or a mere device to divide the estate with the reversioner. On this second point also there were questions of fact to be decided. The appellant's Counsel has abandoned all his other grounds of appeal and the one ground which he wishes to press ought to have been pleaded in the Court of Trial and cannot be taken at any later stage of the case.

For these reasons the defendant's appeal is dismissed with costs in all three Courts.

N. H. *Appeal dismissed.*

(1) 64 Ind. Cas. 388; 41 M. L. J. 203; 14 L. W. 29; (1921) M. W. N. 431.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT

April 3, 1922.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Maharaja SIR MANINDRA CHANDRA NANDI—APPELLANT

versus

RAM KUMAR LAL BHAGAT AND OTHERS RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 47, O XXII, r 10—Decree for possession and mesne profits—Execution proceedings—Lessee of defendant, if can be added as party to account for profits—Lease, whether devolution, creation or assignment of interest.

O XXII of the Civil Procedure Code contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else,—the more ordinary cases being death, marriage, insolvency. [p. 976, col. .]

Where during the pendency of a suit, a party is added by devolution, he must take the suit as he finds it, and a judgment already rendered would be binding on him [p 976, col. 1.]

Although a wide construction should be placed upon the provisions of the law with regard to introducing parties by devolution, and although it is desirable that all points should be ascertained in execution proceedings without a fresh suit, yet that which should in reality form the basis of a suit against a separate party, for some act done by himself, cannot be introduced as a question to be tried in execution proceedings. [p. 976, col. 2.]

Prosunno Kumar Sanyal v. *Kali Das Sanyal*, 19 I. A. 166, 19 C. 685; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 89 (P. C.), referred to.

In an action to recover possession of land, the plaintiff cannot, after obtaining a decree for possession and mesne profits, add as party to the suit any lessee of the defendant so as to compel him to account for any profits received from the land, as the lease cannot be looked upon as an assignment, creation or devolution of the interest of the defendant within the meaning of O. XXII, r. 10 of the Civil Procedure Code [p 976, col 1.]

Appeal from the order of the Patna High Court (Sir Edward Chamier, Kt., Chief

Justice, and Mr. Justice Sharfuddin), dated the 16th November 1916, reported as 38 Ind. Cas. 237, reversing that of the Additional Subordinate Judge, Hazaribagh, dated the 13th November 1914.

JUDGMENT.

LORD PHILLIMORE.—The present respondents brought, as plaintiffs on the 15th April 1907, a suit against Raja Makund Sahi to recover possession of six villages and jungle which they claimed. The Raja defended the action, which in due course came on for trial, and on the 21st September, 1908 the Court of first instance decided against the plaintiffs, and dismissed the suit. Just one year afterwards, on the 21st September 1909, the Raja gave a lease for a term of years of the right of mining for mica, and otherwise exploiting the jungle to the present appellant, whose case is that he had not notice of the pending litigation.

The unsuccessful plaintiffs appealed to the High Court, which on the 15th May 1913 reversed the decision of the first Court and made a decree in favour of the plaintiffs ordering the Raja to put them into possession of the six villages and jungle, and it was further ordered :—

"That the case be sent back to the lower Court [*inter alia*] to take an account of the mesne profits to which the plaintiffs-appellants are entitled for the three years prior to the institution of the suit, and also for the period thereafter till the delivery of possession or the expiration of three years from this date, whichever event happens earlier."

When the case was accordingly remitted to the Court of first instance, a Commissioner or Amin was appointed to make the necessary enquiry and on the 22nd August 1914 he made his report.

On the 2nd January 1915 the Subordinate Judge recorded that the parties did not object to the report of the Amin and that it might, therefore, be accepted, and he ordered "that the suit be decreed finally; that the Amin's report be considered to be a part of the decree; and that the plaintiffs do recover possession with mesne profits, as determined by the Amin, and the costs of this suit from the defendant with interest at 6 per cent. per annum." In this way the suit came to its natural termination.

It happened, however, that the Amin took a somewhat unusual course in conducting the enquiry which led to his report. When enquiring into the mesne profits he first of all ascertained the rents which the Raja had received from the present appellant and other tenants totalling Rs 42,075, with a further profit of Rs. 500, from the jungle. Not content with this, he proceeded further to enquire what were the profits which the various lessees might be taken to have made from the mica which they had extracted during the terms of their leases pending the somewhat protracted litigation. What exactly was his object in doing this, or who set him in motion to do it is not quite clear. The law as to mesne profits is thus expressed in section 2, sub-section (12) of the Code of Civil Procedure :—

"'Mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

It might be said that in ascertaining such profits the successful plaintiffs would not be limited to the actual rents which the trespassing defendant had received. And, apart from the question of mesne profits, a claim might have been preferred for damages for the mica actually removed. Again, it would be conceivable that in a suit properly framed the lessees from the Raja, who had, though ignorant of the plaintiffs' title, carried away what was the plaintiff's mica, could be rendered liable for damages in respect of what they had so taken away. But these lessees were not included in the suit. The Amin with some *naiveté* stated twice in the course of his report that he had had little assistance from the plaintiffs or their agents, who had, in fact, taken very little interest in the execution of the enquiry, and that he obtained his information largely by the help of the defendant Raja and his servants. However he reported under both heads, bringing what he described as the net profit obtained from the mines up to a sum considerably exceeding a lakh of rupees.

The report was in narrative form and finished without any definite recommendation. Whether the conclusion from it was intended to be that the defendant Raja was to pay as mesne profits the rents what he had received

or whether he was to pay as mesne profits the net profits of the mines—it could not be both—does not clearly appear; though from what subsequently happened it can almost certainly be inferred that it was only the smaller figure, that is, the sum of the rents. This report having been made and filed, but before it was confirmed, the plaintiffs—the present respondents—relying upon the statements with regard to the profits obtained from the mines, made an application by a petition dated the 4th September 1914. This petition stated that the several lessees had in collusion with the Raja obtained a settlement of the disputed property in an illegal manner, and had misappropriated a large quantity of mica, worth between one and two lakhs of rupees, and prayed that they should be ordered to appear at the time of the ascertainment of the mesne profits so as to have the matter determined and decided in their presence, and that to avoid future objections they should be made defendants. It will be observed that, unless it be inferentially, no relief was claimed against the appellant and the other lessees.

The appellant was summoned, and put in a counter-petition in which he raised various objections or defences. He stated that the plaintiffs had been aware all along of what he was doing under his lease; he claimed that the application was barred by limitation; he said that the application was made in collusion with the defendant Raja; and that since he knew of the plaintiff's claim to the property he had surrendered his lease, namely, on the 1st August 1914; and he disputed the plaintiffs' title to the minerals even on the footing that they were entitled to the land, averring that the minerals belonged to the superior lord, the Zemindar. He also took objection to the form of procedure.

On these statements the matter came before the Subordinate Judge, who on the 13th September 1914 rejected the plaintiffs' application, holding that under the construction of O. XXII, r. 10 of the Code of Civil Procedure there was no such assignment of interest by the defendant Raja to the present appellant and the other lessees as to warrant their being brought into the suit.

From this order the plaintiffs appealed to the High Court. There is no date upon their memorandum of appeal and nothing to show whether it was lodged before or after the order of the 2nd January 1915. It rather looks as if it was later, but it is not material. Their appeal came on before the High Court, which, on the 16th November 1916, allowed the appeal and ordered the Subordinate Judge to make the six tenants, including the present appellant, parties to the suit, and to ascertain the mesne profits in their presence.

It is from this decree that the present appeal is brought.

From a perusal of the order in its bare form it is not easy to see what could be its object. What advantage could it be to the plaintiffs or the defendant Raja that the mesne profits which the defendant Raja was to pay should be assessed in the presence of the lessees? Moreover, they had been already assessed, and that, finally, the report of the Amin had been accepted, and the mesne profits, whatever they were found by it, had been decreed, and the decree had not been appealed from.

But light is thrown by the language of the learned Chief Justice. He says: "In my opinion the appellants are entitled to have the persons in question added as parties to the proceedings and to compel them to account for any profits which they may have received from the land."

This opinion appears to be founded on the language of O. XXII, r. 10, and it is desirable to examine the Code of Civil Procedure with a view to seeing whether it lends support to this opinion. By section 47

"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

"(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding....."

O. XXII, r. 10, states:—

"(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

The High Court appear to consider that in an action to recover possession of land where the defendant while he is in possession has granted leases, proceedings in execution may involve removal of the tenants, and that for such a purpose a lease may be considered an assignment within the meaning of r. 10.

It is unnecessary for their Lordships to express any opinion as to whether this view is right or not, because the appellant is not setting up his lease or claiming to remain in occupation as tenant—on the contrary, he states that he has surrendered his lease—and because the application was not to remove him. The Order contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon someone else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of r. 10 for all other cases. But they are all cases of devolution. There is, it should be noted in this rule, a significant change of language from that used in the earlier Code, where it is stated in section 372 as follows:—

"In other cases of assignment, creation or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come either in addition to or in substitution for the person from whom it has passed, as the case may require."

The words "in addition to" in the earlier Code have disappeared. But the matter does not rest upon this change. The liability, if any, of the appellant to pay damages for removal of the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers, and a case, if any, against the appellant must rest upon his action and the direct relation established thereby between him and the plaintiffs.

Serious injustice would be done if any other view was taken. A party added by devolution during the pendency must take the suit as he finds it. Judgment already rendered would be binding upon him. He would not, in the present case, be able to question the title of the plaintiffs to the mica, though he has a serious contention that the title to the minerals rests with the Zemindar. Again it is all very well to say that the mesne profits, by which is meant the value of the lost mica, are to be ascertained in his presence. There has been at least a preliminary assessment by the Amin which he would have considerable difficulty in setting altogether aside, and this assessment has been made in his absence. He would come before the Subordinate Judge with a preliminary finding against him for over a lakh of rupees. O. XXII, r. 10 does not apply. There has been no assignment, creation or devolution of any interest within the meaning of that rule.

Their Lordships have been reminded of the decision of this Board in the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1) and of the general principle therein expressed, that a wide construction should be put upon the provisions of the Act with regard to introducing parties by devolution and of the desirability of ascertaining all possible points in execution proceedings without a fresh suit.

But giving all force to these considerations they cannot see how that which should in reality form the basis of an independent suit against a separate party, for some act done by himself, can be introduced as a question to be tried in execution proceedings in another suit. Section 47 of the Act does not apply. If the added persons did commit trespasses, these were distinct ones, and not committed by them as representatives of the original defendant. To hold otherwise would be to confuse the rights.

Considerations both of form and of substance are opposed to the order from which this appeal is brought.

Their Lordships will, therefore, humbly recommend His Majesty that this appeal should be allowed, and the decree of the High Court discharged and the decree of the Subordinate Judge restored, and that the appellant should have his costs before this Board and in the two Courts below.

N. H. & W. C. A. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *Watkins and Hunter.*

Solicitor for the Respondents.—Mr. *E. Dalgado.*

(1) 19 I. A. 166; 19 C. 683; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. s.) 898 (P. C.).

WALIUL HAQ v. BIGGAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPLICATION No. 43 OF 1921.

November 17, 1921.

Present:—Mr Daniels, A. J. C.

Qazi WALIUL HAQ—DEFENDANT—APPELLANT

versus

Musammat BIGGAN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 48—Transfer of a share of property—Subsequent transfer of remainder—Property, parts of, subject to incumbrances—Transferees, respective, position of.

On the principle of section 48 of the Transfer of Property Act where separate rights created in favour of different persons can all be exercised without encroaching upon each other they must be treated as relating to different portions of the property. [p. 978, col. 1.]

Mahabir Prasad v. *Chhote Singh*, 49 Ind. Cas. 39; 21 O. C. 317, referred to.

A. mortgaged a half share in an estate to *B.* who foreclosed the mortgage and became complete owner. Subsequently to this, *A* sold the remaining half share to *T.*, but in neither the mortgage-deed nor the sale-deed was there mention of any incumbrance It turned out later that, prior to the mortgage to *B.*, *A* had mortgaged certain plots to *M.* and the question was whether those plots should be included in the share foreclosed by *A.* or in the share sold to *T.*:

Held, that as the mortgage to *B.* was not made subject to any prior incumbrances, under the ordinary law *A.* must be taken to have covenanted to transfer the property free of all incumbrances, and that as the share sold to *T* was merely what remained after *B* had obtained his half share, the latter, in partition, was entitled to have the incumbered plots assigned to the share sold to *T* [p. 978, col. 2.]

Appeal against an order of the Third Additional District Judge, Lucknow, dated the 23rd May 1921, setting aside decree of the Subordinate Judge, Barabanki, dated the 21st June 1920

Messrs. *Basudeo Lal* and *Ram Bharose Lal*, for the Appellant.

Mr. *Haider Husain*, for the Respondent.

JUDGMENT.—This is a second appeal in a suit brought by the plaintiff, *Musammat* Biggan, for a declaration that she is the exclusive owner of certain of the plots in suit and possesses mortgagee rights in others. The suit arises out of a suit for partition in the Revenue Court in which an order was passed by the Assistant Collector under section 111 (1) (*b*) of the U. P. Land Revenue Act, 1901, directing the plaintiff to file a suit within three months to establish her title. The original owner of the land was Mahtab Ali *alias* Saiyid Malhu. Saiyid Malhu owner a one-anna three-pies share. He mortgaged half of this share to *Musammat* Amiran by a deed dated 27th June 1871. *Musammat* Amiran foreclosed the mortgage and became complete owner of the half share on 15th May 1878. The defendant-appellant Qazi Waliul Haq is her sucessor-in interest.

On 11th July 1878 Saiyid Malhu sold his remaining half share to one Talib Ali, the predecessor-in interest of the plaintiff. In neither of these documents was there any mention of any incumbrance. It now turns out that certain plots out of the one-anna three pies share had been sold and mortgaged by Saiyid Malhu prior to 27th June 1871 and the question in this appeal is really whether those plots should be included in the share mortgaged to and ultimately foreclosed by *Musammat* Amiran or in the share sold to Talib Ali and now possessed by the plaintiff.

The Courts below have taken diametrically opposite views of the rights of the parties It is an admitted fact that the plots transferred by Saiyid Malhu prior to 1871 are less than a half share in the property. The learned Subordinate Judge held that as the mortgage to *Musammat* Amiran was not made subject to any prior incumbrances, under the ordinary law the mortgagor must be taken to have covenanted to transfer the property to her free of all incumbrances. If *Musammat* Amiran had applied for partition of her mortgaged share she would have been entitled to have it assigned to her free of any incumbrances and to have the incumbered plots assigned to the other half share. Talib Ali was a subsequent transferee from Saiyid Malhu and neither he nor his successor, the plaintiff, can claim to be in a better position than Saiyid Malhu himself would have been. The view taken by the District Judge in appeal was that ordinarily where an undivided share in property is mortgaged or sold the transferee obtains an undivided share in each of the plots comprised in the property of his transferor and, therefore, he held that the burden of the incumbrances must be borne in equal shares by the two parties. As between these opposite views it appears to me that the view taken by the learned Subordinate Judge is correct. The point was raised in a reported case, *Mahabir Prasad* v. *Chhote Singh* (1) decided in 1918,

(1) 49 Ind. Cas. 39; 21 O. C. 317.

There it was laid down that on the principle of section 48 of the Transfer of Property Act where separate rights created in favour of different persons can all be exercised without encroaching upon each other they must be treated as relating to different portions of the property. There appears to me no doubt that *Musammat* Amiran could have insisted on having the mortgaged property assigned to her free of incumbrance and I agree with the learned Subordinate Judge that the plaintiff cannot claim to throw any part of the burden on her. In this Court the learned Counsel for the respondent said he would have accepted this position if the land had remained in possession of Saiyid Malhu, but as his own sale-deed also made no mention of the incumbrances he was equally entitled to have an unincumbered half share of the property transferred to him. This argument, however, loses sight of the fact that the share foreclosed by *Musammat* Amiran was expressly mentioned and excluded in the sale-deed to Talib Ali. What was sold to him was merely the share which remained after *Musammat* Amiran had obtained her half share. There are some indications on the record that this is what was understood by the parties at the time. It is significant that while the half share was mortgaged to *Musammat* Amiran for Rs. 200 the price paid by Talib Ali for the other half was only Rs. 25. Similarly when the plaintiff sued to redeem a mortgage on one of the numbers in suit she did not make the defendant a party. This might, of course, be due to oversight but it might also be due to the fact that she did not regard this number as in any way belonging to the defendant's half share. Similarly *Musammat* Amiran was not made a party to a redemption suit brought in respect of another of these plots in the year 1872 within a short time after the mortgage to her. These, however, are minor details. Agreeing with the view of the law taken by the learned Subordinate Judge I allow the appeal and setting aside the decree of the lower Appellate Court restore the decree of the Court of first instance with costs in all Courts. The cross-objections filed by the respondents have not been urged and are dismissed but under the circumstances without costs.

W. C. A. & N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 1612 OF 1920.

June 29, 1922.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

FAKHRULLAH KHAN—DEFENDANT—APPELLANT

versus

RAM SARUP—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 13—Foreign territory—Basra, whether under administration of Government of India—Period of absence in Basra, exclusion of.

The fact that the territory of Basra was occupied by troops sent by the Government of India for the campaign in Mesopotamia and that the despatches relating to the operations of those troops were published in the *Gazette of India*, is insufficient to show that Basra was under the administration of the Government of India; for the purposes, therefore, of section 13 of the Limitation Act, absence in Basra is absence in a foreign territory, and a plaintiff is entitled to deduct the period of such absence from the period of limitation prescribed for a suit to recover on a pro-note executed by the absentee in British India. [p. 979, col. 2.]

Second appeal from a decree of the District Judge, Meerut.

Mr. *Lalit Mohan Banerji*, for the Appellant.

Mr. *Surendro Nath Gupta*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for the recovery of money due on a promissory-note executed by the defendant in favour of the plaintiff, on the 12th of April 1913. The promissory note purports to have been executed for Rs. 1,000. The whole of this sum was payable on demand. The allegations of the defendant were that he executed the said promissory-note for Rs. 100, that the plaintiff was not competent to enter into the transaction which resulted in the taking of the promissory-note from the defendant because he was a Government servant and that the claim was barred by limitation.

The Court of first instance found that the promissory-note in question had been executed for Rs. 1,000 by the defendant in favour of the plaintiff on an old account, and that the plaintiff was entitled to sue for the recovery of the money due to him on that document. It further held that the suit had been brought on the 14th of August 1918, after the time allowed by law had expired and that section 13 of

the Indian Limitation Act did not save limitation. It, therefore, dismissed the claim. The lower Appellate Court, however, came to the conclusion that section 13 was applicable and that the suit was within time. It decreed the claim accordingly. In the lower Appellate Court the defendant does not appear to have challenged the findings arrived at by the Court of first instance in regard to the question of the genuineness of the promissory note for the amount for which it purported to have been executed or in regard to the right of the plaintiff to file the suit. The only point which appears to have been raised in the lower Appellate Court was whether the suit was barred by time. The promissory note was executed on the 12th of April 1913 at Meerut, where the defendant was employed as a store keeper in the Supply and Transport Department. It is admitted that he left Karachi for France on the 15th of September 1914 and reached France on 13th of October 1914. He remained there till the 15th of December 1915. He then left for Basra where he stayed from the 8th of January 1916 to the 15th of March, 1917, returning to India, on the 21st of March 1917. The present suit was filed on the 14th of August 1918. If the period spent by the defendant in Basra and France be taken into consideration and excluded from the operation of limitation under section 13 of Act IX of 1908, then the present suit would be within time. That section provides that in computing the period of limitation prescribed for any suit, the time during which the defendant had been absent from British India and from the territories beyond British India under the administration of the Government of India, shall be excluded. The term "British India" has been defined in section 3, clause (7) of the General Clauses Act, 1897, as meaning "all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor General of India or through any Governor or other official subordinate to the Governor General of India." Basra is clearly not within British India. The only question for consideration is whether Basra was a territory outside British India under the administration of the Government of India within the meaning of section 13 of the said Act at the time when the defendant was staying there in military employ.

The Court of first instance refers to the Indian Year Book for 1917, edited by Sir Stanley Reed. There it is stated that "the Indian Expeditionary Force entered the city of Basra on the 23rd of November 1914; and the notables were assembled and a proclamation stating the reasons for the occupation and the friendliness of the British Government, was read and salutes were fired." It is further stated that "the subsequent operations in Mesopotamia remained under the charge of the Government of India; and the War Office did not assume direct responsibility until February 1917." It is true that the troops which took part in the campaign in Mesopotamia were known by the name of the Indian Expeditionary Force, and the despatches relating to its operations were published in the Gazette of India; but that fact is not sufficient to show that Basra was under the administration of the Government of India. Basra was occupied by the British troops or for the matter of that by the troops sent by the Government of India; but the occupation was military occupation for the purpose of proceeding with the expedition and protecting the army on its way onward and securing its safety and support. The territory was, except for those purposes, not under the administration of the Government of India. It was foreign territory under military occupation, the object of which was much more restricted than that of an administration carried on for other purposes, and, in our opinion, section 13 is wide enough to apply to cases of absence in such territory, though it may be under temporary military occupation of the kind above mentioned. We do not see any reason why the plaintiff should not be allowed the benefit of section 13 and we agree with the lower Appellate Court in finding that the period during which the defendant was absent from British India in France and Basra, should be excluded. Taking that view of the matter, the suit of the plaintiff is clearly within time. In First Appeal from Order No. 95 of 1921 (*Gaya* v. *Kunj Behari Singh*), decided on the 4th of August 1921, a similar view was maintained. The learned Counsel for the defendant-appellant asks us that the case may be remanded to the lower Appellate Court in

order that the other points determined by the Court of first instance may be decided by it; but as there is no affidavit indicating that those points had been taken there, we are unable to accede to that request. The appeal is dismissed with costs.

W. C. A. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

May 25, 1922.

Present:—Lord Buckmaster, Lord Atkinson, Lord Sumner, Lord Carson and Sir John Edge.

THE FORT PRESS COMPANY, LIMITED —DEFENDANTS—APPELLANTS

versus

THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY AND ANOTHER— PLAINTIFFS—RESPONDENTS.

Land Acquisition Act (I of 1894)—Acquisition proceedings, commencement of—Owner of land, right of, to effect private sale, if determined.

The commencement of proceedings under the Land Acquisition Act for the acquisition of a piece of land does not estop the owner from entering into a binding agreement for a private sale of the same. Such an agreement can be enforced like any other contract.

Appeal from a decree of the Bombay High Court, (Mr. Justice Heaton and Mr. Justice Marten), dated the 31st July 1919, in Original Civil Jurisdiction Appeal No. 60 of 1919, reported as 48 Ind. Cas. 621 affirming a decree of the same Court (Mr. Justice Macleod) in Original Suit No. 358 of 1918, dated the 24th February 1919.

Messrs. *G. I. Talbot*, K. C., and *A. F. Wootten*, K. C., for the Appellants.

Sir *George Lowndes*, K.C., Mr. *W. H. Upjohn*, K. C., and Mr. *E. B. Raikes*, for the Respondents.

JUDGMENT.

LORD BUCKMASTER.—In this case the Corporation of Bombay entered into negotiations during the years 1916 and 1917 with the appellants (The Fort Press Company, Limited) for the purpose of acquiring from them by agreement certain lands that were needed for local purposes. Those negotiations were not successful and on the 26th July 1917, while they were still pending, the Government issued, under the Land Acquisition Act, at the request of the Corporation, a notification that the lands were required to be taken by the Government for a public purpose. That notification was followed in due course by a notice on the 22nd August, 1917, signed by the Deputy Collector of Bombay. The Collector proceeded in accordance with the powers conferred upon him by the Act to hear the dispute, but on the 12th September 1917, the negotiations between the appellants and respondents were re opened and a proposal was made by the Fort Press Company stating that they were willing to accept without prejudice Rs. 1,45,517, inclusive of 15 per cent. for compulsory acquisition and the cost of the chimney as the price of the property, subject to certain specified deductions. This proposal was accepted and approved on behalf of the Corporation of Bombay. This alteration in the position of the parties was brought before the Collector in due course, but at an adjourned hearing on the 27th January 1918 it was denied on behalf of the appellants that any agreement had been reached, and the Collector accordingly further adjourned the proceedings in order that, as their Lordships understand the report of what took place, the parties might take the necessary steps to settle whether or not a bargain had been made. Those steps were taken with promptitude by the respondents, who instituted proceedings in the High Court of Judicature at Bombay on the 12th March 1918, asking for a declaration that there was a contract and for a very large number of points of ancillary relief. They succeeded before both Courts, namely, that exercising Original and that exercising Appellate Jurisdiction and from the latter this appeal has been brought. The foundation of the appellants' case rests on the assertion that when once proceedings for compulsory acquisition have been set on foot, the interested parties cannot come to any binding agreement regulating the amount of the purchase price. There is nothing whatever in the Land Acquisition Act itself to negative any such right. If the parties before the institution of the proceedings contemplated by that Act, chose to agree, they were

perfectly competent to do so and there is nothing whatever in the words of the Act to suggest that this power is thereby taken away. The Act certainly does not directly affect such a result, nor can their Lordships ascertain any reason why the fact that compulsory powers have been invoked in order to secure property from unwilling vendors, should be regarded as denuding all parties of rights they possessed before the proceedings began.

In the present case, the Corporation of Bombay enjoys by virtue of its Municipal Act of 1888, express power to acquire immoveable property at certain terms and rates and prices as may be thought right by the Commissioner when approved by the Corporation, and consequently the Board is not faced with the consideration of the question as to whether there was any initial informality in the power of the respondents to do what they have done

Their Lordships think that the agreement made, which is now established beyond dispute, is an agreement which bound the parties and that the High Court exercising their appellate jurisdiction, were right in the view they took.

Their Lordships' opinion is not intended to interfere with the jurisdiction of the Collector. It may be a very unusual thing that he should proceed to determine what in his view the prize should be, after he had evidence of a complete contract on the point, but if he thought right to do so their Lordships' judgment will not affect his taking such a course. All they decide is that the parties who were competent before the proceedings to agree what they thought was the right price for the property remain competent after the proceedings and an agreement so made is capable of being enforced in the Courts in the ordinary way.

For these reasons, in their Lordships' opinion, this appeal fails and must be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

N. H. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *E. F. Turner & Sons.*

Solicitors for the Respondents.—Messrs. *Sanderson, Lee, Eddis & Tennant.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 841 OF 1921.

July 4, 1922.

Present:—Mr. Justice Stuart and Mr. Justice Sulaiman.

JUGAL KISHORE—PLAINTIFF—APPELLANT

versus

GREAT INDIAN PENINSULA RAILWAY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 30, 31—"Against a carrier for losing or injuring goods," meaning of—Loss, time of, proof of—Onus—*Non-delivery of goods—No refusal to deliver—Limitation, operation of—Reasonable time for delievery.*

Art. 30 of Schedule I to the Limitation Act refers to losing or injuring goods by the Carrier, and not by the consignee, that is to say, time begins to run from the time when the Carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. The words "against a Carrier for losing or injuring goods", obviously suggest not a mere loss of goods to the owner, which might be caused by non-delivery, but an actual losing of goods by the Carrier himself, and the burden of proving that the goods were lost more than one year before the institution of a suit for damages, is on the Carrier [p. 982, col 2.]

Fakir Chand v. *Secretary of State for India in Council*, 19 Ind. Cas. 477; 170 P. L. R. 1913; 122 P. W. R. 1913, followed.

There is no inflexible rule that, in an action to recover damages for non-delivery of goods against a carrier, time, under Art. 31 of Sch I to the Limitation Act, must begin to run from the expiry of the ordinary period of transit. [p. 983, col 2.]

In an action for damages for non-delivery of goods consigned to a Railway Company, where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being inquired into and that there was no refusal to deliver well within a year of the suit, Art. 31 of Schedule I to the Limitation Act cannot be pleaded as a bar, for, in such a case, it cannot be said that the suit was brought more than a year from the expiry of a reasonable time within which the goods should have been delivered [p. 983, col. 1.]

Madras and Southern Marhatta Railway Co. v. *Bhimappa*, 17 Ind. Cas. 409; 2 M. L. J. 511, relied on.

Mutsaddi Lal v. *Bombay Baroda and Central India Railway Co.*, 58 Ind Cas 547; 18 A. L. J. 377; 2 U. P. L. R. (A.) 84 42 A. 360, *Great Indian Peninsular Railway* v *Ganpat Rai*, 10 Ind. Cas. 122: 33 A. 544; 8 A. L. J. 543, distinguished.

Second appeal from a decree of the District Judge, Allahabad

Dr. *Kailas Nath Katju*, for the Appellant.

Mr. *Ladli Prasad Zutshi*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of damages for non-delivery of goods.

On the 28th August, 1918, the plaintiff purchased certain bales of cloth at Bombay,

which his commission agents made over to the G. I. P. Railway for transmission to Chunar, which is on the E I. Railway line, and duly obtained a Railway receipt for it. The goods, however, never reached Chunar. Hence the claim.

Both the Railway Companies pleaded the bar of limitation, and both tried to throw the responsibility on the other. The G. I. P. Railway Company asserted that the goods were handed over to the E. I. Railway, at Manikpur junction, while the E. I. Railway Company denied having received the goods at all. At the trial no dispute was raised as to the amount of damages claimed, nor was any issue struck on the point

Both the Courts below have found that the plaintiff has not yet received the goods and has suffered loss; and further that the plea raised by the E. I. Railway Company that they never received the goods, was incorrect, and that in fact the goods did arrive at Allahabad but owing to a mistake made by the Goods Clerk, they were despatched to Chupra instead of Chunar: they have however, reluctantly dismissed the claim as being time-barred and have directed the parties to bear their own costs.

The treatment accorded to the plaintiff is unfortunately not the first which a consignee has had to suffer. When there was a delay in the arrival of the goods, the plaintiff started writing to both the Companies, who delayed action by the plaintiff by informing him that the matter was under enquiry. A perusal of the lengthy correspondence that ensued shows that the plaintiff was all along made to believe that enquiry was being made. A letter on the 25th February 1919 stated that the matter had been referred to the General Traffic Manager. One of the 3rd April 1919 showed that the matter was still under enquiry. That of the 19th April 1919 asked the plaintiff to be at the station to receive the goods.

On the 22nd April 1919 the plaintiff was required to send a copy of the *bejuk* and the letter of the 19th June 1919 told him that the matter was receiving "special attention" and that of the 12th July 1919 that "the subject was receiving best attention."

In December 1919 the plaintiff was asked to call personally. In January and February 1920, the E. I. Railway Company was still asking for particulars of the contents of the bales. On the 31st March 1920 the suit was actually instituted.

The recital of these few dates alone is sufficient to show that the plaintiff was never informed what had happened to the goods whether they were lost, injured or misdelivered nor was he told when and where they were lost or injured. On the other hand, he was all along assured that inquiry was being made, which naturally made him wait. This assurance was continued even after the expiry of the period of one year which is now pleaded as a bar. When the E. I. Railway Company, by its own conduct, made the plaintiff await the result of the enquiry, it is rather startling to find the plea of limitation raised in defence on its behalf. However, as the Companies' agents have thought fit to raise the plea, we are bound to consider it. The defendant Componies plead the bar of Arts. 30 and 31 of the Limitation Act.

Art. 30 applies to suits for compensation for losing or injuring goods, and the period is one year from the date when the loss or injury occurs. It is obvious that the Article refers to losing or injuring goods by the carrier and not by the plaintiff, that is to say, time begins to run from the time when the carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. This was the view expressed by Rattigan, J., in *Fakir Chand* v. *Secretary of State for India in Council* (1), following an earlier case of the Punjab Chief Court. We agree with his view that the words "against a carrier for losing or injuring goods obviously suggest not a mere loss of the goods to the owner, which might be caused by misdelivery, but an actual losing of goods by the carrier himself." Now, as we have already remarked, the Companies do not suggest when and where the loss took place The burden of proving when the goods were lost was decidedly on the Companies, and it not being proved that the goods were lost by them more than one year before the institution of the suit, the claim is not barred by Art. 30.

Art. 31 fixes one year from the date when the goods ought to have been delivered and applies to suits to recover compensation for non-delivery. It is to be noted that in the

(1) 19 Ind. Cas. 477; 170 P. L. R. 1913; 122 P. W. R. 1913.

present case no time was fixed for the delivery of goods, and the correspondence between the parties shows that the matter was being inquired into and that there was no refusal to deliver, up to well within a year of the suit. In the circumstances of the case we are unable to hold that the suit was instituted more than a year from the expiry of a reasonable time within which the goods should have been delivered. This view is fully supported by the case of *Madras and Southern Marhatta Railway Co.* v. *Bhimappa* (2).

The Courts below have relied on the case of *Mutsaddi Lal* v. *Bombay Baroda and Central India Railway Co.* (3). That was a peculiar case. The plaintiff had consigned the goods on the 16th January 1913, and in February 1914 the plaintiff was distinctly informed that the goods were not lost but were lying in their Lost Property Office as delivery had not been claimed by any one, and that he should take delivery there. And yet the suit was not instituted till the 7th January 1919, the plaintiff claiming extension of time because of a letter of the 17th of March 1916, under which the Company had offered to pay him something as compensation. Banerji, J., held that that letter did not amount to an acknowledgment of liability so as to give a fresh start. On that finding the claim was clearly barred by time. It is true that in the body of the judgment there is a remark which may suggest that limitation begins to run from the expiry of the ordinay period of transit, but that ramark is an *obiter dictum* as the point was not a point which had to be decided in that appeal. It, however, finds support from an earlier case, *Great Indian Peninsular Railway* v. *Ganpat Rai* (4), but this also is distinguishable from the present case. The judgment in that case does not show that the Company had been assuring the plaintiff that enquiry was being made or that he waited in pursuance of such an assurance.

In the present case, when the plaintiff had all along been assured that enquiry was being made, and he had even hopes of recovering the goods til September 1919, it cannot be said that his claim was filed more than a year after the date when the goods ought to have been delivered. We do not recognise any inflexible rule that time must begin to run from the expiry of the ordinary period of transit.

We are, therefore, of opinion that the claim is not barred by time. The result is that we allow the appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit with costs in all Courts.

W. C. A. & M. H. *Appeal allowed.*

(2) 17 Ind. Cas. 419; 23 M. L. J. 511.
(3) 58 Ind. Cas. 547; 18 A. L. J. 377; 2 U. P. L. R. (A.) 84; 42 A. 390.
(4) 10 Ind. Cas. 122; 33 A 541; 8 A. L. J. 543.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 49 OF 1921.

March 10, 1922.

Present :—Mr. Justice Coutts-Trotter and Mr. Justice Ramesam.

M. DORAISAMY AIYANGAR—DEFENDANT No. 1—APPELLANT

versus

K. NARAYANA AIYANGAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

City Civil Court Act (Mad. VII of 1892), s. 3—Presidency Small Cause Courts Act (XV of 1882), ss. 19, 41—Landlord and tenant—Suit in ejectment—Jurisdiction of Madras City Civil Court.

The jurisdiction of the Madras City Civil Court to entertain a suit in ejectment against a tenant is not barred by reason of section 4 of the Presidency Small Cause Courts Act read with section 3 of the Madras City Civil Court Act.

Section 41 of the Presidency Small Cause Courts Act relates only to applications and not to suits.

Abdul Rahim Sahib v. *Gangathara Aiyar*, 37 Ind. Cas. 436; 4 L. W. 402, *Kalyanchand Lalchand* v. *Sitabai Dhanasa*, 23 Ind. Cas. 325; 38 B. 309; 16 Bom. L. R. 5 and *Venkata Chandrappa Nayanivaru* v. *Venkatrama Reddi*, 22 M. 256; 8 Ind. Dec. (N. S.) 182, distinguished.

Appeal against a decree of the City Civil Court, Madras, in Original Suit No. 71 of 1921.

FACTS appear from the judgment.

Messrs. *K. S. Jayarama Aiyar* and *A. N. Krishna Aiyangar*, for the Appellant.—There is a special procedure prescribed for ejectment under section 41 of the Presidency Small Cause Courts Act. The plaintiff

should have gone to the Small Cause Court. The City Civil Court's jurisdiction is barred under section 3 of the City Civil Court Act.

Reference was made to *Abdul Rahim Sahib* v. *Gangathara Aiyar* (1), *Kalyanchand Lalchand* v. *Sitabai Dhanasa* (2) and *Venkata Chandrappa Nayanivaru* v. *Venkatrama Reddi* (3).

Mr. *W. V. Rangaswami Aiyangar*, for the Respondents.—What is provided for in section 41 of the Presidency Small Cause Courts Act is an application. Under section 19 this suit is not cognizable as a suit by the Small Cause Court.

JUDGMENT.—The first point in this appeal is whether the cognizance of the suit by the City Civil Court is barred by section 3 of the City Civil Court Act (VII of 1892). The appellant relies on section 41 of the Presidency Small Cause Courts Act (XV of 1882) and contends that, because an application to eject a tenant could be filed in the Small Cause Court, the present suit before the City Civil Court is barred. We do not think this contention is tenable, the present suit before the City Civil Court is obviously not cognizable by the Small Cause Court (*vide* section 19 of Act XV of 1882). What is cognizable is merely an application. O. VI, r. 3 of the Rules for the Presidency Small Cause Courts, no doubt, says that an application under section 41 of the Presidency Small Cause Courts Act shall be in the form of a plaint, but on this ground the application does not become a suit. We, therefore, feel that the present suit was not cognizable by the Small Cause Court as a suit and, therefore, section 3 of the City Civil Court Act does not prohibit its being filed before the City Civil Court. The case of *Abdul Rahim Sahib* v. *Gangathara Aiyar* (1) has no bearing on the point before us. It decides that suits under sections 47 and 49 of the Small Cause Courts Act should be filed before the High Court. *Kalyanchand Lalchand* v. *Sitabai Dhanasa* (2) and *Venkata Chandrappa Nayanivaru* v. *Venkatrama Reddi* (3) deal with the construction of section 11 of the Civil Procedure Code and, therefore, cannot help us in construing section 3 of the City Civil Court Act.

Coming to the merits, it has been contended that the evidence does not support the finding that the plaintiff is a tenant under the Official Assignee and that the first defendant is a sub tenant under the plaintiff. It is also contended that the title of the plaintiff is really a title to the whole lease-hold interest of the insolvent Srinivasa Aiyangar by assignment from the Official Assignee and, as he has not got a registered instrument, the plaintiff is not in a position to prove his title. It seems to us that the evidence of the plaintiff supported as it is by Exhibit E which the lower Court has found to be genuine, conclusively shows that the original arrangement entered into by the second defendant Venkatapathy Aiyangar with the Official Assignee was really on behalf of the plaintiff, that the second defendant was *benamidar* for the plaintiff, that the second defendant (representing the plaintiff) was a tenant under the Official Assignee and that the first defendant was a sub tenant under the plaintiff. Whether the transaction between the Official Assignee and the plaintiff actually amounts to an assignment or only a lease of the lease hold right need not be decided. It is enough that the 1st defendant holds as a tenant under the plaintiff and the amount of Rs. 980 which he has been paying to plaintiff is clearly a balance of rent of Rs. 30 for which he has been holding the premises under the plaintiff, he having paid Rs. 208-0 directly to the Official Assignee. The findings of the City Civil Judge are correct and the decree of the lower Court will be modified by giving credit to all the amounts paid by the first defendant to the Official Assignee. Otherwise the appeal fails and is dismissed with costs.

M. C. P.

Decree modified.

(1) 37 Ind. Cas. 486; 4 L. W. 402.
(2) 28 Ind. Cas. 325; 38 B. 309; 16 Bom. L. R. 5.
(3) 22 M. 256 8 Ind. Dec. (N. S.) 182.

INDERPAL SINGH v. BAFATI.

ALLAHABAD HIGH COURT.

CIVIL REVISIONS NOS. 4 AND 5 OF 1922.

June 27, 1922.

Present:—Mr. Justice Ryves.

INDERPAL SINGH—APPLICANT

versus

BAFATI AND OTHERS—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), s 102—Suit for rent or damages for not raising crop—Civil Court, jurisdiction of.

A suit by a landlord against his tenant for rent or damages for not raising a crop is a suit under section 102 of the Agra Tenancy Act, and is excluded from the jurisdiction of a Civil Court [p. 986, col 1.]

Lalji Panday v. *Berhamdeo Panday*, 13 Ind. Cas. 29; 16 C. W. N. 89, referred to.

Civil revision against an order of the Judge, Court of Small Causes, Basti.

Mr. *Hornandun Prasad*, for the Applicant.

Mr. *Agha Haider*, for the Opposite Party.

JUDGMENT.—The facts giving rise to this application in civil revision are as follows :—

The plaintiff, the Raja of Mahson, is the Zemindar of the holding in dispute. The defendant is its occupancy tenant and holds it on *batai* rent, that is to say, the rent payable by him is half the crop raised each year payable in kind. It is alleged that in the year 1327 Fasli, the defendant purposely did not sow the land, so that there was no crop.

The plaintiff sued the defendant for arrears of his rent in that year, in the Revenue Court. The pleadings are not before me.

From the judgment of the Assistant Collector, it appears that that Court dismissed the suit, on the ground that the *patwari* proved that no crop had been raised on the land. On appeal, the Collector contented himself with dismissing the appeal in a judgment of a few lines, without any discussion. That litigation ended there. I presume it could have been taken further, but as the pleadings are not before me, I cannot say. But anyhow I think it unnecessary to pursue that question further. The Revenue Court did not refuse to hear and decide the suit ; but decided it rightly or wrongly (it is immaterial which) apparently on its merits on the evidence before it.

In 1328 Fasli the defendant again did not sow the land ; hence this suit, which was brought to recover Rs. 30 as damages in the Court of Small Causes at Basti.

The learned Judge says : "Rents in cash or kind are recoverable only through the Revenue Court. It is true, liability for rent in case of intentional non production is not specially provided for in the Tenancy Act; but there does not seem to be any difference in principle in the case of non-production of crops in any particular year, and the case of removal of crops after production but before appraisement, for the purpose of estimating rent provided for in section 104, clause 4 of the Act." He, accordingly, held, that the suit was exclusively triable by the Revenue Court, and ordered the plaint to be returned for presentation to the proper Court.

The plaintiff comes here in revision. It is strenuously argued, on his behalf, that section 102 (1) of the Act, read with section 104, (having especial regard to the wording of clause 4) enables a Revenue Court to give relief where the rent is payable in kind, only when a crop has in fact been grown. If a tenant deliberately refuses to sow the land, he commits a breach of his implied covenant to sow and cultivate the land with due diligence, and that, therefore, as to rent can be ever ascertained there being no crop, much less can it be recovered on the basis of half of the harvested crop, his only remedy is to sue for damages for breach of contract.

In order, *prima facie*, to decide a question of jurisdiction, it is necessary to examine the plaint. Before proceeding further, therefore, I will give a summary of the plaint.

Paragraph 1 describes the plaintiff as the landlord, and the defendant as his occupancy tenant of the land in dispute. Paragraph 2 states, that the land was let to the defendant on the agreement (and according to a prevalent custom) that the tenant should cultivate the land and sow crops, and that the Zemindar should receive half of the produce by way of rent. Paragraph 3.—"The defendant is obstinate and headstrong, and in order to cause loss to the plaintiff did not sow the land during 1327 Fasli, but left it fallow, with the result that the plaintiff suffered a loss of Rs. 30, which he is entitled to recover from the defendant." Paragraph 4.—As the lands are occupancy holdings of the defendant, the plaintiff cannot get them cultivated by other tenants. Paragraph 5.—

HAMID MIRZA BEG v. AHMAD MIRZA BEG.

The plaintiff often demanded "damages or rent," (*harja wa nuksan ya lagan*) from the defendant, but he refused. Paragraph 6.—The plaintiff has suffered loss from the unlawful action of the defendant, and as long as the defendant does not sow any crops in the suit lands, so long it is impossible for the plaintiff to realize the *batai* rent (rent in kind) through the Revenue Courts. The suit for arrears of rent was dismissed by the Rent Court; and the plaintiff has no remedy except to bring a suit for damages in this Court.

It seems to me that, from a perusal of the plaint itself, the suit was within the cognizance of the Revenue Courts. Admittedly the relationship of landlord and, tenant subsists, and the rent has not been paid, and the plaintiff prays to recover Rs. 30, "damages or rent". I think, for reasons recorded below, this suit falls within a suit contemplated by section 102 of the Tenancy Act, having regard to the explanatory words of the Fourth Schedule, Serial No. 2.

Section 167 of the Tenancy Act, I think, puts the matter beyond doubt. It provides that "all suits.....of the nature specified in the Fourth Schedule shall be heard and determined by the Revenue Courts; and, except in the way of appeal, as hereinafter provided, no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit.....might be brought." Turning to the Fourth Schedule, I find included in it Serial No. 2, *i. e.*, a suit under section 102 of the Act "for arrears of rent, or where rent is paid in kind, for money equivalent of such rent." It seems to me, that this suit comes within section 102, as explained in the schedule. These words "or where rent is paid in kind, for money equivalent of such rent," was first introduced into the Tenancy Legislation of these Provinces, by section 93 (*a*) of Act XII of 1881, apparently to give effect to the ruling of the Full Bench of this Court, in *Tajuddin* v. *Ram Parshad* (1). Apart, however, from the broad question whether such a suit lies in a Civil Court, I think, the present suit is excluded from the cognizance of the Small Cause Court, in which it was filed by Art. 8 of the Second Schedule to Act XI of 1887. The case of *Lalji Panday* v. *Berhamdeo Panday* (2) is exactly in point. There Mookerjee and Carnduff, JJ., discuss the law at length. I reject the application with costs.

W. C. A.

Application rejected.

(1) 1 A. 217; 1 Ind. Dec. (N. S.) 127.

(2) 13 Ind. Cas. 29; 16 C. W. N. 83.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 69 OF 1921.

July 10, 1922.

Present :—Mr. Simpson, A. J. C., and Syed Wazir Hasan, A. J. C.

HAMID MIRZA BEG AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

AHMAD MIRZA BEG—DEFENDANT—RESPONDENT.

Pleadings—Amendment—Civil Procedure Code (Act V of 1908), O. VI, r. 17—New case, when can be allowed to be introduced—Suit, events happening subsequent to institution of—Declaration of title, suit originally brought for—Possession, relief as to, becoming necessary—Trial Court, power of—Plaint, amendment of.

An amendment in the pleadings should be made if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided. [p 988, col 1.]

Kurtz v. *Spence*, (1887) 36 Ch D. 770 at p. 774; 58 L. T. 320; 36 W. R. 488, followed.

Order VI, r. 17, Civil Procedure Code, will not exclude an amendment which has the effect of introducing a new case simply because it does so: but such an amendment would be refused if the new case sought to be introduced could more conveniently be the subject of a fresh action [p. 989, col. 1.]

Budding v. *Murdoch*, (1878) 1 Ch. D 42; 45 L. J. Ch. 212; 24 W. R. 23 and *Raleigh* v. *Goschen*, (1898) 1 Ch. 73 at p. 78; 67 L. J. Ch. 59; 77 L. T. 423; 46 W. R. 90; 14 T. L. R. 36, relied on.

Northampton Coal Co v. *Midland Waggon Co.*, (1878) 7 Ch. D. 500; 38 L T. 82; 26 W. R. 485 and *Crosfield & Sons Limited* v. *Manchester Ship Canal Co.* (1904) 2 Ch. D. 123; 73 L J. Ch. 345; 52 W. R. 635; 90 L. T. 557; 20 T. L. R. 371, referred to.

If events which have happened subsequent to the institution of a suit render the relief prayed for useless, if granted, and introduce matters which become the real questions in controversy between the parties, a Court of Original Jurisdiction at any

rate has power to order such an amendment as may be necessary for the purpose of determining questions so arising. [p. 988, col. 1.]

Where a suit as originally brought is for a mere declaration of title, but subsequent events render it necessary to claim possession of the property to which the title related, the Trial Court is quite competent to order amendment of the plaint so as to include the relief as to possession as well. [p. 988, cols. 1 & 2.]

Govinda v. *Perumdevi*, 12 M. 186; 4 Ind. Dec. (N. S.) 444, distinguished.

Appeal from a decree of the Subordinate Judge, Sitapur, dated 20th July 1921 and 20th August 1921.

Dr. *J N. Mirza* assisted by Mr. *Muhammad Arabi*, for the Appellants.

Mr. *Haider Husain*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Sitapur, dated the 20th August 1921, dismissing the plaintiffs' suit with costs. The plaintiffs prayed in their plaint for the following reliefs :—

(*a*) That the defendant has ceased to fill the position of the *taluqdar* of the estate.

(*b*) That the plaintiff No. 1 is entitled to the position of the *taluqdar* and shall be entitled to the possession of the estate on the termination of Receivership

(*c*) That if for any reason the plaintiff No. 1 be not held entitled to the position of the *taluqdar* a declaration be made to the effect that the plaintiff No. 2 is entitled to the position of a *taluqdar* and to the possession of the estate on the termination of the Receivership.

The ground of action was founded upon the terms of an agreement between the parties dated the 12th July 1919 and it is urged that the defendant has forfeited his right to continue in possession of the estate and that the plaintiffs or one of them are or is, as the case may be, entitled to enter into possession. In paragraph 12 of the plaint it was stated that "as the Receiver is now in possession a declaration in favour of the plaintiffs will be sufficient." The claim was valued at five lacs of rupees and a Court-fee of Rs. 10 was paid on the ground that the reliefs prayed for were merely declaratory.

It appears that one Rani Abadi Begam, the daughter of the last holder of the estate had obtained a decree for dower due to her mother in a suit which she had brought against all the parties to this litigation. With a view to facilitate the satisfaction of that decree a Receiver was appointed by the Court on the 7th March 1917, who duly entered into possession of the estate, and it is common ground that on the date of the present suit, that is, the 15th April 192 , the Receiver was in possession of the estate. The Receiver was, however, discharged by the Court on the 19th May 1921, whereupon the Court directed the plaintiffs to amend their plaint by adding a relief for possession of the property and to pay the proper Court-fee with reference to that relief. It granted one month's time for the necessary amendment and the payment of the requisite Court fee and further directed that in case of default the suit would stand dismissed with costs. The plaintiffs failed to make the amendment and to pay the necessary Court-fee within the time limited by the Court. The result was that their suit was dismissed as already indicated.

It is argued in appeal before us that the claim as made in the plaint for mere declaratory reliefs was a competent claim having regard to the circumstances at the date of the institution of the suit and that the subsequent discharge of the Receiver did not and should not affect the plaintiffs' suit. In view of the opinion which we have formed in respect of this appeal and which we shall shortly express, we deem it wholly unnecessary to decide the question whether the plaintiffs were able to seek further relief upon a mere declaration of title on the date of the suit or not.

It is admitted in the plaint that the only bar to a relief for recovery of possession of the estate was the fact that the Receiver was in such possession on the date of the suit. It is quite clear, therefore, that whatever the nature of the possession of the Receiver was it ceased on the 19th May 1921 when the Court removed the Receiver and it is not disputed that since that point of time the defendant is in complete possession of the Aurangabad estate, which is the estate in dispute. It would, therefore, follow that no further ground remained for the plaintiffs to continue to restrict their suit to mere declaratory reliefs and not to seek the only proper relief in the circumstances of ejectment of the defendant. We think that the lower Court was perfectly

justified in ordering the amendment of the plaint in the manner in which it did. Rule 17 of O. VI of the Code of Civil Procedure lays down that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." On the happening of the event of the discharge of the Receiver the only controversy between the parties lay on the question of the plaintiffs' right to eject the defendant. It is obvious that this controversy cannot be determined without trying the issue which would raise the question of the right of the plaintiffs to enter into the possession of the property as against the defendant. It has always been held that an amendment in the pleadings should be made if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided *Kurtz* v. *Spence* (1). It need hardly be pointed out that in the altered condition of things a declaration of the nature sought for by the plaintiffs would, if granted, have proved only useless. A second suit for recovery of possession will be necessary. There is no authority for the proposition that if events which have happened subsequent to the institution of a suit render the relief prayed for useless, if granted, and introduce matters which become the real questions in controversy between the parties a Court of Original Jurisdiction at any rate has no power to order such an amendment as may be necessary for the purpose of determining questions so arising.

Reliance was placed by the Counsel for the appellants on the decision of the Madras High Court in the case of *Govinda* v. *Perumdevi* (2). In that case a suit was brought for a declaration that certain alienations of land made by a Hindu widow were not binding on the plaintiff. The suit was dismissed by the Court of first instance on the ground that the plaintiff's right was a contingent one and not a vested interest. Pending the appeal by the plaintiff in the High Court the widow died and the plaintiff then sought leave to amend the plaint so as to claim possession as a consequential relief. The respondents, however, seem to have drawn the attention of the learned Judges to the proviso of section 42 of the Specific Relief Act (I of 1877), with regard to which they made the following observations:—"But this direction obviously refers to the position of the plaintiff when he commenced the suit and can not be treated as taking away a right of suit which had already accrued. We do not consider that the proviso is applicable to this case, for when the Court once acquires jurisdiction it cannot be divested of it except under some provision of law. The Appellate Court has only to see as a Court of error that the decree under appeal was correct or otherwise when it was passed." We are led to presume on the basis of these observations and the circumstances in which they were made that the object of the respondents was to obtain an order for the dismissal of the appeal on the ground that the proviso to section 42 of the Specific Relief Act applied to the case. It is quite clear that the learned Judges refused to do so. On the question of amendment the learned Judges expressed the following opinion.—"The next question for consideration is whether, in the event that has arisen, the original plaint may be amended. The right disclosed by the plaint was a right to sue for a mere declaration of title, and it has now ceased and is replaced by a right to sue for possession by reason of the reversion having become an estate vested in possession. The amendment would substantially alter the original cause of action and rest on an event which did not occur until after the suit had been instituted and been dealt with by the Court of first instance We are of opinion that the amendment asked for cannot be made at this stage of the suit." We need express no opinion on the question as to whether a relief for a declaration of title and a further relief for possession on the basis of the same title discloses two different causes of action or not, but we incline to the view that they do not, though the event which made the relief for the recovery of possession available happened subsequent to the institution of the suit. It is clear to our mind that the learned Judges were greatly influenced by the fact that the amendment was sought for in the Court of Appeal and they expressed no opinion as to whether if

(1) (1837) 36 Ch. D. 770 at p. 774; 58 L. T. 320; 36 W. R. 438.

(2) 12 M. 136; 4 Ind. Dec. (N. S.) 444.

such an amendment is sought for at an early stage of the suit in the Court of first instance the prayer should be disallowed. In the case before us the amendment in question was ordered to be made even before the defendant had filed his written statement. We may observe in passing that the law relating to amendments as contained in r. 17 of O. VI will not exclude an amendment which has the effect of introducing a new case simply because it does so [*Budding* v. *Murdoch* (3)]. But such an amendment would be refused if the new case sought to be introduced could more conveniently be the subject of a fresh action. [*Raleigh* v. *Goschen* (4)]. In the case of [*Northampton Coal Co* v. *Midland Waggon Co.* (5)]. A Company in liquidation desired to amend by raising a new case which would greatly increase costs, it was ordered to give security for costs. In *Crosfield & Sons Limited* v. *Manchester Ship Canal Co.* (6) the defendant Company was allowed at the trial to plead ouster of jurisdiction, although the point was not raised on the pleading.

We are, therefore, satisfied that the learned Subordinate Judge properly exercised his powers in ordering the amendment which he did and that the plaintiffs not having complied with that order must bear the consequences. The appeal fails and is dismissed with costs.

W. C. A. *Appeal dismissed.*

(3) (1876) 1 Ch. D. 42; 45 L. J. Ch. 213; 24 W. R. 23.
(4) (1898) 1 Ch. 73 at p. 78; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R 90; 14 T. L. R. 36.
(5) (1878 7 Ch. D. 500; 38 L. T. 82; 26 W. R. 485.
(6) (1904) 2 Ch. D 123 73 L. J. Ch. 345; 52 W. R. 635; 90 L. T. 557; 20 T. L. R. 371.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No 236 OF 1920.
June 29, 1922.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.
BAHADUR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Musammat MOHNI KOER—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 107—Partition—"Co-sharer," meaning of—Childless Hindu widow, right of.

The word "co-sharer," in section 107 of the U. P. Land Revenue Act, means a recorded co-sharer of some kind of proprietary interest in the *mahal* and not a person entitled merely to collect rents or realise a share of the profits on behalf of the proprietor, such as a mortgagee, lessee, or *thekadar* or an assignee of the rents [p. 990, cols. 1 & 2.]

A childless Hindu widow who succeeds to her deceased husband's share in a *mahal*, such share having been his separated property, is as much entitled as any other recorded co-sharer to claim a perfect partition of her share, if her name was recorded, though she might not be competent to alienate the same for certain limited purposes. [p. 990, col. 2.]

Bhoop Singh v. *Phool Kower*, 2 Agra H C. R. 368 and *Jhunna Kuar* v. *Chain Sukh*, 3 A. 400; A. W. N. (1881) 8; 2 Ind. Dec (N. s.) 221, followed.

Habibullah v. *Kushimba*, 3 A. L. J. 481; A. W. N. (1906) 199, *Mahadeo Singh* v. *Deo Koer*, 9 O C. 53, *Sundar* v. *Parbati*, 12 A. 51; 16 I. A. 186; 5 Sar, P. C. J. 448; 6 Ind Dec (N s.) 782 (P. C.) *Hari Narayan* v *Vatai*, 3 B 560; 9 Bom. L R. 1049, *Durga Dutt* v. *Gita*, 9 Ind Cas 498; 33 A 443; 8 A. L. J. 220, *Raghubir Singh* v *Janki Kuar*, 52 Ind. Cas 11; 22 O C. 117 at p 120; 6 O L. J. 282, referred to.

Neman v *Jas Kunwar*, 21 Ind Cas 449 35 A. 527; 11 A L J. 833 and *Kailashi Kunwar* v. *Badri Prashad*, 21 Ind Cas. 49; 35 A. 548; 11 A. L. J. 849, distinguished.

First appeal from a decree of the Subordinate Judge, Aligarh.

Mr. *Uma Shankar Bajpai*, for the Appellants.

Mr. *Durga Prasad*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to a one-third share of the village Sewai Raghunathpur. An application was made by the defendant-respondent for a partition of that share in the Revenue Court. It was opposed by the plaintiffs, who own another one-third share in the same village. Their contention was that the defendant held only a life-interest therein and was entitled to get the profits of that share for her life but was not entitled to claim a partition.

The Revenue Court directed the objectors to get the question of proprietary title determined by the Civil Court; and the present suit was consequently filed by them for a declaration that the defendant had only a life interest in the disputed property and was not entitled to claim a partition. The Court below found against them and dismissed the suit.

The entire two-thirds share belonged originally to Bisheshar Nath, the father of

the defendant respondent. On the 19th March 1888 he executed a Will, by virtue of which he devised his entire property in favour of his nephew, Parmanand, with the exception of certain interests, which he had reserved in favour of his wife, *Musammat* Champa Kuer, and his daughter, *Musammat* Mohini Kuer, and another person named Bhaggu Lal. *Musammat* Champa Kuer, and *Musammat* Mohini Kuer were allowed the said two-thirds share in the village Sawai Raghunathpur in equal parts with full power to realize and enjoy the profits of their respective shares in any way they liked; but they were not given any authority to make a transfer of the property bequeathed to them. On the death of *Musammat* Champa Kuer, her share was to devolve on Parmanand or his sons and heirs; and on the death of *Musammat* Mohini Kuer, the share given to her was to devolve on her own sons or grand-sons, if any, or if she had no male issue or grand-sons, on Parmanand or his sons and heirs. On the death of Bisheshar Nath, the names of *Musammat* Champa Kuer and *Musammat* Mohini Kuer were entered in the revenue papers. On the death of *Musammat* Champa Kuer, her share devolved on Hanuman Prasad, the son of Parmanand, and is now in the possession of the plaintiffs.

The Court below found that short of being given a power of transfer, *Musammat* Mohini Kuer was entitled to enjoy all the rights of a Zemindar, and her right to enjoy her share in any way she liked included a right to claim a partition of that share.

Under section 107 of the U. P. Land Revenue Act (II of 1901) a recorded co-sharer is entitled to apply for partition. But where that share is in the possession of a mortgagee, no application for partition either by the mortgagor or the mortgagee can be entertained unless both join in applying for partition. The expression "co-sharer" has not been defined anywhere by the Act, but reading section 107 with section 32 and section 111, there can be no doubt that the co-sharer, who is entitled to apply for partition, must be a recorded co-sharer of some kind of proprietary interest in the *mahal* and not a person entitled merely to collect rents or realise a share of the profits on behalf of the proprietor, such as a mortgagee, lessee, or *thekadar*, or an assignee of the rents. A Hindu widow in possession of an estate, which has devolved on her by inheritance from her husband, represents the estate and combines in herself for certain purposes the interests of herself and the reversionary body, whom she represents. A Muhammadan widow, who is in possession in lieu of dower, similarly combines her interest as an heir, if any, with that of the other heirs, whose share she holds in her possession in lieu of her dower debt for her life. In either case her interest is such as to entitle her to claim a partition against her recorded co-sharers, which would bind her as much, in the absence of fraud or collusion, as those who succeed to the property on her death. The interest, which a daughter receives under a devise from her father, though limited in character, is similarly such as will entitle her to claim a partition, because she represents herself as much as those who are likely to succeed to her on her death. She is not a mere assignee of the profits. She is a proprietor for the time being, though only of a limited interest. She can manage the property in any way she likes, and let it out to any person to whom she chooses and short of making a transfer, she possesses all proprietary rights, including a right to hold the property in severalty or to enjoy it jointly with her co-sharers, as may suit her interests. In *Bhoop Singh* v. *Phool Kower* (1) and *Jhunna Kuar* v. *Ohain Sukh* (2), it was accordingly held that a childless Hindu widow, who succeeds to her deceased husband's share in a *mahal*, such share having been his separated property, was as much entitled as any other recorded co-sharer to claim a perfect partition of her share, if her name was recorded, though she might not be competent to alienate the same except for certain limited purposes. In *Habibullah* v. *Kushimba* (3), it was held that a Muhammadan widow in possession of the estate of her husband in lieu of her dower, was similarly entitled to claim a partition of her share, if she was a recorded co-sharer in respect of

(1) 2 Agra H. C. R. 366.
(2) 3 A. 400; A. W. N. (1881) 8; 2 Ind. Dec. (N. S.) 221.
(3) 3 A. L. J. 481; A. W. N. (1906) 199.

that share. A similar view has been taken in *Mahadeo Singh* v. *Deo Koer* (4).

In a separated family the right of each co-widow of a deceased person to enjoy the property of her deceased husband separately by partition among themselves has been recognized *Sundar* v. *Parbati* (5) and *Hari Narayan* v. *Vitai* (6). In *Durga Dutt* v. *Gita* (7), it has been laid down that whatever limitations there might be upon the power of alienation of one of two co widows succeeding as such to a life interest in the husband's estate, there is nothing to prevent them from effecting a partition of such estate to secure a proper enjoyment of their interests. The right of a Collector to disallow a partition under section 109 remains unaffected.

The interest, which devolved on *Musammat* Mohini Kunwar, from her father, under the devise, is such an interest as would entitle her to claim a partition thereof for the purpose of securing a better enjoyment of the same, for, as pointed out in *Raghubir Singh* v. *Janki Kuar* (8) her position might otherwise be rendered precarious, as it would be within the power of her co-sharers to prevent her from realising her share of the profits and to compel her to starve, until she is in a position to sue for her share of the profits and recover the same, if she gets a decree. The decision in *Neman* v. *Jas Kunwar* (9) and *Kailashi Kunwar* v. *Badri Prashad* (10), do not apply, for in both these cases, the name of the widow who had applied for partition, had merely been entered for her consolation or as a provision for her maintenance with the consent or acquiescence of the persons belonging to the joint family, from whom she could not have claimed anything but maintenance, and her position was at best that of a mere assignee of the profits in lieu of maintenance for her life.

There is nothing in the Will executed by Bisheshar Nath to indicate that *Musammat* Mohini Kuer was granted a share in lieu of her maintenance. In fact a daughter is not entitled to claim maintenance from her father after she is married and attains majority. She is a widow and has no male issue, but she is to all intents and purposes a recorded co-sharer, though she has no right to transfer her share, and there is no reason why she should not be allowed to claim a partition thereof.

The appeal, therefore, fails and is dismissed with costs.

W. C. A. *Appeal dismissed.*

(4) 9 O. C. 88.
(5) 12 A. 51; 16 I. A. 186; 5 Sar. P. C. J. 448; 6 Ind. Dec. (N. S.) 782 (P. C.).
(6) 31 B. 560; 9 Bom. L. R. 1049.
(7) 9 Ind. Cas. 498; 33 A. 443; 8 A. L. J. 220.
(8) 52 Ind. Cas. 11; 22 O. C. 117 at p. 120; 6 O. L. J. 282.
(9) 21 Ind. Cas. 449; 35 A. 527; 11 A. L. J. 833.
(10) 21 Ind. Cas. 49; 35 A. 548; 11 A. L. J. 849.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 631 OF 1919.

July 22, 1920.

Present :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

DHARAM CHAND GAIN—DEFENDANT—APPELLANT

versus

KANAK SARKAR—RESPONDENT.

Summons, mode of service of—Civil Procedure Code (Act V of 1908), O V, r. 15—Requirements of Statute to be strictly carried out.

Before making an *ex parte* decree against a defendant the requirements of the Statute as regards the service of summons should be strictly complied with. The inquiry contemplated by r. 15 of O V of the Civil Procedure Code should not be confined to the son of the defendant, or to a person related to him. An attempt should be made to find the defendant by an inquiry from his neighbours or other persons. [p 992, col. 2.]

Appeal against the decree of the District Judge of 24 Parganas, dated 14th January 1919, affirming that of the Munsif, Basirhat, dated the 12th October 1917.

Babus *Piraj Mohan Majumdar* and *Anilendra Nath Roy Chowdhury*, for the Appellant.

Babus *Dwarka Nath Chuckerbutty* and *Arun Kumar Ghose*, for the Respondent.

JUDGMENT.

MOOKERJEE, ACT. C. J.—This is an appeal by the tenant defendant in a suit instituted under section 46 of the Bengal Tenancy Act. Sub section (1) of that section provides that "A suit for ejectment on the ground of refusal to agree to an enhancement of

DHARAM CHAND GAIN v. KANAK SARKAR.

rent shall not be instituted against a non-occupancy *raiyat* unless the landlord has tendered to the *raiyat* an agreement to pay the enhanced rent, and the *raiyat* has within three months before the institution of the suit refused to execute the agreement." Sub-section (2) then provides as follows: "A landlord desiring to tender an agreement to a *raiyat* under this section may file it in the office of such Court or Officer as the Local Government appoints in this behalf for service on the *raiyat*. The Court or Officer shall forthwith cause it to be served on the *raiyat* in the prescribed manner, and when it has been so served, it shall for the purposes of this section be deemed to have been tendered,"... Rule 30 of the statutory rules made by the Government of Bengal provides as follows: "The agreement under sub-section (2) of section 46 shall be filed in the Court having jurisdiction to entertain a suit for arrears of rent of the holding, and shall be served on the *raiyat* in the manner prescribed for the service of summons on defendant under the Code of Civil Procedure on payment of the fee prescribed by the High Court."

In the case before us the plaintiff alleges that the agreement was duly served in accordance with O. V, r. 15 of the Code of Civil Procedure which provides as follows: "Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him." The First Court found in favour of the plaintiff that the summons had been duly served. The District Judge has affirmed that conclusion. But the facts found by him are not sufficient to show that the requirements of O. V, r 15 have been fulfilled. The District Judge has held that what is required is that the agreement should be properly brought to the notice of the defendant, and that as the agreement was served upon the son, one can have little doubt but that it was duly brought to the notice of the defendant by his son who lives in the same house with him. This clearly is a consideration which cannot be permitted to weigh with the Court when the question is whether or not the requirements of the Statute have been carried out. It is not definitely found whether the first condition mentioned in r. 15 existed, namely, whether the defendant could not be found. The District Judge says "that it is very unlikely that the defendant's son or any one connected with the defendant would give any real information as to the defendant's whereabouts": and, further that "the evidence would go to show that enquiries were made from the defendant's son as to the whereabouts of the defendant to which apparently only vague replies were given." The Statute does not require that the enquiry should be confined to the son of the defendant or to a person related to him. An attempt could easily have been made to find out the defendant by an enquiry from his neighbours or other persons. The District Judge has not also found whether the son was an adult male member of the family residing with him. The findings are thus insufficient to justify the decree, for it is essential that the requirements of the Statute in these matters should be strictly carried out.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remitted to him for re-consideration.

It is stated that there are other points involved in the appeal. We do not deal with them, because if the point mentioned be decided against the plaintiff, no other question will arise. But if the point is decided in favour of the plaintiff and against the defendant, the other questions which arise in the case will be re-considered by the lower Appellate Court.

Costs will abide the result.

FLETCHER, J.—I agree.

W. C. A.

Appeal allowed.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

JOGENDRA KRISHNA ROY v. KURPAL HARSHI & CO.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 140 OF 1920.

May 2, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

JOGENDRA KRISHNA ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KURPAL HARSHI & CO.—RESPONDENTS.

Landlord and tenant—Lease for a term of years—Lessee put into possession—Legal documents not executed and registered—Lease, if can be surrendered before expiry of term—Lessor's remedy—Damages or rent—Evidence Act (I of 1872), s.120—Testimony of party to suit, value of—Omission to call important witness—Presumption.

When in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. [p. 995, col. 1]

A lessee of a tenancy for a term of years is not entitled to terminate it by notice of surrender before the expiry of the term of the lease. [p. 995, col. 1.]

Where a contract of tenancy, under which rent is payable periodically is unlawfully brought to a premature termination by the tenant, the landlord is entitled only to damages and not to rent for the unexpired term of the lease. Acceptance of surrender does not preclude the lessor from suing for damages for the breach of contract by the lessee, as it does not destroy the existing cause of action. [p. 995, col 2.]

There is no rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness. [p. 994, col. 1.]

Per *Buckland, J.*—If a party wishes not to have a presumption raised against him by the fact that an important witness has not been called, he should exhaust to the utmost of his power every means to bring that witness before the Court. [p. 996, col. 1.]

Appeal against a decree of the Subordinate Judge, Chittagong, dated the 29th April 1920.

Dr. *Dwarka Nath Mitter*, Babus *Manindra Nath Banerjee* and *Pramutha Nath Banerjee*, for the Appellants.

Babus *Jogendra Nath Mukherjee*, *Paresh Nath Mukherjee* and *Kanai Dhone Dutt*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiffs in a suit for realization of rent of a godown taken on lease by the defendant-firm. The case for the plaintiffs was, that the defendant, firm came into occupation in January 1917, under the arrangement that the tenancy would last for a term of three years ending in December 1919, and that the rent payable would be Rs. 250 a month. The defendants remained in occupation till the 31st March 1918, but on the 27th February 1918 the plaintiffs were served with a notice of relinquishment. They forthwith protested that the tenancy could not be surrendered in this manner; but, notwithstanding their objection, the defendants vacated the premises, with the result that the plaintiffs re-entered with effect from the 1st April 1918. The plaintiffs accordingly claimed rent for the unexpired period of the lease. The case for the defendants was that there was neither in fact nor in law a tenancy for three years, that the status of the defendants was that of a tenant from month to month and that the tenancy was terminated by the notice which was duly served. The defendants further contended that the plaintiffs were not entitled to succeed in the suit as framed, and that, in any event, they could not recover the whole sum claimed. The Subordinate Judge came to the conclusion that the plaintiffs had failed to establish that there was a tenancy for a term of three years and accordingly dismissed the suit. On the present appeal, three questions have been argued on behalf of the plaintiffs, namely, first, whether there was in fact an agreement to lease for a term of three years or whether there was a contract of tenancy from month to month; secondly, assuming that there was in fact an agreement to lease for three years, whether the relation of landlord and tenant for a term of three years was in law constituted, and, thirdly, if there was in fact and in law a tenancy for a term of three years, what are the reliefs which the plaintiffs can claim.

As regards the first point it may be stated at the outset that there is no written lease nor is there correspondence between the parties to show that there was a contract of tenancy for a term of

three years. One of the plaintiffs has pledged his oath that there was an agreement that the tenancy would continue for three years from January 1917 to December 1919 and that this agreement was made with one Arjun Babu who was the temporary manager of the defendant firm when the tenancy was created. The Subordinate Judge has not believed this statement, and has stated his reasons in the following passage of his judgment. "Nilkrishna Babu" the second plaintiff, "is certainly a very big man, but he is still a party and unless his evidence is undoubtedly satisfactory and conclusive on the point, the Court cannot pass a decree for a fairly large amount on his testimony." The reasons thus assigned by the Subordinate Judge for disbelieving the plaintiff are neither adequate nor convincing. There is no inflexible rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit. Such a rule, if adopted would nullify the provisions of section 120 of the Indian Evidence Act, which provides that in all civil proceedings, the parties to the suit shall be competent witnesses. When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness: and the Court is free to attach to the evidence that amount of credence which it appears to deserve, from his demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, power of memory, and other tests, by which the value of a statement of a witness can be ascertained if not with absolute certainty yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. Now, if we consider the evidence of the plaintiff from this point of view we have to examine the conduct of the parties as also the surrounding circumstances. The defendant company came into occupation in the middle of January 1917. The plaintiffs assert that on the 27th July 1917 they wrote to the defendant company asking them to take a written lease for three years. As no reply was received from the defendants, on the 24th August 1917 the draft of the lease was forwarded with a covering letter. To this also no reply was received. The plaintiffs have produced their peon books and proved the entries made in due course of business to indicate that the letters were sent out to the office of the defendants. The entries are initialled apparently by the persons to whom the letters were delivered but the initials have not been identified. The defendants urged in the Court below that these letters did not reach them. If this be true, it can be explained only on the theory that the plaintiffs never intended to send genuine letters to the defendants but were in July and August 1917 fabricating evidence for use on a suitable occasion. There is no evidence on the record to lend support to such an hypothesis. On the other hand, we find that as soon as the plaintiffs received the notice of relinquishment dated the 27th February 1918, they forthwith protested and asserted that the tenancy which had been taken for three years could not be surrendered earlier. In the course of the correspondence which then ensued, it was stated by the defendant company that they ignored the undertaking given by Arjun Babu. The plaintiffs, however, adhered to the position they had taken up and yet the defendant company vacated the premises on the 31st March 1918. It is worthy of note that Arjun Babu has not been called as a witness nor has any satisfactory reason been assigned for his absence. The present manager, Lalji Babu, also has not been called. The conduct of the parties thus points to the conclusion that the story told by the plaintiffs is trustworthy. We have then the surrounding circumstances to consider. It cannot be disputed on the evidence that the godown, if not re-constructed, was thoroughly repaired at a considerable cost by the plaintiffs at the time when the tenancy was created in favour of the defendants. It is improbable that so much money would have been spent by the plaintiffs if there had not been an agreement for a lease for a substantial term of years. On the other hand, we must also bear in mind that the defendant company were engaged in a flourishing business and it is improbable that they would take a godown on a precarious tenancy, liable to be terminated on fifteen days' notice. The evidence further indicates that the business did not continue to

flourish; this may be the true reason why the defendant company resiled from the original agreement and set up a tenancy from month to month. On the direct oral evidence, and the evidence of the conduct of the parties and the surrounding circumstances, I feel no doubt that the agreement was in fact for a tenancy for a term of three years commencing from January 1917 and terminating in December 1919.

As regards the second point, we have to determine whether the relation of landlord and tenant for a term of three years was in law constituted. The answer must be in the affirmative. It is now well-established by a long series of decisions in this Court from *Bibi Jawahir Kumari* v. *Chatterput Singh* (1) to *Syam Kishore De* v. *Umesh Chandra Bhattacharjee* (2) and *Haripada Ghose* v. *Nirod Krishna Ghose* (3) that when, in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered the position is the same as if the documents had been executed provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. We must then take it that there was in law as in fact a tenancy for a term of three years and that the defendant company were not entitled to terminate it by the notice of surrender dated the 27th February 1918.

As regards the third point we have to consider what are the reliefs which the plaintiffs may be granted. The suit was described in the plaint as one for arrears of rent and has been throughout treated as a suit of that character but plainly, the claim cannot be deemed as in the nature of a demand for arrears of rent. The tenancy was surrendered with effect from 1st April 1918 and the landlords re-entered on the premises; thereupon the tenancy must be regarded as extinguished. There was in essence a breach of contract and the plaintiffs are entitled only to damages. If this view were not adopted the anomaly would arise that in a suit instituted on the 12th September 1913 the plaintiffs would recover rent from April 1918 to December 1919, that is, for a period subsequent to the date when the plaint was lodged in Court. What happened in substance was that there was an "anticipatory breach" of the contract, an expression which is felicitous but not perhaps logical, as was pointed out by Lord Wrenbury in *Bradley* v. *Newsum Sons & Co.* (4) whose luminous observations were quoted with approval in *Manindra Chandra Nandy* v. *Aswini Kumar Acharyya* (5). See also the decision of the Judicial Committee in *Jamal* v. *Moolla Dawood Sons & Co.* (6). The true nature of such a suit, where a contract of tenancy, under which rent is payable periodically, is unlawfully brought to a premature termination was also explained in the case of *Gray* v. *Owen* (7). There the tenancy was illegally brought to an end by the defendant before the termination of the lease. The question arose, whether the plaintiff was entitled to rent for the unexpired term of the lease, or to damages. The answer was given by the Kings Bench that the plaintiff was entitled only to damages. Acceptance of the surrender did not preclude the plaintiff from suing for damages for the breach by the defendant of the contract. It did not destroy the existing cause of action. If the plaintiff succeeded in letting the house at the same or higher rent, he would have been entitled only to nominal damages, but as he did not succeed in letting out, he was entitled to recover the amount of rent which he had lost. In the case before us, it thus becomes necessary to determine what sum, if any, the plaintiffs have realised from the godown since the date when the defendants vacated it. We have heard the parties on this point and we do not find it necessary to

(1) 2 C. L. J. 343.
(2) 55 Ind. Cas. 154; 31 C. L. J. 75; 24 C. W. N 463.
(3) 61 Ind. Cas. 687; 33 C. L. J. 437.

(4) (1919) A. C. 16 at p. 53: 88 L. J. K. B. 35; 119 L. T. 238; 24 Com. Cas. 1; 14 Asp. M. C. 340; 34 T. L. R. 613.
(5) 60 Ind. Cas. 337; 32 C. L. J. 163 at p. 197; 25 C. W. N. 297; 48 C. 427.
(6) 31 Ind. Cas. 949; 43 I. A. 6; 43 C. 493; 23 C. L. J. 137: 20 C. W. N. 105; 30 M. L. T. 73; 14 A. L. J. 89; 19 M. L. T. 80; 3 L. W. 181; (1916) 1 M. W. N. 70; 18 Bom. L. R. 315; 9 Bur. L. T. 8 (P. C.).
(7) (1910) 1 K. B. 622; 79 L. J. K. B. 389; 102 L. T. 187; 26 T. L. R. 297

remand the case for further enquiry on this point. We have come to the conclusion that the plaintiffs should have a decree for Rs. 2,500, (two thousand and five hundred); that we assess as the measure of damages which they have suffered by reason of the breach of contract by the defendants.

The result is that this appeal is allowed, the decree of dismissal made by the Subordinate Judge is set aside and the suit is decreed for Rs. 2,500 with interest from date of suit till realisation. There will be no order for costs either here or in the Court below.

BUCKLAND, J.—This is practically an undefended case. The initial error committed by the learned Sudordinate Judge is to be found in the extract quoted from his judgment that "Nil Krishna Babu is certainly a very big man, but he is still a party." There is a presumption in favour of truth and a party who gives evidence is not necessarily a suspect. The same tests have to be applied to him as to every other witness. This error resulted in the learned Subordinate Judge holding in effect that the defendants had no case to meet. In such a view he may possibly have been right in saying that the defendants' failure to examine Arjun and Lalji is immaterial. But in the view which we take the omission to examine these witnesses is most significant. The learned Subordinate Judge says that since Arjun is not now in the defendants' service and since there is not sufficient evidence on plaintiff's side to prove the alleged contract by him defendants' failure to examine him is not very material. So far the learned Subordinate Judge relies upon the fact that Arjun is not in the defendants' service, that is no excuse at all. The only evidence as to the omission is that enquiries were made at the Bombay office. If a party wishes not to have a presumption raised against him by the fact that an important witness has not been called, he should exhaust to the utmost of his power every means to bring that witness before the Court. It appears from the evidence in the case that Lalji was the manager of the defendant firm and that he was succeeded by Arjun. Consequently, both these persons would have been in a position to give material evidence had there been any substance in the defence. The Subordinate Judge has overlooked the additional weight given to the plaintiffs' evidence by the omission to call these witnesses, for though he seems to think there was no case for the defendants to meet, that clearly was not the view taken by their legal advisers at the trial, and had he taken that circumstance into consideration he might possibly have come to a different conclusion with regard to the evidence given on behalf of the appellant. I agree that this appeal should be allowed as ordered.

B. N. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 357 OF 1919.

April 27, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice and Mr. Justice Abdul Qadir.

MOTI SINGH—PLAINTIFF—APPELLANT

versus

THE PRESIDENT OF THE NOTIFIED AREA COMMITTEE OF ANANDPUR—DEFENDANT—RESPONDENT

Punjab Municipal Act (III of 1911), s. 61 (B) (b)—Profession tax—Offerings made by disciples whether income derived from profession or calling.

The income derived by a spiritual leader from offerings made by his disciples is income derived from a profession or calling within the meaning of section 61 (*B*) (*b*) of the Punjab Municipal Act. [p. 997, col. 1.]

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 28th October 1918, affirming that of the Munsif, First Class, Hoshiarpur, dated the 13th August 1918.

Lala *Fakir Chand*, for the Appellant.

JUDGMENT.—This second appeal arises out of a suit brought by *Sodhi* Moti Singh of Anandpur, Tahsil Una, District Hoshiarpur, against the Notified Area Committee of his town, for a declaration that a tax of Rs. 110 levied by the Committee on him as a professional tax, has not been rightly imposed. The Munsif of Hoshiarpur dismissed the plaintiff's suit, being of opinion that the plaintiff is looked upon as a spiritual guide of the Sikh public of the place and that his work falls within the meaning of a profession. The plaintiff appealed and the decree of the Trial Court was confirmed by the District Judge. The plaintiff has now come

up in second appeal, through *Lala* Fakir Chand, whom we have heard, and no one appears before us on behalf of the Anandpur Notified Area.

The learned District Judge has held that as the plaintiff receives offerings from pilgrims, a part of his income is, at any rate, due to his carrying on the calling of a religious teacher. We think the view taken by the learned District Judge is correct. A reference to the *Gazetteer* of Hoshiarpur District for 1904, (page 214), shows that the *Sodhi* family of Anandpur receives offerings from its disciples at the grand fair of *Holi*. Thousands of Sikhs assemble around their *Guru*, who sits in state on a raised platform, while they stand in front on a paved floor. *Lala* Fakir Chand contends that the offerings made to the *Sodhi* on that occasion are not made to him because he is regarded as a religious teacher, but because of his being, by virtue of his descent, a representative of the *Guru*, and as such the income so earned by him should not be regarded as income from any calling or profession. According to section 61 (*B*), (*b*) of the Municipal Act, a tax on persons practising any profession or any art, or carrying on any trade or calling in the Municipal limits may be levied by the Municipality with the previous sanction of the Government. The Anandpur Committee have got the necessary sanction, and it is in the exercise of this power that this tax was levied. We think the Committee was within its rights in levying that tax. The professions of a theologian or religious teacher is considered to be one of the learned professions in the dictionary meaning of the word, and, judging by the position of the plaintiff, we think he exercises the profession of a religious teacher. Even if there be any doubt as to his work being characterised as a profession, we agree with the District Judge in regarding it at least a calling, and, therefore, the income derived by the plaintiff from offerings from his disciples appears to have been rightly made the subject of a tax by the Notified Area Committee. This appeal fails and is dismissed, but we make no order as to costs in this Court as there was no appearance on behalf of the respondent.

Appeal dismissed.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 859 OF 1911.

May 20, 1913.

Present:—Mr. Justice Stephen and Mr. Justice Mullick.

ABDUR RASHID—PLAINTIFF—APPELLANT

versus

Sheikh KHANDKAR AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 29—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Lease by guardian in terms of compromise entered into with leave of Court—Consent of Collector, if necessary.

Where, in accordance with a compromise entered into on behalf of a minor with the sanction of the Court under O. XXXII, r. 7 of the Civil Procedure Code, the guardian of the minor grants a lease, the consent of the Collector under section 29 of the Guardians and Wards Act is not necessary.

Biku Halwai v. *Mohesh Halwai*, 8 C. L. J. 266, referred to.

Appeal against a decree of the District Judge, Sylhet, dated the 21st December 1910, modifying that of the Munsif, First Court, Sylhet, dated the 21st July 1910.

Moulvi *Nur ud din*, *Ahmed*, for the Appellant.

JUDGMENT.—This appeal relates to a rent suit which was partially decreed in the Court below. At the hearing of the appeal the lower Appellate Court agreed in most of its findings with the First Court, but dismissed the suit on the ground that the lease was granted by one Kissori on behalf of an infant without any authority in that behalf, because he did not obtain the consent of the Collector in accordance with the provisions of section 29 of the Guardians and Wards Act. Such consent is not in fact necessary, because the lease was made in accordance with a compromise which had been entered into with the sanction of the Court whose duty it was particularly to see that the compromise including the execution of the lease, was for the benefit of the infant. This is according to the proper construction of the section in question and O. XXXII, r. 7, Civil Procedure Code; it is in accordance with the law laid down in the case of *Biku Halwai* v. *Mohesh Halwai* (1). As the lower Appellate Court has acted on this mistaken view of the law, but has otherwise agreed in the finding of the first Court, we allow the appeal, set aside the judgment and decree

(1) 8 C. L. J, 266.

of the lower Appellate Court and restore those of the Court of first instance. The present appellant is entitled to his costs in the lower Appellate Court and to the costs of this Court less the hearing fee.

B. N. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 34 OF 1920.

April 6, 1921.

Present:—Mr. Daniels, A. J. C.

Saiyid ZULFIQAR ALI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SURAJ PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Long term—Clog—Usufructuary mortgage for long term—Term, particular, void and unenforceable, effect of—Mortgage, whether invalid as a whole.

A long term in a mortgage does not necessarily amount to a clog on the equity of redemption. It only does so where it is such as to render redemption practically impossible or where the bargain is unconscionable and the long term is unaccompanied by any corresponding advantage to the mortgagor. A long term in a usufructuary mortgage is less likely to operate as a clog on redemption than in any other class of mortgage, because redemption is effected on payment of a fixed sum and there is no danger of arrears of interest mounting up to an extent which may far exceed the value of the property. [p. 999, col 2.]

Where in consideration of a reduction of interest a long term is agreed upon between the parties to a usufructuary mortgage and the other terms are also such as are naturally incident to a possessory mortgage for a long term, there is no clog on equity of redemption. [p. 999, col. 2.]

Durga Singh v. *Nawab Mirza Muhammad Raza Husain Khan*, 25 Ind. Cas 912; 17 O. C. 313 and *Sayad Abdul Hak Sardar Diler Jung Bahadur, C. I. E.* v. *Gulam Jilani*, 20 B. 677; 10 Ind. Dec. (N. s.) 1021, distinguished.

The fact that a particular covenant in a mortgage, (*e. g.*, that the mortgage is not to be redeemed with borrowed money), is void and unenforceable does not invalidate the mortgage as a whole. [p. 999, col. 2.]

Appeal from a decree of the first Additional District Judge, Lucknow, dated the 22nd November 1919, confirming a decree of the Additional Subordinate Judge, Lucknow, dated the 7th April 1919.

Mr. *Ishri Prasad*, for the Appellants.

Messrs. *Bisheshwar Nath* and *Ram Bharose Lal*, for Respondents Nos. 1, 3, 4, 5 and 6.

JUDGMENT.—This was a suit for redemption of a usufructuary mortgage executed on 26th May 1890 for a period of 98 years. The mortgage was of a one anna share in *Mouza* Rasulpur Sadar for a sum of Rs. 3,150. It was executed by Safdar Ali, the father of the plaintiffs-appellants, in favour of *Musammat* Surja, wife of Ganeshi Halwai and predecessor-in-interest of the defendants-respondents. The suit has been brought long before the expiry of the period of the mortgage and the sole substantial question at issue is whether the term of 98 years constituted, either alone or in conjunction with the other terms of the mortgage, a clog on the equity of redemption so as to entitle the mortgagors to equitable relief. There is a subsidiary issue as to whether the lower Appellate Court ought to have admitted a certified copy of a partition *chitthi* which was not tendered in the Trial Court. The document, if admitted, would only be of subsidiary value as it is merely a piece of evidence as to the profits of the mortgaged property in a particular year. The exact time when the *chitthi* was prepared is not known but the partition case was decided in the year 1880. The particular reason given by the lower Appellate Court for not accepting it, namely, that it is an *ex parte* statement by an interested party, is admittedly erroneous, but there does not appear to be any strong ground why the document should have been admitted in appeal and I see no sufficient reason to admit it now.

The case set up in the plaint was that the mortgagor was an illiterate man who was incapable of understanding the transaction and that the first three defendants were clever persons who got the mortgage executed in the name of their mother and by their cleverness overreached the mortgagor. Both the Courts below have found that there is nothing whatever to show that the mortgagor was incapable of understanding his own interests or that he was in any way overreached. They hold, on the contrary, that the mortgagor received compensating advantages for the long term to which he had agreed and that the bargain was a free and fair bargain between the parties in which the advantage was by no means entirely on the side of the mortgagee. It is common ground between the parties that in the year 1881 a 2-annas $2\frac{3}{4}$-pies share in this village including

the share in suit was mortgaged to Ganeshi, the husband of *Musammat* Surja, with possession for a sum of Rs. 2,200. In 1890 Ganeshi having died, *Musammat* Surja advanced a further sum of Rs. 950 making up a total of Rs. 3,150, released 1 anna $2\frac{3}{4}$ pies of the mortgaged share, and in lieu of 2 annas $2\frac{3}{4}$ pies accepted as security a usufructuary mortgage of a 1-anna share only in lieu of the larger amount. The rate of interest she was receiving was thus reduced in two ways. On the one hand, the amount of the loan advanced by the creditor was increased by more than 75 per cent., and, on the other hand, the share of profits which she was receiving was reduced to less than half its former amount. The mortgage itself recites, and this amounts to an admission by the appellants' predecessor-in-interest, that in consideration of this reduction of interest a long term had been agreed upon between the parties. This, however, is not all. A third party filed a pre-emption suit in respect of the transaction alleging that it was a sale in disguise. Both the mortgagor and the mortgagee filed written statements denying this allegation. In his written statement (Exhibit A-6) Safdar Ali admitted the mortgage, admitted the term of 93 years, asserted that the deed was neither more nor less than what it appeared on its face, and further alleged that other mortgages for long terms had been executed in this village. The pre-emption suit was subsequently dismissed (Exhibit A-7). The lower Appellate Court suggests that the long term may have been inserted by both parties to the transaction with a view to avoid pre emption, but as this is not the case set up by either party it is not necessary to consider it.

These facts are not disputed by the appellants but they suggest that the profits of the mortgaged share must have risen largely between 1881 and 1890 and that this accounts for the mortgagee accepting a smaller security in the latter year. They have been unable to establish this assertion by evidence and the finding of both the Courts below is against them on this point. It may be noted that Safdar Ali lived for eleven years after the mortgage but made no application to redeem in his lifetime, and it was not till seventeen years after his death that the present suit was brought. The facts referred to above are sufficient to distinguish the case from *Durga Singh* v. *Nawab Mirza Muhammad Raza Husain Khan* (1) and *Sayad Abdul Hak Sardar Dilar Jung Bahadur C. I. E.* v. *Gulam Jilani* (2), relied on by the appellants. In the latter case there was a one-sided stipulation by which the mortgagee was entitled to foreclose within the period of the mortgage, while the mortgagor was not entitled to redeem. A long term in a mortgage does not necessarily amount to a clog on the equity of redemption. It only does so where it is such as to render redemption practically impossible, or where the bargain is unconscionable and the long term is unaccompanied by any corresponding advantage to the mortgagor. It is obvious that a long term in a usufructuary mortgage is less likely to operate as a clog on redemption than in any other class of mortgage, because redemption is effected on payment on a fixed sum and there is no danger of arrears of interest amounting up to an extent which may far exceed the value of the property.

The appellants rely on some of the other terms of the mortgage for the purpose of showing that the bargain was unconscionable. Most of these terms are naturally incident to a possessory mortgage for a long term in which the mortgagee takes the place of the *zemindar* for the time being. Thus the mortgagee was given the right to cut and sell trees. She was to have authority to resume rent-free holdings and *jagirs* and to re-settle land with others. She was to be recouped for money spent on constructing *pakka* wells and was to be entitled at the time of redemption to realise any outstanding arrears of tenants' rent, *takavi*, etc. There is indeed one term in the mortgage which the respondents have admitted, both in the Courts below and in this Court, to be void and unenforceable, namely, a stipulation that the mortgage is not to be redeemed with borrowed money. The fact that this particular covenant is unenforceable does not, however, invalidate the mortgage as a whole.

In the result I agree with the Courts below that the term of the mortgage, though long, does not, in the circumstances of this

(1) 25 Ind. Cas. 912; 17 O. C. 313.
(2) 20 B. 677; 10 Ind. Dec. (N. S.) 1021.

case, amount to a clog on the equity of redemption. I accordingly dismiss the appeal with costs.

W. C. A. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

May 12, 1922.

Present :—Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

BADRI NARAIN SINGH—APPELLANT

versus

Thakurain HARNAM KUAR AND OTHERS—RESPONDENTS.

Oudh Estates Act (I of 1869), ss. 22 (1), 23—Succession—"Ordinary law," meaning of—Sanad—Primogeniture, rule of—Custom—Instances prior to sanad—Evidence.

The expression 'ordinary law,' referred to in section 23 of the Oudh Estates Act, is the law which would govern the parties apart from the Statute, and includes any Sanad giving title to the property in dispute. [p 100', col. 2.]

Bhai Narindar Bahadur Singh v. *Achal Ram*, 20 C. 649 at p. 654: 20 I. A 77: 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique & Jackson's P. C No. 128; 10 Ind. Dec. (N. S.) 438 (P. C.), *Debi Bakhsh Singh* v *Chandrabhan Singh*, 7 Ind. Cas. 724; 37 I. A. 168; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; (1910) M. W. N. 643; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 20 M. L. J. 917; 32 A. 599: 13 O. C. 316 (P. C.) and *Sitla Bakhsh Singh* v. *Sital Singh*, 60 Ind. Cas, 548; 48 I. A. 228; 43 A. 245; 19 A. L. J. 337; 40 M. L. J. 449; 8 O. L. J. 214; 25 C. W. N. 721; 24 O. C. 107; 33 C. L. J. 520; 29 M. L. T. 390 (P. C.), referred to.

Where a Sanad, under which an estate in Oudh is held, lays down the succession according to the rule of primogeniture, evidence of a single unexplained instance of the widow of one of the grantees having succeeded to the exclusion of male heirs, is insufficient to establish a custom binding on another branch of the family. Similarly, evidence of widows having succeeded prior to the grant of the Sanad cannot be used to set up a rule of succession directly contrary to the terms of the Sanad under which the estate is held. [p. 1003, col. 1.]

Brij Indar Bahadur Singh v. *Ranee Janki Koer*, 5 I. A. 1 at p. 14; 1 C. L. R. 318 (P. C.); 3 Sar. P. C. J. 763; Bald. 148; Rafique & Jackson's P. C. No. 48; 3 Suth. P. C. J. 474 (P. C.) and *Thakur Sheo Singh* v. *Rani Raghubans Kunwar*, 32 I. A. 203 at p. 214; 27 A. 634; 15 M. L. J. 352; 8 O. C. 317; 9 C. W. N. 1009; 2 C. L. J. 194 (P. C.), referred to.

Appeal from a judgment and decree of the Court of the Oudh Judicial Commissioner, (Kanhaiya Lal, A. J. C. and Kendall, A. J. C.) in First Civil Appeal No. 30 of 1915, dated 2nd January 1917, reported as 40 Ind. Cas. 555, affirming that of the Subordinate Judge, Partabgarh, dated 25th February 1915.

Mr. *Dunne*, *K. C.*, and Mr. *Kenworthy Brown*, for the Appellants.

Mr. *De Gruyther*, *K. C.* and Mr. *Dube*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Partabgarh by which the plaintiff's suit was dismissed. The question raised is as to the title to an estate in Oudh of considerable value known as the Mahal Tajpur.

Lal Ajodia Bakhsh, the ancestor of the plaintiff, belonged to a family of Bisen Thakurs long settled in the District of Partabgarh, and was the owner of an estate called Kundrajit or Shamepur. At the time of the Mutiny, this family had four branches representing the descendants of the four sons of Lal Ajodhia Bakhsh; the first branch being represented by Thakurain Baijnath (a widow), the second by Lal Chhatarpal, the third by Lal Surajpal and the fourth by Lal Chandrapal. On the annexation of Oudh in 1856, this estate, with the remainder of the soil of the Province, was confiscated by the British Government, which assumed the right (as stated in Lord Canning's Proclamation of the 15th March 1858), to dispose of it in such manner as it thought fitting. Lal Chhatarpal had taken action against the British Government, but Thakurain Baijnath had been loyal; and ultimately by a Sanad, which is undated but which appears from other documents to have been executed in the year 1863, the Chief Commissioner of Oudh under the authority of the Governor General granted the estate of Kundrajit to the above-named four persons, Thakurain Baijnath, Lal Chhatarpal, Lal Surajpal and Lal Chandrapal, and their heirs, subject to the usual conditions as to the surrender of arms and loyalty to the British Government. The Sanad was in the form then commonly adopted and contained the following clause:—

"It is another condition of this grant that, in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full

power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

Chhatarpal appears to have objected to the Sanad on the ground that he was alone entitled to the whole estate, but it was ultimately accepted by him and by the other grantees.

On the passing of the Oudh Estates Act (Act I of 1869), the four grantees above-named (bracketed together), were entered as owners of Kundrajit in List No. 1 and List No. 4, as prepared under section 8 of the Act. There appears to have been no reason why they should not have been entered in List No. 3 as owners of an estate regulated by the rule of primogeniture; but they may have preferred not to be subject to the special rules of succession which, under section 22 (clauses 1 to 10) of the Act, apply to estates entered in that List. In any case, this is now immaterial, as the estate must be dealt with according to the rules regulating estates entered in List No. 4.

In or about the year 1872, Kundrajit was divided into four Mahals, which were allotted to the four branches of the family, Mahal Tajpur being allotted to Chhatarpal. The effect of this partition was that this Mahal was held by Chhatarpal alone as an impartible *taluq* on the terms of the Sanad and of the Act of 1869.

Chhatarpal died on the 19th October, 1899, and was succeeded by his son, Lal Ram Kinkar. On the death of the latter without issue on the 6th October 1907, his widow, the first respondent, Thakurain Harnam Kaur, took possession of Tajpur and the lands then held with it. Thereupon, the appellant, Babu Badri Narain Singh, who was the son of Chhatarpal's eldest brother and was the nearest male heir in line and degree, claimed to be entitled to the succession; and on his right being disputed he commenced, in 1913, the present suit against Thakurain Harnam Kuar and other members of the family for possession of Tajpur and other lands. By his plaint, he claimed possession (*a*) under the terms of the Sanad, (*b*) by an alleged family custom of succession by male lineal primogeniture, and (*c*) under a Will executed by Chhatarpal on the 6th September 1899. This Will, having been executed less than 3 months before the death of Chhatarpal, is now admitted to have been inoperative (under section 13 of the Act of 1869), to pass the estate, and it need not be further referred to.

The suit was heard by the Subordinate Judge of Partabgarh, who held that the alleged custom was not proved, and that having regard to section 23 of the Act of 1869, under which the succession on intestacy to a *taluqdari* estate entered in List No. 4 is to be "regulated by the ordinary law to which the members of the intestate's tribe and religion are subject," the succession in this case was to be regulated not by the Sanad but by the Law of the Mitakshara. He accordingly held that the widow of Lal Ram Kinkar was entitled to succeed, and dismissed the suit.

On appeal the Judicial Commissioners differed on the question whether the Sanad applied; but they agreed in holding that there was an established custom in the family that the widow should succeed, and that this custom continued notwithstanding the forfeiture and re-grant of the estate, and they accordingly affirmed the decision of the Subordinate Judge. Against this decision the present appeal was brought.

It is not and cannot be disputed that, if the rule of succession laid down in the Sanad of 1863 is to have effect, the appellant as the nearest male heir is entitled to the succession; and in the argument for the respondents, the principal stress was laid upon the contention which prevailed with the Subordinate Judge, namely, that the effect of section 23 of Act I of 1869 was wholly to displace the rule of succession prescribed by the Sanad and to substitute for it the ordinary rules of succession prevailing among Hindus who are subject to the law of the Mitakshara. This contention was disposed of by the First Judicial Commissioner in manner appearing by the following extract from his judgment:—

"The meaning of the words 'ordinary law' has been the subject of much discussion in this case. I could not merely imply the personal law of the intestate's tribe and religion, because the personal law applicable to Hindus and Mahammadans has, in many instances, been modified and is controlled by

the Indian Statutes. In the case of Hindus, for instance, the personal law of Hindus is controlled and governed in some respects by the Caste Disabilities Removal Act (XXI of 1850), the Hindu Widows' Re-marriage Act (XV of 1856), the Hindus Wills Act (XXI of 1870) and the provisions of the Transfer of Property Act (IV of 1882) and the Crown Grants Act (XV of 1895), wherever they are applicable. In the case of Muhammadans, the provisions of the Muhammadan Law are similarly controlled and governed in some respects by the Transfer of Property Act (IV of 1882), wherever they are applicable. It cannot, therefore, be said that a reference to the 'ordinary law' in section 23 is merely meant to imply the personal law, uncontrolled by custom or acts of the Indian Legislature. As pointed out by Lord Hobhouse in a case of List No. II, the effect of the 11th sub-section of section 22 is simply to refer the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted, and such ordinary law would include custom : [*Bhai Narindar Bahadur Singh* v. *Achal Ram* (1)]. In *Parbati Kunwar* v. *Chandarpal Kunwar* (2), Lord Collins applied the same rule to a case of List No. IV, governed by section 23. In other words when the special rules of succession laid down in section 22 are exhausted and section 22, clause (11) is reached, or when section 23 is applicable, the situation governing the succession has to be found apart from the Statute, that is, in the ordinary law applicable as if Act I of 1869 had not been passed. That ordinary law would include not only custom but also a Sanad, where the Sanad contains a rule of succession which is enforceable by Statute."

Their Lordships agree with the reasoning and conclusion of the First Judicial Commissioner; and indeed no other conclusion is consistent with the decisions of this Board in *Bhai Narindar Bahadur Singh* v. *Achal Ram* (1), *Debi Bakhsh Singh* v. *Chandrabhan Singh* (3) and *Sitla Bakhsh Singh* v. *Sital Singh* (4). These decisions clearly establish that the "ordinary law" referred to in the Act is the law which would govern the parties apart from the Statute and includes any Sanad giving title to the property in dispute. It is true that these decisions were rendered with reference to clause 11 of section 22, and not with reference to section 23 of the Act; but the terms of the latter section are precisely similar to those of section 22 (11), and their Lordships see no sufficient reason for giving to them a different construction. It may be added that the Oudh Estates (Amendment) Act, 1910, has no application to this case, which arose before that Act was passed.

An argument was founded, as in the cases cited, upon the dictum of Sir Barnes Peacock in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (5), that in that case "the limitation in the Sanad was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act." But it must be remembered that in that case (which arose under List No. 2) the contest was between the female heir of the grantee (a widow) and the heir of her late husband, neither of whom could claim under the Sanad; and this being so, the case is no authority for the view that the effect of section 22 (11) or of section 23 of the Act, was wholly to destroy the rules of succession laid down under Sanads which had been so recently granted. Probably the dictum means on more than this, that the Act supersedes the Sanad where the two are in conflict. Reliance was also placed on the case of *Paratti Kunwar* v. *Chandarpal Kunwar* (2) which arose under List No. 4; but that case was argued (doubtless for good reasons)

(1) 20 C. 649 at p. 654; 20 I. A. 77; 6 Sar. P. C. J. 310; 17 Ind. Jur. 319; Rafique & Jackson's P. C. No. 128; 10 Ind. Dec. (N. S.) 438 (P. C.).

(2) 4 Ind. Cas. 25; 31 A. 457 at p. 474; 10 C. L. J. 216; 13 C. W. N. 1073; 6 A. L. J. 767; 11 Bom. L. R. 890; 12 O. C. 304; 19 M. L. J. 605; 36 I. A. 125 (P. C.).

(3) 7 Ind. Cas. 724; 37 I. A. 168; 14 C. W. N. 1010; 12 C. L. J. 303; 8 M. L. T. 273; (1910) M. W. N. 643; 7 A. L. J. 1122; 12 Bom. L. R. 1015; 20 M. L. J. 917; 32 A. 599; 13 O. C. 316 (P. C.).

(4) 60 Ind. Cas. 548; 48 I. A 228; 43 A. 245; 19 A. L. J. 337; 40 M. L. J. 449; 8 O L. J. 214; 25 C. W. N. 721; 24 O. C. 107; 33 C. L. J. 520; 29 M. L. T. 390 (P. C.).

(5) 5 I. A. 1 at p. 14; 1 C. L. R. 318 (P. C.); 3 Sar. P. C. J. 763; Bald. 148; Rafique & Jackson's P. C. No. 48; 3 Suth. P. C. J. 474.

without any reference whatever to the Sanad, and cannot, therefore, be taken as an authority on the question now under discussion.

In their Lordships' opinion, this argument fails.

With regard to the question of custom, the decision of the Judicial Commissioners appears to have been founded on certain instances in which the members of the family of Lal Ajodhia Bakhsh were succeeded by their widows; but all these instances, with one exception, occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the Sanad; and they cannot be used to set up a rule of succession directly contrary to the terms of the Sanad under which the estate is now held. The Crown Grants Act of 1895, section 3, enacts that all provisions, &c., contained in a grant "shall be valid and take effect according to their tenor, any rule of law, Statute or enactment of the Legislature to the contrary notwithstanding," and full effect was given to this enactment in *Thakur Sheo Singh* v. *Rani Raghubans Kunwar* (6). The exception was in the case of the widow of Surajpal, one of the grantees under the Sanad of 1863, who appears to have been allowed to take possession of his estate to the exclusion of his male heirs; but this single instance, which is unexplained, is wholly insufficient to establish a custom binding on another branch of the family. This argument, therefore, also fails, and the appellant's title prevails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner and the decree of the Subordinate Judge should be set aside, and that the appellant should be held entitled to possession of Mahal Tajpur with any accretion thereto and to an account and payment of mesne profits. The respondents will pay the costs of the appellant in both Courts and his costs of this appeal.

W. C. A. *Appeal allowed.*

Solicitor for the Appellant:—Mr. *Douglas Grant.*

Solicitor for the Respondents:—Messrs. *T. L. Wilson & Co.*

(6) 32 I. A. 203 at p. 214; 27 A. 634; 15 M. L. J. 352; 8 O. C. 317; 9 C. W. N. 1009; 2 C. L. J. 194 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2292 OF 1918.

July 15, 1920.

Present:—Sir Asutosh Mookerjee, Kt., Acting Chief Justice, and Justice Sir Ernest Fletcher, Kt.

UJIR ALI SIRDAR—PLAINTIFF—APPELLANT

versus

SHADHAI BEHARA AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Limited interest, acquisition of—Appeal, second—Misconstruction of document containing admission—Question of fact or law—Evidence—Evidence, improper, admitted—Exclusion by High Court—High Court, appraisement of remaining evidence by.

A limited interest in property can be acquired by adverse possession. [p. 1004, col. 2]

Ishan Chandra Mitter v. *Raja Ramranjan*, 2 C. L. J. 125, *Raktoo Singh* v. *Sudhram Ahir*, 8 C. L. J. 557, *Icharan Singh* v. *Nilmoney Balidar*, 35 C. 470; 7 C. L. J. 499; 12 C. W. N. 636, *Probhabati Dasi* v. *Taibaturnessa*, 20 Ind. Cas. 664; 19 C. L. J. 62; 17 C. W. N. 1088, *Panchkari Chattapadhya* v. *Maharaj Bahadur Singh*, 28 Ind Cas. 708; 19 C. W. N. 136, *Birendra Kisore* v. *Laksmi*, 30 Ind Cas 896; 22 C L. J. 129, *Muthuraju Thevan* v. *Robert Gordon Orr*, 10 Ind. Cas 575; 35 M. 618; 10 M. L. T. 12; 21 M, L. J. 615, followed.

The misconstruction of a document which is the foundation of a suit is a question of law, but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal. [p. 1005, col 1.]

Nowbut Singh v. *Chutter Dharee Singh*, 19 W. R. 227, *Ananda Chandra Sen* v. *Parbati Nath Sen*, 4 C. L. J. 198, *Braja Mohan Mandal* v *Thakur Das Nath*, 4 Ind. Cas. 732; 10 C. L. J. 593, *Buzlul Karim* v. *Satiesh Chandra Giri Mohant*, 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752, *Rajah Makund Deb* v. *Gopi Nath Saha*, 25 Ind. Cas. 286; 21 C. L. J. 45, relied on.

It is not possible for the High Court in second appeal to say whether, after the exclusion of evidence improperly admitted, there is sufficient evidence left to justify the decree of the lower Appellate Court. This is a matter which must be considered by that Court. [p. 1005, col. 1.]

Appeal against a decree of the District Judge, Jessore, dated the 24th September 1918, affirming that of the Subordinate Judge Jessore, dated the 29th July 1918.

Babus *Dawarka Nath Chuckerbutty*, *Romesh Chandra Sen* and *Bhupendra Kumar Ghose*, for the Appellant.

Mr. *B. Chakravarti* and Babus *Chibaprasanna Bhattacharyya* and *Jotindra Mohan Sen Gupta*, for the Respondents.

UJIR ALI SIRDAR v. SHADHAI BEHARA.

JUDGMENT.

MOOKERJEE, ACTG, C. J.—This is an appeal by the plaintiff in a suit for ejectment of the defendants from what, according to him, originally constituted a service-tenure.

The suit was instituted in the first instance against five defendants, the representatives-in-interest of the alleged service-holder, and was decreed in the Court of first instance. Upon appeal to the District Judge, that decree was set aside on the ground that one Macleod, a transferee from the other defendants, should have been joined as a party defendant to the suit. The validity of the order of remand so made by the District Judge was considered by this Court, but the order was affirmed. Thereupon the order made was carried out and Macleod was added as a defendant on the 6th September 1916. The Subordinate Judge has, after re-trial, held that the claim is unfounded, and that view has been accepted by the District Judge.

On appeal to this Court, the decree of the District Judge has been assailed on three grounds; namely, *first*, that in respect of the parcels of land claimed by Macleod, the District Judge has erroneously held that the suit was barred by limitation; *secondly*, that in respect of the other parcels of land, the District Judge has misconstrued an admission alleged to have been made by the plaintiff in his deposition; and, *thirdly*, that in respect of these parcels of land, the District Judge has erroneously relied upon statements in two deeds of gift, which were inadmissible under section 18A of the Bengal Tenancy Act.

As regards the first contention, we are clearly of opinion that the case for the appellant cannot be sustained. It has been found that Macleod purchased the holding now in his occupation by two deeds in 1903. The conveyances purported to be in respect of permanent tenures held at rents fixed in perpetuity. The documents were registered and the landlord's fees were paid into the Registration Office. The District Judge, in concurrence with the Subordinate Judge has found that the landlord became aware of the transfer and also knew that Macleod openly held the lands, asserting his right as tenant by virtue of his purchase. The present suit was instituted on the 13th May 1910, but as Macleod was not added as a defendant till the 6th September 1916, in so far as he is concerned, we must take it for the purposes of limitation that the suit as against him was filed on the 6th September 1916. Consequently, at the date of the institution of this suit, Macleod had already been in possession for more than 12 years, to the knowledge of the landlord, in assertion of his title as transferee of the holding conveyed to him. It has been argued, however, on behalf of the appellant that time did not begin to run as against the plaintiff till he had terminated the alleged service-tenure by a notice upon the service holder. We are of opinion that there is no foundation for this contention: In the first place, the Subordinate Judge found that the plaintiff had failed to adduce evidence to prove his allegation as to the existence of the service-tenure. In the second place, there is no finding and, indeed, in view of the evidence to which we have just referred, there could not be any finding that after the transfer by the original defendants to Macleod in 1903, they could have rendered any service to the plaintiff. It is, consequently, plain that Macleod has by prescription acquired the status of a tenant under the plaintiff, on the well-recognised principle that a limited interest in property can be acquired by adverse possession. *Ishan Chandra Mitter* v. *Raja Ramranjan* (1), *Raktoo Singh* v. *Sudhram Ahir* (2), *Icharan Singh* v. *Nilmoney Balidar* (3), *Probhabati Dasi* v. *Taibaturnessa* (4), *Panchkari Chattapadhya* v. *Maharaj Bahadur Singh* (5), *Birendra Kisore* v. *Laksmi* (6), *Muthuraku Thevan* v. *Robert Gordon Orr* (7). We must consequently hold that the suit has been rightly dismissed as against Macleod.

As regards the remainder of the lands, the case for the defence was that they formed an occupancy holding bearing an annual rental of Rs. 10. The District Judge has held this allegation proved by the evidence which includes, first, an admission alleged to have been made by the plaintiff

(1) 2 C. L. J. 125.
(2) 8 C. L. J. 557.
(3) 35 C. 470; 7 C. L. J. 499; 12 C. W. N. 636.
(4) 20 Ind. Cas. 664; 19 C. L. J. 62; 17 C. W. N. 1088.
(5) 28 Ind. Cas. 708; 19 C. W. N. 136.
(6) 30 Ind. Cas. 896; 22 C. L. J. 129.
(7) 10 Ind. Cas. 575; 35 M. 618; 10 M. L. T. 12; 21 M. L. J. 615.

in his deposition and, secondly, recitals in two deeds of gift executed on the 10th April 1894 and 22nd August 1894 by the holders of the tenancy at that time. The second and third grounds urged by the appellant raise the question of what has been called the construction of the admission and the admissibility of the recitals.

As regards the admission, we are of opinion that the appellant cannot raise the question in second appeal. It was pointed out by Sir Richard Couch, C. J. in the case of *Nowbut Singh* v. *Ohutter Dharee Singh* (8) that the misconstruction of a document which is the foundation of a suit is no doubt a question of law, but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal. The same view has been taken in the cases of *Ananda Chandra Sen* v *Parbati Nath Sen* (9), *Braja Mohan Mandal* v. *Thakur Das Nath* (10), *Bulul Karim* v. *Satish Chandra Giri Mahant* (11), *Rajah Mukund Deb* v. *Gopi Nath Sahu* (12).

As regards the recitals in the deeds of gift we are of opinion that they are not admissible under section 18A of the Bengal Tenancy Act which provides that: "Nothing contained in any instrument of transfer to which the landlord is not a party shall be evidence against the landlord of the permanence, amount or fixity of rent, area, transferability or any incident of any tenure or holding referred to in such instrument." The respondent has contended that even if the recitals are excluded, there is abundant evidence to support the conclusion of the District Judge But it is not possible for us in second appeal to say whether, if the recitals in the deeds of gift are excluded, as they must be, there is sufficient evidence left to justify the decree, That is a matter which must be considered by the lower Appellate Court. *Womes Chunder Chatterjee* v. *Chundee Churn Roy Chowdhry* (13).

(8) 19 W. R. 222.
(9) 4 C. L. J. 198.
(10) 4 Ind Cas. 732; 10 C. L. J. 593.
(11) 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752.
(12) 25 Ind. Cas. 286; 21 C. L. J. 45.
(13) 7 C. 293; 3 Ind. Dec. (N. s.) 737.

The result is, that although we affirm the decree of dismissal as against Macleod we set aside the decree of the Court below in respect of all the lands not purchased by him, and remand the case to the District Judge in order that he may re-consider the question of the lands which are alleged to form an occupancy holding bearing an annual rental of Rs. 10. The matter will be re-considered irrespective of the recitals in the two deeds of gift. In so far as Macleod is concerned, the appeal stands dismissed with costs; in so far as the other respondents are concerned, costs will abide the result.

FLETCHER, J.—I agree.

B. N. *Appeal partially decreed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 502 OF 1921.

February 16, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

CHUNILAL SOMESHVAR BHATT—PLAINTIFF—APPELLANT

versus

VITHALDAS KARSANDAS—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17 - Deposit of tittle-deeds—Document amounting to charge also executed—Document containing reference to execution of formal mortgage-deed later on—Document, registration of, if necessary—Registration not effected—Mortgage, enforcement of—Formal mortgage, right to demand execution of.

Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, the general rule will not apply where there is a deposit accompanied by an actual written charge. In that case one must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone the parties must be governed Such a document must be registered [p. 096, col 2; p. 100 , col. 1.]

Shaw v. *Foster*, (1872) 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T 281; 20 W. R. 907, followed.

Pranjivandas Jagjivandas Mehta v. *Chan Mah Phee* 35 Ind. Cas. 190; 43 C. 895; (1916) 1 M. W. N. 443; 31 M. L. J 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R 664; 30 M.L.T. 242; 9 Bur. L. T. 125; 24 C. L.J. 314; 8 L B. R. 458; 43 I. A. 122 (P. C.) and *Behram Rashid* v. *Sorabji Rustamji Elavia*, 23 Ind. Cas. 149; 38 B. 372; 16 Bom. L. R. 35, referred to.

CHUNILAL SOMESHVAR BHATT v. VITHALDAS KARSANDAS.

Where there is a document amounting to a complete contract containing a reference to a more formal document to be executed later on if desirable, it takes effect unless there is a condition that it is not to take effect unless the second document is executed. [p. 1007, col. 2.]

The defendant deposited the title-deeds of a house with the plaintiff, and on the same day passed a *chithi* in respect thereof which after reciting the taking of a certain sum of money stated: "I have given my house in mortgage for the above amount and.....shall execute a *pucca* document in respect of the same whenever you may ask me. The interest is settled at the rate of eight annas.... ...This is agreeable and binding on me." This *chithi* was not registered. The plaintiff sue to recover his money by sale of the mortgaged house, or in the alternative for a registered mortgage-deed thereof:

Held, (1) that the *chithi* required registration; [p. 1007, col. 2.]

(2) that in the absence of such registration, the plaintiff was not entitled to a declaration that he had a charge on the property mentioned in the title-deeds deposited with him, or to an order for sale of that property to satisfy his claim; [p. 1007, col. 2.]

(3) that the plaintiff was not entitled to obtain a mortgage-deed from the defendant as he had already got a mortgage and the only effect of his getting another document would be to have the terms of the mortgage settled in a more formal manner and that if the first document was not registered, he could not by getting another document cure the defect. [p. 1007, col. 2.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 263 of 1919, confirming the decree passed by the Second Class Subordinate Judge at Godhra, in Civil Suit No. 2 of 1919.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *M. H. Mehta*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover Rs. 1,000 principal, and Rs. 69-5-0 interest thereon, by sale of the mortgaged house mentioned in the plaint situated at Godhra, or in the alternative, for a registered mortgage-deed thereof, alleging that he had advanced that sum to the defendant to enable him to carry on trade in Bombay and in consideration thereof the defendant deposited the title-deed of his house at Godhra and created an equitable mortgage thereon for Rs. 1,000. The defendant on the same day passed in Bombay a *chitti* in respect thereof. The defendant admitted the payment of Rs. 1,000 on the 19th November 1917, and alleged that that amount was to be accounted for in the partnership account at the end of the year, and he further contended that the equitable mortgage and the agreement relied upon by the plaintiff did not come within the jurisdiction of the Court, as the agreement took place in Bombay, the amount was paid in Bombay and the defendant was doing business in Bombay and residing in Bombay.

The Trial Court had jurisdiction to try the suit, but as the *chitti*, Exhibit 12, on which the plaintiff relied, required registration, the suit failed. This decision was confirmed in appeal, and before us it has been argued in the first place, that the defendant admitted that there was an equitable mortgage of his property, and, therefore, the plaintiff on that admission was entitled to the decree he asked for. But I do not think it can be said that the defendant's pleading admits that there was an equitable mortgage which could be the basis of a decree. He merely refers in the written statement to the plaintiff's allegations and mentions what the plaintiff relies upon for establishing the creation of an equitable mortgage in Bombay.

Then it has been very strenuously urged that the document, Exhibit 12, does not require registration: and in order to determine whether it requires registration, we have to consider, upon the proper construction of that document, whether it creates a charge or an interest in the property mentioned therein, and with reference to documents connected with the deposit of title-deeds, what the Court has to consider is laid down in *Shaw* v. *Foster* (1) referred to in the judgment of the Privy Council in *Pranjivandas Jagjivandas Mehta* v. *Ohan Mah Phee* (2): "Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that the general rule will not apply where you have a deposit accompanied by an actual written charge. In that

(1) (1872) 5 H. L. 321; 42 L. J. Ch. 49; 27 L. T. 231 20 W. R. 907.

(2) 35 Ind. Cas. 190; 43 C. 895; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 03; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242 9 Bur. L. T. 125; 24 C. L. J. 314; 8 L. B. R. 458; 43 I. A. 122 (P. C.).

case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

In the case before the Privy Council the question was what was the scope and extent of the security, as the title-deeds of several properties had been handed over and the document accompanying them only referred to one property. The question whether the document required registration was not before their Lordships.

It is difficult to see how Exhibit 12 can be considered as anything less than a mortgage, considering that it states after reciting the taking of Rs. 1,000:

"In security of that we have given our one house in Godhra bearing Municipal No. 292 and with superstructure being Sanad No. 7, measuring 85 square yards, in mortgage for the above amount. And we have also given to you the copy of the Sanad. We shall execute a Pasea document in respect of the same whenever you may ask us. Its interest is settled at the rate of eight annas. It is agreed that you should return to us the copy of the Sanad on paying the above amount. This is agreeable and binding on us."

If that document had been registered, and the mortgagor had thereafter sought to deal with the property, there can be little doubt that the plaintiff would have set up this document as conferring upon him a prior title. If there had been no document accompanying the title-deed, then it would have been open to the plaintiff to prove orally what was the intention with which the document was deposited, and whether it was meant to be considered as a security. But as the defendant executed this document, we must refer to it in order to ascertain what was the contract. The fact that the defendant agreed to execute another document in formal terms, if he was asked for one, does not affect the value of the document signed, provided it is evidence of a complete transaction which can be spelt out of its wording. There is a certain class of cases in which the parties only purport to record the terms of the agreement in an informal manner, intending that the formal expression of the oral agreement should be executed thereafter. But if the first document contains everything that is necessary for the purpose of proving an agreement then the first document takes effect, unless it is stated to be a condition of the first document that it should not take effect unless the second document is executed. But in this case there is a complete contract to be found in Exhibit 12, although the plaintiff had a right to obtain a mortgage-deed drawn up in more formal language. It seems to me, therefore, that the Courts below were right in deciding that Exhibit 12 required registration.

Reference was made to the case of *Behram Rashid* v. *Sorabji Rustamji Elavia* (3) which was decided by Mr. Justice Beaman and myself and there Mr. Justice Beaman very clearly points out the way in which contemporaneous writings of this kind should be dealt with.

The whole point is whether the document created a charge upon the property referred to therein, and once there is a writing with reference to the deposit of title-deeds, then it is quite clear that the Court must refer to that writing, and can refer only to it, in order to determine what were the conditions on which the title-deeds were deposited. The plaintiff, therefore, was not entitled to a declaration that he had a charge on the property mentioned in the title-deeds deposited with him, or to an order for sale of that property to satisfy his claim, nor do I think he was entitled to obtain a mortgage deed from the defendant, as, if my construction of the deed is correct, he had already got a mortgage and the only effect of his getting another document would be to have the terms of the mortgage settled in a more formal manner. Therefore, if the first transaction is not registered he could not by getting another document cure the defect. But as the defendant admits the advance, it is certainly open to the Court to consider whether a decree should not be passed against the defendant personally. It is true that the learned Trial Judge says that the plaintiff does not want a decree against the defendant personally, but wishes to proceed against the mortgaged property

(3) 23 Ind. Cas. 140; 38 B. 372; 16 Bom. L. R. 35.

only. But it is not clear that the plaintiff was given an opportunity of endeavouring to prove that he was entitled to a personal decree against the defendant if he failed to get a decree against the property. I think he ought to have an opportunity of doing so, and, therefore, the suit should go back to the Trial Court for decision on the issue whether the Court has jurisdiction to pass a personal decree against the defendant, and if so, whether such a decree should be passed. We set aside the order dismissing the suit to that extent. The appellant must pay the costs of the appeal.

COYAJEE, J.—I agree.

N. H. *Order varied.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1061 OF 1921.

February 14, 1922.

Present:—Mr. Justice Scott Smith.

ALLAH RAKHIYA KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AHMAD—DEFENDANT-(VENDEE) AND SEWA RAM *alias* KALU RAM—PLAINTIFF—RESPONDENTS.

*Punjab Pre-emption Act (I of 1913), s. 4—Sale—*Adhlapi *tenure, whether sale.*

A., the owner of certain land, stipulated with *B.* that if the latter built a well on the land and brought it into working order within a certain period he would become the owner of a one-third share n the land:

Held, that the transaction did not amount to a sale and was not, therefore, liable to pre-emption.

The creation of an *adhlapi* tenure in which no money consideration passes at all does not amount to a sale.

Mul Chand v. *Mansa Ram*, 157 P. R. 1883, distinguished.

Ghulam Muhammad v. *Tek Chand*, 62 Ind. Cas. 932; 2 L. 199, followed.

Second appeal from a decree of the Senior District Judge, Multan, dated the 4th December 1920, reversing that of the Munsif, First Class, Leiah, District Muzaffargarh, dated the 29th June 1920.

Lala *Rama Nand*, for the Appellants.

Lala *Nawal Kishore*, for the Respondents.

JUDGMENT.—Sewa Ram, defendant No. 2, having created an *adhlapi* tenure with regard to the land in suit in favour of Ahmad defendant No. 1, the plaintiffs-appellants sued for pre emption on the ground that the creation of an *adhlapi* tenure amounted to a sale. The Courts below have concurrently held, following *Mul Chand* v. *Mansa Ram* (1), that the creation of an *adhlapi* tenure amounted to a sale. The First Court decreed the claim, but the lower Appellate Court, holding that there was no custom of pre-emption with regard to such a sale, dismissed the plaintiffs' suit. The plaintiffs have, therefore, filed a second appeal to this Court and it is contended on their behalf that there was no plea raised and no issue framed as to whether such a sale could be pre empted. Counsel for the respondents asks that the decree of the lower Appellate Court dismissing the plaintiffs' suit be maintained on the ground that *Mul Chand* v. *Mansa Ram* (1) is distinguishable and that in the present case it cannot be said that the creation of *adhlapi* rights amounted to a sale.

According to the agreement by which the tenure was created, Ahmad was to construct a well and bring it into working order within five years, and if he did this he was to become owner of one-third share of Dal Kalachiwali. No cash payment was stipulated for and the case is, therefore, distinguishable from that reported as *Mul Chand* v. *Mansa Ram* (1), for there the transferee agreed not only to restore the ruined well but to pay a certain sum in cash and it was held that in such circumstances the transaction amounted to a sale. That case is, therefore, distinguishable from the present one. In *Ghulam Muhammad* v. *Tek Chand* (2) it was held that the creation of an *adhlapi* tenure in which no money consideration passed at all did not amount to a sale and *Mul Chand* v. *Mansa Ram* (1) was distinguished The facts of the present case are on all fours with those in that reported as *Ghulam Muhammad* v. *Tek Chand* (2) and I accordingly hold that there has been no sale in the present case such as would give rise to a right of pre-emption.

The appeal fails and is dismissed with costs.

S. K. *Appeal dismissed.*

(1) 157 P. R. 1883.

(2) 62 Ind. Cas. 932; 2 L. 199.

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Abatement of appeal—*Decree for joint possession of land—Appeal by defendant—Death of one respondent—No substitution in time, effect of—Civil Procedure Code (Act V of 1908), O. XXII, rr. 4 (1), 11.*

Where during the pendency of an appeal preferred by the defendant against a decree for joint possession of land, one of the plaintiffs-respondents dies and his heirs are not substituted within the time allowed by law, the appeal abates not only against the deceased respondent but also against the other respondents as being no longer competent and should be dismissed against all the respondents. The fact that in the plaint the plaintiffs specified their respective shares would make no difference as the mere specification by the plaintiffs that each individual plaintiff's share is so much does not alter the nature of the decree **C** ARJAN MIRDHA *v.* KALI KUMAR CHAKERBUTTY **194**

Abwab—*Stipulation for delivery of* ghee *and goat contained in* mourasi mokurrari kabuliyat, *if enforceable—"Goat and* ghee" *forming no part of the rent payable—Bengal Putni Taluks Regulation (VIII of 1819), s. 3—"Engagements," meaning of.*

A registered *mourasi mokurrari kabuliyat* executed in 1877 recited that "within the aforesaid Mouza you have granted me a *potta* of 12 *bighas* of land at an annual *jama* of Rs 6 and Rs. 24 as premium," and after reciting how the money should be paid and in what instalments, the *kabuliyat* stated that the landlord should have right to the minerals, etc., and lastly there was the following clause:—"Also it should appear that I would deliver 1 seer of *Shyama ghee* and one kid every year." No amount was mentioned as payable in lieu of the *ghee* and goat in case of default In a suit for rent on the basis of the *kabuliyat*:

Held, (on the assumption that Regulation VIII of 1819 controlled all the incidents of the tenure in question that the stipulation regarding the *ghee* and goat was, in its term and effect, the imposition of an *abwab* and as such not enforceable.

That the 'goat and *ghee*" did not form part of the rent and the stipulation regarding delivery thereof was not legalised by Regulation VIII of 1819, but was subject to the law relating to '*abwabs*' in force at the time of the creation of the lease.

The word "engagements" mentioned in section 3 of the Bengal Putni Taluks Regulation connotes engagements as to rent and other terms connected therewith C RAM TARAN TEWARY *v* KUMEDA DASI, 26 C. W. N. 634; (1922) A. I. R. (C.) 80 **161**

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Adhlapi tenure, *whether sale.*

The creation of an *adhlapi* tenure in which no money consideration passes at all does not amount to a sale. L ALLAH RAKHIYA KHAN *v.* AHMAD **1008**

Adverse possession *a mixed question of law and fact—Appeal, second.*

The question of adverse possession is a mixed question of fact and law. The facts found by the lower Appellate Court must be accepted in second appeal, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by the High Court in second appeal. C JOGENDRA NATH MUKHERJEE *v.* RAJENDRA NATH BHATTACHARJEE, 26 C. W. N. 890; (1922) A. I. R. C. 54 **200**

against widow—Reversioner, whether affected.

Although possession may be adverse against a widow, it is not adverse against a reversioner during her lifetime. L NAND SINGH *v.* DHANKAUR, 2 L. L. J. 573 **299**

Adverse possession—concld.

——— *Limited interest, acquisition of.*

A limited interest in property can be acquired by adverse possession. C UJIR ALI SIRDAR *v* SHADHAI BEHARA, 35 C. L. J. 187; 1922) A. I. R. C. 85 **1003**

——— *Mortgage, simple—Possession, adverse, against mortgagor, when adverse against mortgagee.*

When *after* a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against the mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land

But in the case of grant of a mortgage by a person *previously dispossessed* the adverse possession which had commenced to operate against the mortgagor would not by the grant of the mortgage be arrested but would operate equally against the mortgagee. **Pat** KUNJ LAL *v* KANHAI MAHTO **641**

——— *Symbolical possession of rightful owner—Adverse possession, when interrupted Partition suit—Third person in wrongful possession joined as defendant—Decree giving no relief against him—Such person, whether party to suit—Symbolical possession, whether can be given as against him—Civil Procedure Code (Act V of 1908), O. XXI, r. 6, application of.*

Symbolical possession of the rightful owner can interrupt adverse possession in those cases only in which the Civil Procedure Code recognises symbolical possession.

Where in a partition suit, a third person in wrongful possession of the land is also joined as a defendant but the decree of the Court gives no relief against him, the latter is not in substance a party to the suit, nor can symbolical possession be given as against him under O. XXI, r. 36 of the Civil Procedure Code. B RAGHUNATH WAMAN *v.* KONDIBA BABAJI, 24 BOM. L. R. 499; (1922) A. I. R. (B.) 2 **91**

——— *Vacant site in village—Temporary user, if assertion of ownership.*

In the case of a vacant site situated in a village, possession goes with title, and where a person sets up a plea of adverse possession he must prove that this possession has been adverse for a period of at least 12 years.

The mere storage of bricks and wood and the tethering of cattle on such a site would not amount to an assertion of ownership on the part of the person so using the site. L CHANDAN *v.* BAHADUR, 4 L. L. J. 168; 62 P. L. R. 1922; (1922) A. I. R. (L.) 82 **263**

Agra Tenancy Act (II of 1901), s. 102 *—Suit for rent or damages for not raising crop—Civil Court, jurisdiction of.*

A suit by a landlord against his tenant for rent or damages for not raising a crop is a suit under section 102 of the Agra Tenancy Act, and is excluded from the jurisdiction of a Civil Court. INDERPAL SINGH *v* BAPATI, 20 A. L. J. 77; 44 U. P. L. R. (A.) 20. **985**

Ancestral land—*Evidence as to its ancestral character not adduced—Assumption that self-acquired.*

Ancestral land—concld.

In the absence of proof that a certain land is ancestral, it must be assumed that it is not. **L** FATEH MUHAMMAD *v.* IMAM-UD-DIN, 2 L. L. J 188 **106**

Appeal, Civil, *dismissal of, in default—Compromise filed subsequently—Court, duty of.*

Where after an appeal has been dismissed in default, both appellant and respondent being absent, the parties present a petition of compromise and ask that the case be decided in terms thereof, the Court is bound to give effect to the compromise. **C** ASWINI KUMAR DUTT *v* SUKHODA SUNDARI **448**

——— *Execution, order refusing stay of—Appeal, if competent.*

No appeal lies from an order refusing to stay execution. **L** KANHAYA LAL *v.* RAM GOPAL-RAM SARUP **49**

——— *New case.*

Where a plaintiff sets up a claim to property attached in execution of a decree on the ground that the property belongs to him, having fallen to him on partition, and he fails to prove that any partition has taken place, he cannot be permitted in appeal to take an entirely new point that the property, even though joint family property, is not liable under the decree as necessary parties were not impleaded in the suit. **L** RAM CHAND *v.* RAMA NAND, 3 L. L. J. 392 **227**

——— *Objection to form of suit, whether can be raised in appeal for first time.*

An objection as to the form of the suit which is not raised in the Courts below, cannot be raised in appeal. **L** NARINJAN SINGH *v.* CHARN DASS, 3 L. 239; (1922) A. I. R. (L.) 363 **557**

——— *Plea, new, involving questions of fact, admission of.*

A plea which involves questions of fact which ought to have been decided in the Trial Court and are not decided because the plea was not raised there, cannot be raised at any later stage of the case. **O** MOHKAM *v.* BANSIDHAR, 9 O. L. J. 359; 4 U. P. L. R. J. C.) 93 **972**

——— *Preliminary decree, appeal against—Final decree, passing of—Court, jurisdiction of, to decide appeal, if affected.*

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———, second—*Finding of fact, if can be attacked on ground of insufficiency of evidence.*

In second appeal a finding of fact of the lower Appellate Court cannot be attacked on the ground of insufficiency of evidence. **C** PROSANNA KUMAR BEDANTA TIRTHA BHATTACHARJYA *v.* MADHU BADYA **500**

——— *Finding of fact unassailable.*

A finding of an Appellate Court which is based on a consideration of the evidence in the case is unassailable in second appeal **C** SHIB CHANDRA SINGHA *v.* GOUR CHANDRA PAL, 35 C. L. J. 473; (1922) A. I. R. (C.) 160; 27 C. W. N. 1 4 **86**

——— *Misconstruction of document containing admission—Question of fact or law.*

Appeal, second—concld.

The misconstruction of a document which is the foundation of a suit is a question of law, but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal. **C** UJIR ALI SIRDAR *v.* SHADHAI BEHARA, 35 C. L J. 182; (1922) A I. R. (C.) 185 **1003**

——— New and inconsistent plea. *See* LIMITATION ACT, 1908, s. 18, SCH. J, ART. 62 **94**

Application for possession by purchaser, *not step-in-aid of execution—Limitation Act (IX of 1908), Sch. I, Arts.* 181, 182.

An application for possession made by a decree-holder auction-purchaser after the confirmation of sale, is not a step-in-aid of execution, inasmuch as as soon as a sale is confirmed, the property vests in the purchaser and any further step which it may be necessary for him to take in order to secure possession is not a step taken by a decree-holder, even if he happens to be the auction-purchaser but is an application by the auction-purchaser as such and has, consequently, nothing to do with the execution of the decree. **Pat** KAMAL NAIN SINGH *v.* KESHO PRASAD SINGH, 1 PAT 701; (1922) A 1. R. (PAT.) 310 **638**

Approver—*Corroboration.*

Evidence that is itself tainted cannot be useful for purposes of corroboration of tainted evidence.

A wife who knows all about a proposal to murder her husband, and is a consenting party to the commission of the crime, is in the position of an accomplice and her evidence should not ordinarily be accepted either as corroborative of the evidence of an approver or as sufficient, apart from independent corroboration, to justify the conviction of the accused. **L** AHMAD NUR *v.* EMPEROR, 23 CR. L. J. 597 **821**

——— *Criminal proceedings before conclusion of principal trial—Illegality.*

It is illegal to start criminal proceedings against an approver for not having complied with the condition on which a pardon was tendered to him, before the conclusion of the principal trial. **S** EMPEROR *v.* HAJI JIAND, 23 CR L. J 611 **835**

Arbitration Act (IX of 1899), s. 14—*Specific Relief Act (I of 1877), s. 42—Award not filed in Court—Suit for declaration that award not binding, nature of.*

The Arbitration Act prescribes the manner in which an award may be enforced, and section 14 of the Act details the courses open to a Court after an award has been filed in Court, but the Act has no bearing on a suit for a declaration that a certain award by arbitrators is not binding on a plaintiff. Such a suit falls under section 42 of the Specific Relief Act. **L** FIRM HIRA NAND-MURLI DHAR *v.* FIRM FLEMING SHAW & Co, 4 L. L. J. 12; (1922) A. I. R. (L.) 26 **187**

Archaka of temple, suit by, against trustee for possession, maintainability of. *See* SPECIFIC RELIEF ACT, 1877, s. 9 **183**

Arms Act (XI of 1878), s. 4—*Arms*—Dah—*Criterion for determining whether* dah *an arm.*

In determining whether any given *dah* is an arm within the meaning of that term in section 4 of the Arms Act, the true criterion is the intention of the maker as regards its purpose. A *dah* having a blade

Arms Act—concld.

22½ inches long, not intended for domestic purposes, is an arm. **L B** PO ME *v.* EMPEROR, 11 L. B. R. 340; 23 CR. L. J. 594 **818**

——— **ss. 19, 20**—*Possession of arms without license—Concealment—Conviction.*

Each case of concealment of arms must be decided on its own facts, and in each case the Court must decide on the evidence whether a particular act of concealment falls under section 19 or section 20 of the Arms Act. **L** SHER ALI *v.* EMPEROR, 23 CR. L. J. 609 **833**

Attachment, *flaw in—Attachment, absence of —Auction-sale, whether nullity.*

An auction-sale duly held without material irregularity or fraud in publishing or conducting it cannot be considered a nullity merely by reason of a flaw in the attachment, or the absence of an attachment. **N** SHANKARRAO *v.* MANIKRAO **643**

Attested document, *mode of proof of— —Rule inexorable—Document used for collateral purpose, if can be proved in the ordinary way—Evidence Act (I of 1872), ss. 68, 69, 70, 71—Evidence admitted without objection, admissibility of, when can be challenged at later stage of the litigation.*

The strict mode prescribed in section 68 of the Evidence Act of proving an attested document applies not only to cases where the document is attempted to be enforced to prove the legal right or relation it creates, but also to a case where such document is sought to be proved for a collateral purpose.

The law, as laid down in section 65 of the Evidence Act, is imperative and does not, on the face of it, admit of any relaxation except in the cases provided in sections 69, 70 and 71 of the Act.

The rigour of the English Law on which section 68 is founded has been to a certain extent lessened by the proviso as contained in section 70 of the Evidence Act.

Obiter.—Where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legislative enactment, does not apply. **C** SHIB CHANDRA SINGHA *v.* GOUR CHANDRA PAL, 35 C. L. J. 473; (1922) A. I. R (C.) 160; 27 C. W. N. 134 **86**

Basra, whether under administration of Government of India. *See* LIMITATION ACT, 1908, S. 13 **978**

Benami transaction—*Duty of Court to give effect to.*

If a *benami* transaction does not contravene the provisions of law, Courts are bound to give effect to it. **N** BALKRISHNA *v.* LAKHU **191**

Benamidar, *right of, to sue.*

A *benamidar* can sue in his own name. **N** BALKRISHNA *v.* LAKHU **191**

———, *status of.*

A *benamidar*, though he has no beneficial interest in the property, represents in fact the real owner, and so far as their relative position is concerned is a mere trustee for him. **N** BALKRISHNA *v.* LAKHU **191**

Bengal Land Revenue Sales Act (XI of 1859), ss. 2, 3—*Bengal Land Revenue Sales Act (VII of 1868), s. 11—Holding, when becomes saleable for arrears—Pre-mature sale invalid and* ultra vires.

The effect of the Bengal Land Revenue Sales Act (XI of 1859) and Act VII of 1868 and of the Board's Notification of 6th October 1871, issued under section 3 of the Act of 1859, in relation to the time at which certain holdings become saleable for arrears, is that no holding can be sold till after the 28th June next after the first day of the month following the month in which the revenue or rent should have been paid.

The date on which the amount of rent or revenue is payable depends, primarily, not on general or administrative considerations, such as the course of business in the Collectorate, or the mode in which the accounts are kept, but on the contract between the parties.

A *kabuliyat*, dated the 16th November 1862, contained a stipulation that the tenant would pay the rent year by year. Under the provisions of Bengal Act VII of 1868 the tenancy was sold for arrears of revenue of 1914-15 in May 1915:

Held, that the rent was not in arrear till the 31st December 1914, and the Collector was without authority to sell before the 28th June 1915, that, accordingly, the sale held in May 1915, was invalid and *ultra vires* **C** BIRENDRA CHANDRA SINGH *v.* MAHAMMAD SOLEMAN, 26 C. W. N. 140 **491**

——— **s. 37**—*Creation of* patni *by auction-purchaser—Annulment of under-tenures—Presumption.*

The mere creation of the *patni* by an auction-purchaser at a revenue-sale would not, by itself, be an indication to the under-tenure-holders that the option to annul the under-tenures had in fact been exercised. **C** KULA MIAH *v.* NAZU MAIH **449**

Bengal Putni Taluks Regulation (VIII of 1819), s. 3. *See* ABWAB **161**

Bengal Tenancy Act (VIII of 1885), ss. 3, 153—Rent, whether includes cess—Dispute as to amount of cess annually payable—Appeal, second. *See* CESS ACT, 1880, s. 41 **937**

——— **ss. 50, 106, 115**—*Record of Rights, final publication of—Presumption under s. 50—Tenant showing unchanged rent 20 years before suit—Presumption of fixed-rate tenancy apart from s. 50, if arises.*

When there has been a final publication of the Record of Rights, the tenant is entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act only in a suit under section 106 of the Bengal Tenancy Act.

Apart from a case where section 50 of the Bengal Tenancy Act may be applicable, a tenant, by showing that his rent has not been changed during the 20 years immediately before the institution of the suit or proceeding in which his status as a fixed-rate tenant is questioned, is not entitled to ask the Court to presume that he has held at that rate from the time of the Permanent Settlement. **Pat** GOBIND LAL *v* RAM SARAN LAL, 2 P. L. T. 642 **433**

——— **ss. 53, 54, cl. (3), 67.** *See* LANDLORD AND TENANT **109**

Bengal Tenancy Act—contd.

——— **ss. 60, 72**—*Registered proprietor—Rent-suit—Defendant paying rent to transferee under* kabuliyat *for long time whether protected.*

Plaintiff, the registered proprietor, sued the defendant for rent. The defendant pleaded payment to transferee from the proprietor. The Courts below found that although the plaintiff was the registered proprietor, his rights had long since been purchased by the transferee to whom the defendant had executed a *kabuliyat* and had been paying rent for a long time. The Courts, thereupon, dismissed the suit, being of opinion that section 60 of the Bengal Tenancy Act had no application to the facts of the case:

Held, (1) that the fact that the plaintiff was a registered proprietor was enough to bring the case within section 60 of the Act and the defendant was not entitled to plead in defence that the rent was due to any third person;

(2) that section 72 of the Act which protected only a tenant to whom the transferee had given notice of the transfer had no application to the case. **Pat** ADAYABATI *v.* JANARDAN THAKUR, 3 P. L. T. 756 **288**

——— **s. 111A**—*Publication of Record of Rights—Declaratory suit—Disimssal—Cause of action—Final publication of Record—Fresh cause of action—Limitation—Limitation Act (IX of 1908), Sch. I, Art.* 120.

The plaintiffs brought a suit on the 1st June 1917 for declaration that they had *raiyati* title in certain land and that they were not under-*raiyats* under the defendant as recorded in the Record of Rights which had been finally published in the Bengali year 1322. During the preparation of the Record of Rights a dispute between the plaintiffs and the defendant as to the status of the former had been decided on the 2nd July 1913. The defendant contended that limitation commenced to run from the decision of the dispute and, consequently, the suit was barred by the six years' rule of limitation contained in Art. 120 of the First Schedule to the Limitation Act:

Held, that the suit was within time, for under section 111A of the Bengal Tenancy Act the plaintiffs had a statutory cause of action which arose on the date of the final publication of the Record of Rights. **C** BADARUDDIN MUNSHI *v.* SARAPADDIN BEPARI **489**

——— **s. 148A**—*Essential principles underlying—Suit of by co-sharer for entire rent, form of.*

The essential principles underlying section 148A of the Bengal Tenancy Act are, that the suit should in form be for the whole rent and in substance for the separate share of rent in arrears: that the whole body of landlords should be impleaded with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the plaintiff is entitled to assert that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves **Pat** MASUD AHMED *v.* JAGAN SINGH, 3 P. L. T. 39 **625**

——— **ss. 159, 161, 167**—*Adverse possession—"Encumbrance", meaning of.*

The word "encumbrance" in sections 159 and 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding, and such an encumbrance cannot be annulled in any manner other than what is provided in section 167. **C** ISHAN CHANDRA BAKSHI *v.* SEFATULLA SIKDAR, 35 C. L. J. 36; 26 C. W. N. 703 **219**

Bengal Tenancy Act—concld.

——— **Sch. III, Art. 3,** applicability of. *See* RES JUDICATA **472**

Bengal Tenancy Amendment Act (II B. C. of 1918), s. 4 E, sub-s. (2), 49F—*Power of an aboriginal to effect a mortgage of his holding to a non-aboriginal, how restricted—Permission of Collector, if can enlarge that power.*

The power of an aboriginal to effect a mortgage of his land is restricted by the provisions of section 4 E sub-section (2) of the Bengal Tenancy Act as amended by Act II B. C. of 1918 under which such a tenant is empowered only to make a complete usufructuary mortgage of his land, and the permission of the Collector under section 49F of the Act cannot enlarge the power of the aboriginal to effect a mortgage of his holding in any other way than by a complete usufructuary mortgage **C** GANGARAM MAJHI *v.* MAHAPATRA **301**

Berar Land Revenue Code, 1896, s. 78 (2)—*Tenant of antiquity—Origin of tenancy traceable—Tenant neither proved to be perpetual nor* ante-jagir—*Presumption.*

The protection afforded by section 78 (2) of the Berar Land Revenue Code is not available to a tenant the origin of whose tenancy is known, or can be proved to have commenced after a certain point of time; that section applies only where by reason of antiquity, evidence of the commencement of a tenancy is lost

In the absence of any proof that a tenancy is perpetual or that the tenant is an *ante-jagir* tenant, it must be assumed that he is an annual tenant. **N** YESHWANT *v.* SHIVPPA **178**

——— **s. 205**—*Pre-emption—Agreement to re-sell—Enforceability against pre-emptor.*

A pre-emptor's right under section 205 of the Berar Land Revenue Code cannot be defeated by the vendee's agreement to re-sell the property to the vendor, nor can the condition to re-purchase be enforced against the pre-emptor. **N** BAPU *v.* BHOMJI **498**

Berar Patels and Patwaris Law, 1900, ss. 6, 9, 20—*Patelship allowance, suit for share of—Jurisdiction of Civil Court.*

Under section 20 of the Berar Patels and Patwaris Law, 1900, a Civil Court has no jurisdiction to entertain a suit to enforce a claim to a share in the emoluments appertaining to the office of Patel **N** CHAMPAT *v.* GANPATRAO **506**

Bombay Hereditary Offices Act (III of 1874), s. 18—*Panch, appointment of—Collector's powers of appointment—Appointment by Deputy Collector—Award validity of—Jurisdiction of Civil Court.*

On an application to a Deputy Collector for the appointment of a Panch according to section 18 of the Bombay Hereditary Offices Act, the Deputy Collector ordered the Mamlatdar to do so, and he, in turn, ordered his Head Karkun to get two Panches

Bombay Hereditary Offices Act—concld.

appointed by the parties, and appointed the Head Karkun to be Sar Panch: the villagers, however, refused to appoint the Panches whereupon the Mamlatdar directed the Head Karkun to himself appoint the necessary two persons: the Panch so constituted made an award which was approved by the Deputy Collector. In a suit on foot of the award, its validity was challenged:

Held, that the award was not a valid award, as the procedure adopted in appointing the Panches was not a substantial compliance with the terms of section 18 of the Bombay Hereditary Offices Act; that the subsequent approval of the Deputy Collector gave no kind of validity to the award which at the time it was made had no validity, and that such approval was not in accordance with the proviso to the section.

A Civil Court has no jurisdiction to determine a matter for the determination of which section 18 of the Bombay Hereditary Offices Act provides the procedure. **B** MAHADU KASHIBA *v* KRISHNA TATYA, 24 BOM. L R. 917 **746**

Bombay Rent (War Restrictions) Act (II of 1918), s. 9—*Fraction of premises leased required by landlord—Tenant, eviction of.*

A *bona fide* requirement of a landlord of a small fraction of the premises leased does not amount to a reasonable requirement of the whole of the premises within the meaning of section 9 of the Bombay Rent War Restrictions) Act so as to entitle him to evict the tenant from them. **B** VITHALDAS BHAGVANDAS *v.* NAGUBAI M JOSHI, 23 BOM. L. R. 856 **330**

Bond—*Alteration, effect of—Suit on altered bond if maintainable—Proof of actual loan by independent evidence.*

The plaintiff brought a suit on a bond for Rs 35. The defendant denied payment of consideration and also pleaded that the bond which he admittedly had executed was a bond for Rs. 25 only and had been altered so as to show the amount advanced to be Rs. 35. The Trial Court dismissed the suit on the finding that the bond was altered, although the consideration money of Rs. 25 had been paid. The plaintiff moved the High Court under section 25 of the Provincial Small Cause Courts Act:

Held, that although the plaintiff could not recover his claim on the bond sued upon, he was entitled to recover the amount of Rs. 25 which he had been found to have advanced to the defendant, inasmuch as he was entitled to succeed on proof of the loan by independent evidence. **C** KHOSAL MAHAMMAD *v* AMIRUDDIN MAHAMMAD PRAMANIK **331**

——— *Execution, denial of—Execution established—Court, if may infer passing of consideration.*

Where a person denies execution of a bond and the Court finds that he did execute it, if the bond contains a recital that the money was paid to him, no error of law would be committed if from those facts the Court concluded that the consideration was paid. **C** JADU MONDAL *v.* JAGENDRANATH BANERJEE **303**

Buddhist Law, *Burmese—Inheritance—Succession—"Orasa," meaning and position of*—Orasa *son or daughter, rights of—Children of* orasas, *rights of.*

Buddhist Law—contd.

Per *Robinson, C. J., Maung Kin, J., Heald, J., and Duckworth, J*— 1) In a Burman Buddhist family consisting of both sons and daughters, any child can acquire the full status of Orasa prior to the death of either parent;

2 in such a family where the eldest child is a daughter no son can become Orasa;

(3) in such a family the question which child is the Orasa can be decided before the death of either parent;

(4) in such a family there cannot be two Orasas;

(5 sons are not to be preferred to daughters as Orasa, unless the son is the eldest born;

6 in such a family where the eldest born child is the son he is the Orasa, and if he predeceases his parents, his children have a right to preferential treatment in the division of the estate If the eldest son dies before he becomes competent to take his father's place, a younger son, being fully qualified, may become Orasa, and, if that son predeceases his parents, his children have a right to the same preferential treatment If the eldest born child is a daughter and she predeceases her parents, after becoming competent to take her mother's place, her children have a right to the same preferential treatment. But it is doubtful whether another daughter, younger than a son, can ever take the place of the eldest born daughter, who is not competent, or dies before becoming able to take her mother's place;

7) the eldest child, being a daughter, can claim on the death of her mother a quarter share as Orasa, and if she then dies before her father without having got the share her children have a right to preferential treatment.

Per *Maung Kin, J.*—It is the eldest born legitimate son who is entitled to claim a quarter of the parental estate from his mother on the death of the father, provided he has helped the parents in the acquisition of property and takes the deceased father's place and continues the family. And this eldest born son, who is entitled to a quarter share, is called an Orasa.

The eldest born legitimate daughter has the right to claim a quarter share on the death of her mother whether she co exists with sons or not, and the eldest born child is the Orasa, although, as regards the claim to a quarter share on the death of one of the parents, it would depend upon the circumstances of each particular case whether the claim can be made or not, that is to say, if the child is a son he can only make the claim from the mother, on the ground that he steps into his deceased father's place similarly, if a daughter, she can only claim as one who takes the place of her mother It is clear also that there cannot be two Orasas, a male and a female, in the same family, because an Orasa is either the eldest born or the one who supersedes the eldest born.

The eldest born child—male or female—is the child through whom his or her children may claim a preferential right in the estate of their grandparents.

Per *Heald, J.*—The word *auratha* is commonly used to mean the eldest child, whether son or daughter, and if the eldest child, being a son, is competent on the father's death to take the father's

place in the family, or, being a daughter is competent on the mother's death to take the mother's place then he or she is *auratha*, and on the father's or mother's death is entitled to the father's or mother's personal property and to one-fourth of the rest of the estate, and if the eldest child, whether son or daughter, dies without having become entitled to that interest in the estate, his or her children are entitled to share equally in the estate with the younger brothers and sisters of the deceased.

(1) The eldest-born child who is competent to take the place of the father or mother acquires the status of *auratha* on becoming so competent and can acquire that status before the death of either parent.

(2) If the eldest-born child is a daughter and reaches an age at which she is competent to take her mother's place, no son can become *auratha* either before or after his father's death.

(3) The status of *auratha* in no way depends on the death of either parent. The eldest-born competent child is *auratha* in any case.

(4) There can never be two *aurathas* in a family. If a son or daughter dies after acquiring the status of *auratha*, there is no *auratha* in the family.

(5) Sons are not as such preferred to daughters as *auratha*. If the eldest-born child is a son and is competent he is *auratha*. If the eldest-born child is a daughter and is competent she is *auratha*.

(6) In a family where the eldest born child is a daughter and is competent, there can be no *auratha* son and there can be no son whose children have a right to preferential treatment in the division of the parents' estate.

(7) If the eldest-born child is a daughter and is competent she is *auratha* and as *auratha* can on her mother's death claim from her father a quarter share of the estate. If she dies before becoming entitled to that share, her children have a right to preferential treatment in the division of the estate.

Per *Duckworth, J*—"*Auratha*" (a very loosely used term), means nothing more than "eldest legitimate issue, male or female." The term has been much misused, since it does not necessarily follow that the child who is *auratha* whilst both parents are alive, will be the child, who can obtain a one-fourth share on the death of *one* parent. This depends on the sex of the parent who dies first. The *auratha* then is the eldest child, irrespective of sex, legally begotten, who is of age and competent.

If a son is not the first born child, he can never be *auratha* unless the eldest child dies before reaching majority or competency, and then only when the eldest child is a male. It is very doubtful whether another can become *auratha* in place of the deceased eldest daughter. There is some authority for a brother succeeding a brother, but not for the converse case,—and then only in relation to the one-fourth share.

Per *Pratt, J*—(1) In a family consisting of both sons and daughters a child can attain the full status of Orasa prior to the death of its parents, in so far that, if he or she predeceases his parents, his or her childre may be entitled to the preferential

treatment prescribed in section 15, Book X of the *Manugye*.

(2) In such a family where the eldest child is a daughter no son can become Orasa until his father dies, subject to the proviso that the eldest daughter attained her majority before her death.

(3) The question as to which is the Orasa can be decided, so far only as the right of representation is concerned.

(4) In such a family there cannot be two Orasa children in the sense of children whose offspring would, in the event of their parents' death, be entitled to claim an equal share with their younger uncles and aunts.

But it is conceivable that where the Orasa eldest child was a daughter and the eldest son attained his majority before his father's death, he would on his father's death be entitled to rank as Orasa for the purpose of claiming one-fourth of the estate from his mother. It is to be noted that Orasa is here used in two distinct senses.

(5) Sons are not always preferred to daughters as '*orasa*'.

(6) In such a family when the eldest child is a daughter there cannot be an Orasa son, who, predeceasing his parents, can transmit to his children a right to preferential treatment in the division of the estate, assuming that the eldest child attained majority and did not forfeit her status as Orasa.

(7) The eldest child, being a daughter, can transmit to her children a right to preferential treatment in the division of the estate, and there is authority for holding that on her mother predeceasing her father she can claim a quarter share as Orasa **L B** MAUNG SIN *v.* MRS KIRKWOOD, 11 L. B R. 220 **49**

Burden of proof—*Execution of document, proof of—Admission of signature by other party—Onus, whether shifted.*

An admission by a defendant regarding the putting of a signature or a thumb-mark on a document while he maintains that the paper when he signed it was blank is not such an admission of the execution of the document as to thrust the burden of proving his case upon him. It is for the plaintiff to prove due execution of the document. **A** PIRBHU DAYAL *v.* TULA RAM, 20 A. L. J. 672; (1922) A. I. R. (A. 40. **809**

———, question of, when immaterial. *See* EVIDENCE **86**

——— *Question when immaterial.*

The burden of proof shifts as the evidence is developed; and when both the parties produce their evidence, the question on whom the initial *onus* lay ceases to be of much importance. **O** RAM NATH *v.* RAGHIA SAH, 25 O. C. 125; (1922) A. I. R. (J. C. 211 **892**

Calcutta Rent Act (III B. C. of 1920), s. 2 (e)—*"Premises" if includes workshop—Workshop having retiring room and office room, if "premises"*

A workshop is not included in the word "premises" as defined in section 2 (*e*) of the Calcutta Rent Act, and the mere fact that an Engineer of the workshop has a retiring room, or that a room is used for the purpose of an office connected with the workshop does not bring the case within the word "premises"

Calcutta Rent Act—contd.

as used in the Act. **C** INDIAN ENGINEERING MOTOR Co. *v.* GLANDSTONE WYLLIE & Co., 26 C. W. N. 102 **907**

——— **s. 11,** *scope of—Lease for term of years—Tenant informing landlord of his intention to quit after expiry of lease—Landlord entering into agreement to lease to another—Act, coming into operation of, before expiry of lease—Tenant, right of, to take advantage of Act.*

The Legislature in enumerating, in the proviso to section 11 of the Calcutta Rent Act, the grounds upon which a landlord can successfully claim an order for possession did not intend to limit the claim to these grounds but merely enumerated these grounds for the purpose of indicating the grounds upon which a landlord would be entitled to possession as of right, leaving it open to the Court to exercise a discretion in his favour upon any other grounds which might appear to the Court to be satisfactory.

Certain premises in Calcutta were demised to defendant No. 1 for a term of twenty years beginning from the 1st April 1901; on the 7th January 1920, defendant No 1 intimated to the plaintiff landlord that he would not remain in occupation of the premises after the expiration of the lease Thereupon on the 16th January 1920 the plaintiff entered into an agreement with *E.* for letting out the premises to him for a term of 10 years from the 1st of April 1921 or as soon as the defendant No. 1 vacated the premises. The defendant, however, refused to vacate the premises on the strength of his supposed rights under the Calcutta Rent Act which came into operation in March 1920. Whereupon the plaintiff instituted the present suit to eject the defendant from the premises:

Held, that the arrangement between the plaintiff and *E.* being not conditional if possession was not given to *E.* the plaintiff would be exposed to the consequences of a breach of his agreement with *E.* Consequently, it was just and proper that protection should be afforded to the plaintiff and that the latter had shown cause which ought to be deemed satisfactory by the Court for the purpose of coming to the conclusion that he was entitled to the order he sought *vide* proviso to sub-clause 1, sub-section 1, section 11 of the Calcutta Rent Act. **C** MANMOTHA NATH *v.* WALTER LOCKE & Co., 25 C. W. N. 1012 **417**

——— **s. 11**—*'Tenant,' meaning of—Monthly tenant—Tenancy determined before, but ejectment suit pending at, passing of Act—Tenant, whether within the meaning of "tenant" in section.*

The word "tenant" in section 11 of the Calcutta Rent Act as shown by the language of section 12 includes the case of a monthly tenant whose tenancy is determined by regular notice before, but against whom an ejectment suit is pending at, the date of the coming into operation of the said Act. **C** BITHALDAS CHANDAK *v.* LALBEHARI DUTT & SONS, 25 C. W. N. 967; 49 C. 369 **361**

——— **ss. 15, 18**—*Standard rent, application for fixing—Order of Rent Cantroller dismissing application without fixing rent, whether open to revision by President, Improvement Trust Tribunal—Rent Controller, whether Court of Civil Jurisdiction—High Court's power of revision—Government of India Act,*

Calcutta Rent Act—concld.

1915, *(5 & 6 Geo. V, Ch. 61)*, *s.* 107—*Application for fixing standard rent, if can be made before expiry of lease.*

A Rent Controller is bound to fix the standard rent on an application for that purpose being made to him and to certify it under the provisions of section 15 of the Calcutta Rent Act. If he refuses to do so the High Court has jurisdiction to set aside his order and direct him to fix the standard rent according to law.

The President of the Improvement Trust Tribunal has no jurisdiction under section 18 of the Calcutta Rent Act to revise an order of the Rent Controller refusing to fix standard rent.

The Rent Controller is a Court of Civil Jurisdiction

The High Court has the power of revision under its general powers of superintendence over the Rent Controller's Court under section 107 of the Government of India Act.

There is nothing to prevent the Rent Controller from fixing the standard rent during the currency of a lease. **C** H. D. CHATTERJEE *v.* L. B. TRIBEDI, 25 C. W. N. 78; 49 C 518 **274**

Cattle Trespass Act (I of 1871)—*Penal Code (Act XLV of 1860), ss. 23, 379—Seizure and detention of cattle doing damage, whether offence—"Wrongful loss," meaning of.*

Where an animal is found doing damage to a person's field, it is no offence for that person to seize and detain it for less than twenty-four hours, instead of taking it to a cattle-pound and to restore it to the owner on receipt of compensation which does not exceed the amount the owner would have to pay if the animal had been impounded, as such detention, being authorised by the Cattle Trespass Act, would not amount to causing "wrongful loss" to the owner, within the meaning of section 23 of the Penal Code. **N** RAMRATAN *v.* EMPEROR, 23 CR. L. J. 511 **47**

Cause of action—*Criminal Procedure Code (Act V of 1898), s. 144, notifications and orders under—Denial of right by persons securing the orders—Right of persons prejudiced by orders—Suit for declaration of right and injunction, maintainability of—Prayer to declare notifications and orders* ultra vires, *whether competent.*

A suit for a declaration that certain orders and notifications passed under section 144 prejudicially affecting plaintiff's rights were *ultra vires* is not maintainable, except perhaps in a properly framed suit in which Government and its officers are impleaded The proper way to question such orders is by moving the High Court in revision

A suit, however, does lie against the persons who procured the orders to declare plaintiff's rights as against the defendants in so far as the orders constitute an infringement of plaintiff's rights. **M** BABA SAH *v.* MAHOMED HUSAIN SAHIB, (1921) M. W. N. 867; 15 L W. 68; 42 M. L. J. 179; (1922) A. I. R. (M.) 123 **180**

C. P. Tenancy Act (XI of 1898), s. 41. *See* C. P. TENANCY ACT (I OF 1920), ss. 5, 110 **427**

C. P. Tenancy Act, 1898—concld.

——— **s. 70 (5),** *transfer in contravention of —Consideration not recoverable by vendee on dispossession—Compensation, right of vendee to claim —Sale-deed, admissibility of, in evidence.*

Where a person acquires possession of a holding under a sale, which is in contravention of the provisions of the Central Provinces Tenancy Act, he cannot, on being dispossessed, recover the money paid by him as consideration for the sale. But before he is dispossessed he is entitled to claim compensation, and the deed evidencing the sale is admissible in evidence to prove the passing of consideration. **N** DHONDIBA *v.* PANDURANG **252**

C. P. Tenancy Act (I of 1920)—*Lessee of proprietary interest in village—Right to obtain and execute decree for arrears of rent.*

A person other than the landlord, for instance, a holder of the proprietary interest at the moment, is entitled to obtain and execute a decree for arrears of rent but he cannot execute it by the special process of ejecting the tenant, as nobody but the landlord can eject a tenant for arrears of rent. **N** GANPATI TELI *v.* DAJI **855**

——— **ss. 6, 110**—*Retrospective effect of s. 6—C. P. Tenancy Act (XI of 1898), s. 41—Absolute occupancy holding—Transfer without consent—Landlord's right to sue for possession—Section, whether one of procedure.*

In case of a transfer of an absolute occupancy holding section 41 of the C. P. Tenancy Act (XI of 1898 not only gave the landlord a right of pre-emption, but it also gave him the right to sue the transferee for ejectment.

The section did not relate to procedure merely but created rights.

Therefore in view of the express provisions of section 110 of the C. P. Tenancy Act (I of 1920) section 6 of that Act cannot have retrospective effect so as to deprive the landlord of his rights under section 41 of Act XI of 1898 in respect of transfers made while that Act was in force. **N** VINAYEK *v.* MAHEBULLA KHAN **427**

Cess Act (IX B. C. of 1880), ss. 4, 41, *sub-s.* (3)—*Cesses, whether recoverable from tenants paying rent in kind.*

There is nothing in law to prevent a landlord from recovering cesses from his tenants in the case of lands held by them on rents payable in kind. **C** JOGESH CHANDRA ROY *v.* ANNODA CHARAN CHOUDHURY, 26 C. W. N. 368 **662**

——— **s. 41,** *power of parties to contract themselves out of*—Kabuliyat, *construction of—Ambiguity —Conduct of parties*—"Rajaswa," *meaning of—Bengal Tenancy Act (VIII of 1885), ss. 3, 153—Rent, whether includes cess—Dispute as to amount of cess annually payable—Appeal, second.*

The plaintiff was the proprietor of a Zemindari in the entirety of which the defendant held a Putni lease evidenced by a *kabuliyat* executed by his predecessor in 1858 the terms of which were confirmed and ratified by the defendant in 1908

Cess Act—concld.

The *kabuliyat* contained a clause to the following effect:—"If there be any demand on the Zemindari for any amount on account of '*Rajaswa*' or if any order is passed, then I shall without any objection abide by it and pay my rent along with it." Under section 41 of the Cess Act of 1880 the total amount of cess payable by the Zemindar to the Government was Rs 95 and odd while the amount annually payable by the *putnidar* to the Zemindar was under the same section Rs. 80 and odd. The defendant had regularly paid the latter amount to the Zemindar. In a suit to recover the difference between the larger and the smaller sum :

Held, (1) that as the provisions of section 41 of the Cess Act were subject to any special provisions contained in a contract between the parties, the defendant as *putnidar* was liable to pay to the Zemindar the whole amount payable by the latter to the Government;

(2) that the word "*Rajaswa*" as used in the *kabuliyat* was wide enough to include any imposition or levy payable to the State and was, therefore, wide enough, in its natural meaning in the context in which it was found, to include cess payable under the Cess Acts of 1871 and 1880;

(3) that the dispute between the parties was one as to the amount of rent annually payable within the meaning of section 153 of the Bengal Tenancy Act, and consequently a second appeal was not barred under that section.

Where there is any real ambiguity in a clause contained in a document, it is open to the Courts to have regard to the conduct of parties and to the construction of the clause upon which they have acted during a long course of years,

Apart from any question of ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the Courts should not follow the general rule, that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed.

A "demand from the Zemindar" is not necessarily the same thing as "a demand on the Zemindari." But a demand from the Zemindar of an impost payable by him as the superior landlord in respect of the lands comprised in his estate is a demand on the Zemindari.

Rent as defined in section 3 of the Bengal Tenancy Act includes cess. Therefore, where a dispute between the parties relates to the amount of cess annually payable, second appeal is competent under section 153 of the Bengal Tenancy Act. **C** BHUPENDRA NARAIN SINHA *v.* MIDNAPORE ZEMINDARY CO. LTD, (1922) A. I. R. (C.) 500 **937**

City Civil Court Act (Mad. VII of 1892), s. 3—*Presidency Small Cause Courts Act (XV of 1882), ss. 19, 41—Landlord and tenant —Suit in ejectment—Jurisdiction of Madras City Civil Court.*

The jurisdiction of the Madras City Civil Court to entertain a suit in ejectment against a tenant is not barred by reason of section 41 of the Presidency Small Cause Courts Act read with section 3 of the Madras City Civil Court Act.

City Civil Court Act—concld.

Section 41 of the Presidency Small Cause Courts Act relates only to applications and not to suits. **M** DORAISAMY AIYANGAR *v.* NARAYANA AIYANGAR, 16 L. W. 137; 43 M. L. J. 288; (1922) *M.* W. N. 462 **983**

Civil Procedure Code (Act V of 1908)—*Appeal—Dismissal in default, effect of—*Res judicata—*Execution proceedings—Order determining rights of parties—Execution case struck off in default—Parties, whether have right to re-open the question.*

Where an appeal is dismissed in default the effect is to relegate the parties to the position as if there had been no appeal, or as if it had been dismissed on the merits.

Though an order in execution does not operate as *res judicata* strictly within the meaning of section 11 of the Civil Procedure Code of 1908, such a decision becomes final between the parties upon general principles of law as an interlocutory order in the suit.

If an order has been made which directly or by implication determines the rights of the parties to an execution proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle a party to re-open the question upon which there has been a previous adjudication, **N** PURA *v.* BEHARILAL **239**

——— *Suit in name of shop by one partner only, whether maintainable.*

One of the partners in a shop is competent to sue in the name of the shop, and, in such a case, it is not necessary that all the partners should be named in the plaint as plaintiffs or that the plaint should be signed by all of them. **N** SURIRAM SHANKERLAL *v.* MADHO PATIL **425**

——— **s. 16, proviso**—*Jurisdiction—Land situate outside British India—Suit for mesne profits, whether maintainable in British Court.*

The proviso to section 16 of the Civil Procedure Code makes it clear that a Court in British India has jurisdiction to entertain a suit for mesne profits of land situate outside British India, where the defendant resides within the jurisdiction of the British Court. **B** MAHADEO GOVIND SUKTANKAR *v.* RAMCHANDRA GOVIND SUKTANKAR, 23 BOM. L. R. 903; 46 B. 108; (1922) A. I. R. B.) 168 **510**

——— **s. 35, O. XXXII, rr. 8, 9**—*Minor pauper—Suit by next friend—Costs, whether may be recovered from next friend—Powers of Court.*

A Court has power under the Civil Procedure Code of 1908 to order the costs of a pauper suit by a minor to be recovered from the next friend who has filed it on behalf of the minor. **N** MAROTI *v.* BHAGI **465**

——— **ss. 38, 47**—*Court not competent to execute decree—Power to treat suit as execution application.*

Under section 47, clause (2), of the Civil Procedure Code a suit cannot be treated as an execution application unless the Court before which the suit is pending is either the Court which passed the decree or the Court to which the decree is sent for execution, as, under section 38 of the Code, no other Court except either of these two has power to execute a decree. **N** BRIJ MOHANSINGH *v.* KASTURCHAND, (1922) A. I. R. (N.) 189 **693**

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——— **s. 41**—*Decree transferred for execution—Certificate, sending of, to original Court—Certificate of failure to execute decree—Certificate of result of each application for execution—Jurisdiction of Executing Court, determination of.*

Section 41 of the Civil Procedure Code requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of *each application for execution* that is made to the Executing Court. In any case such certificates have to be sent under the executive orders of this Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree and the sending of a certificate of the latter kind cannot do so at all. **N** INDRA RAJ SINGH *v.* MORADKHAN, (1922) A. I. R. (N.) 210 **657**

——— **s. 47**—*Execution of decree—Stay of execution by Trial Court—Appeal.*

All questions that determine the rights and liabilities of the parties in the matter of the execution of a decree are appealable.

An order of the Trial Court directing stay of execution is a question relating to execution and is appealable. **L** SARDAR KHAN *v.* FATEH DIN **751**

——— **s. 47, O. XXI, r. 2, cls. (2), (3)**—*Judgment-debtor's application for enquiry as to payment out of Court—Order dismissing application—Appeal—Certificate of payment—Application of cls. (2), (3).*

An order dismissing a judgment-debtor's application made under r. 2 (2) of O XXI, Civil Procedure Code, for certifying payment said to have been made to the decree-holder out of Court amounts to a decree passed in a proceeding under section 47 of the Code and is appealable as such.

A judgment-debtor's application under clause (2) of r. 2, O XXI, Civil Procedure Code, inviting an enquiry as to the payment alleged to have been made by him to the decree-holder cannot be thrown out on the ground that the payment was not certified under clause (3) of that rule, inasmuch as the stage contemplated by that clause does not arise until the question raised in the enquiry is decided. **Pat** JADUNANDAN SINGH *v.* SHEONANDAN PRASAD SINGH, (1922) PAT. 200; 3 P. L. T. 487; 1 PAT. 644; (1922) A. I. R. (PAT.) 276 **645**

——— **s. 47, O. XXI, r. 35**—*Execution of decree—Decree for possession of immoveable property—Execution not taken out—Possession taken out of Court—Dispossession—Suit, whether maintainable.*

Plaintiff obtained a decree against defendant for possession of a piece of land conditional on payment of a certain sum of money. He paid the sum and obtained possession out of Court. Some years afterwards he was dispossessed by the defendant. He brought a suit to recover possession of the land from the defendant:

Held, (1) that although the decree had not been technically executed in the sense in which the word is used in the Code of Civil Procedure, it had been given effect to out of Court, and having been satisfied nothing further remained to be done in execution;

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(2) that plaintiff having been in lawful possession of the land and having been dispossessed therefrom, was entitled to bring the present suit. **L** RUP CHAND *v.* ALLAH JAWAYA **744**

——— **s. 47, O. XXI, rr. 58, 60**—*S. 47, scope of—Execution proceedings—Representative of party to suit—Attachment, objection to—Objection based on personal claim to property—Court, order of—Appeal.*

Where *qua* the execution proceedings a person happens to be the representative of the judgment-debtor, any question raised by him can only be decided under section 47 of the Civil Procedure Code. The distinction between a proceeding under section 47 and a proceeding under O. XXI, r. 58 is that all objections to attachment raised by a party to the suit in which the decree was passed, or his representative, come under section 47, but objections to attachment raised by a third party come under O. XXI, r. 58, Civil Procedure Code.

Therefore, an order passed on objection raised by the representative of a party to the suit, although the claim to the property is set up by him in his own personal capacity and not as representing the judgment-debtor, must be deemed to be an order passed under section 47 and not under O. XXI, r. 60 of the Civil Procedure Code and as such is open to appeal. **Pat** NAURATAN LAL *v.* MRS. STEPHEN, 3 P. L. T. 613 **369**

——— **s. 47, O. XXI, r. 90**—*Representative of judgment-debtor—Auction-purchaser—Execution sale, setting aside of—Auction-purchaser, whether can apply under O. XXI, r. 90.*

An auction-purchaser is not the representative of the judgment-debtor and cannot move a Court under section 47 of the Civil Procedure Code.

An auction-purchaser cannot under O XXI, r 90, Civil Procedure Code, apply to set aside an auction sale. **N** BALWANT *v.* RATANLAL **429**

——— **s. 47, O. XXII, r. 10**—*Decree for possession and mesne profits—Execution proceedings—Lessee of defendant, if can be added as party to account for profits—Lease, whether devolution, creation or assignment of interest.*

O. XXII of the Civil Procedure Code contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else,—the more ordinary cases being death, marriage, insolvency.

Where during the pendency of a suit, a party is added by devolution, he must take the suit as he finds it, and a judgment already rendered would be binding on him

Although a wide construction should be placed upon the provisions of the law with regard to introducing parties by devolution, and although it is desirable that all points should be ascertained in execution proceedings without a fresh suit, yet that which should in reality form the basis of a suit against a separate party, for some act done by himself, cannot be introduced as a question to be tried in execution proceedings.

In an action to recover possession of land, the plaintiff cannot, after obtaining a decree for possession and mesne profits, add as party to the suit any lessee of the defendant so as to compel him to account for any profits received from the land, as the lease cannot be looked upon as an assignment, creation or devolution of the interest of the defendant within the meaning of O. XXII, r. 10 of the Civil Procedure Code. **P. C.** MANINDRA CHANDRA NANDI *v.* RAM KUMAR LAL BHAGAT, 31 M. L. T. 131; 4 U. P. L. R. (P. C.) 88; 43 M. L. J. 589; 1 PAT. 581; 27 C. W. N. 29; 24 BOM. L. R. 125; (1922) A. I. R. (P. C.) 304; 50 A. L. J. 958; 16 L. W. 955; 36 C. L. J. 542 **973**

——— **s. 50, O. XXI**—*'May apply,' meaning of—Death of party defendant after decree and before execution sale—Legal representative not brought on record—Sale, whether nullity—Suit on mortgagee—Puisne mortgagee impleaded as defendant—Compromise decree—Puisne mortgagee, whether "judgment-debtor."*

The words 'may apply' in section 50, Civil Procedure Code, are equivalent to 'shall apply', for, except in the sense that the decree-holder may, if he chooses, drop execution altogether, there is no option left to him and it is imperative on him to follow the procedure enjoined by the section if he desires further execution

Proceedings taken in execution of a decree without the legal representatives of a deceased judgment-debtor being brought on the record are void and do not amount to a mere irregularity, and, if the proceedings have culminated in a sale, the sale is altogether void and is a nullity and need not be set aside, for this purpose no distinction can be drawn between the case of a judgment-debtor's death before the order for sale is passed and the case of a death after the order.

Section 50, Civil Procedure Code, covers all applications in execution even after attachment.

In a suit by a first mortgagee impleading the puisne mortgagee as party defendant the latter filed a statement stating that he had no objection to the passing of a decree and praying that the balance remaining, after selling the property and paying the plaintiff, might be applied towards his mortgage. The plaintiff and other defendants filed a compromise petition in terms whereof a decree was passed. The puisne mortgagee, who was, however, not removed from the record died after decree. In due course the mortgage decree was executed and properties sold without the representatives of the deceased puisne mortgagee being brought on record. In the present suit by the heirs of the puisne mortgagee to enforce their mortgage:

Held, 1) that the puisne mortgagee was a judgment-debtor in the prior suit

(2 that the mortgage security was not extinguished as the sale in execution of the decree in the prior suit was a nullity **M** RAGHUNATHASWAMI IYENGAR *v.* S. GOPALU RAO, (1921) M. W. N. 732; 4 M. L. J. 547; 15 L. W. 1[illegible]; (1922) A. I. R. (M.) 67 **667**

——— **s. 5[illegible], O. XXI, rr. 64, 66**—*Execution sale—Attachment, whether essential—Attachment of property not ordered to be sold by decree—Sale within 30 days of proclamation—Irregularity.*

The failure to attach the property before the execution sale, although an irregularity under the Civil Procedure Code, does not render the sale null and void.

Under section 51 of the Civil Procedure Code which relates to procedure in execution, the general

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powers of a Court executing decrees enable it to order execution by attachment and sale or by sale without attachment of *any* property. Therefore, the Court has power to sell property not ordered to be sold by the decree without first causing an attachment of the same.

A sale of the property, ordered to be sold by public auction in execution of a decree, within 30 days of the proclamation, although clearly an irregularity, has not the effect of making the sale a nullity without proof of substantial injury thereby to the judgment-debtor. **Pat** WAZIR NARAIN SINGH *v.* BHIKHARI RAM, (19.2) PAT. 321: 3 P. L. T 765: 4 U. P. L. R. (PAT.) 100 **363**

——— **s. 60 (f)**—Jatri Bahis *of Gayawal—Attachment and sale.*

The *Jatri Bahis* of a Gayawal merely contain entries as to the names and addresses of the pilgrims who deal with him and can be used only by him in order to perform personal service to them. As such, they come well within the provisions of section 60 *(f)* of the Civil Procedure Code as property not capable of attachment or sale in execution of a decree.

The *Jatri Bahis* are the stock-in-trade and appertain to the *Gaddi* of a Gayawal and may be heritable but are not attachable or saleable for that reason. The mere fact that they possess a market-value does not necessarily mean that they are saleable. **Pat** LACHMAN LAL PATHAK *v.* BALDEO LALL THATHWARI, (1922) PAT. 228; 3 P. L. T. 603; 1 PAT. 619 **944**

——— **s. 64**—*Decree passed on award pending attachment, whether void.*

A decree embodying an arbitration award and passed pending an attachment is not a private transfer which can be treated as void under section 64, Civil Procedure Code. **M** NARAYANA AIYAR *v.* BIYARI BIVI, 14 L. W. 524; 41 M. L. J. 557; (1921) M. W. N. 808; 45 M. 103; (1922) A. I. R. (M. 221 **673**

——— **s. 64, Sch. I, O. XXXVIII, r. 5, Sch. III, para. 11**—*Attachment before judgment—Property under control of Collector—"Attachment," meaning of—Non-compliance with r. 5, O. XXXVIII, effect of.*

Paragraph 11 (1) of the Third Schedule to the Civil Procedure Code does not stand in the way of an attachment before judgment of the property of a judgment-debtor while the property is under the control of a Collector, because such an attachment is not a process in execution of a decree.

The object of the provision in the latter part of paragraph 11 of the Third Schedule to the Civil Procedure Code is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object, for by such attachment alone the property is not exposed to the risk of such loss.

The term "attachment" in section 64 of the Civil Procedure Code covers an attachment before judgment. Consequently, an attachment before judgment and an attachment in execution of a decree have the same effect for the purpose of binding the property so as to prevent private alienations.

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An order directing the attachment before judgment of the property of a judgment-debtor without complying with the requirements of r. 5 of O. XXXVIII, is *ultra vires*, and an attachment in consequence of such an order is void and cannot be relied upon to defeat an alienation of that property. **N** BANSILAL *v.* SITARAM **188**

——— **s. 66**—*Auction sale—Agreement with auction-purchaser to purchase property sold—Specific performance.*

The provisions of section 66 of the Code of Civil Procedure must be strictly construed.

A suit by a plaintiff claiming specific performance of an agreement to sell, made by a purchaser at an auction-sale, cannot be described as a suit brought on the ground that the purchase was made on behalf of the plaintiff, because, in such a case, the purchase is made on behalf of the purchaser with whom the title remains until the plaintiff obtains specific performance of the contract.

Therefore, section 66 of the Civil Procedure Code does not preclude a suit to enforce specific performance of an agreement made either prior or subsequent to the purchase by the auction-purchaser to sell the property to the plaintiff when the purchase-money has been entirely found by the defendant and where there is no allegation that without the enforcement of the agreement to sell, the property is actually the property of the plaintiff, that is, that it was bought by the defendant *benami* for the plaintiff. **N** ABDULLA KHAN *v.* JALAM SINGH **559**

——— **s. 73.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 51 (1), EXCEPTION **512**

——— **s. 73, O. XXXVIII, r. 11**—*Priority of attachment, whether confers prior right—Attachment before judgment in several suits—Moneys realised before decrees—Rateable distribution.*

Priority of attachment by itself confers no prior right.

Where moneys belonging to a judgment-debtor are attached before judgment in a number of suits against him by several creditors and they are realised before decree is passed in any of them, re-attachment is not necessary and the money should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtain decrees if they obtain decrees before any of the others apply for payment. **M** SUBRANANIAM CHETTY *v.* SANKARA IYER, 15 L. W. 531; (1922) M. W. N. 262; 31 M. L. J. 70; (1922) A. I. R. (M.) 236 **714**

——— **s. 75, O. XXVI**—*Commission, issue of—Court delegating functions to Commissioner.*

Section 75 of the Civil Procedure Code defines clearly the circumstances under which a commission may be issued, and does not authorise a Court to delegate to a Commissioner the trial of any material issue which it is itself bound to try. **L** SAWAN MAL *v.* RAUNAQ MAL, 3 L. 209; (1922) A. I. R. (L.) 47 **802**

——— **s. 92**, applicability of, to suits between rival claimants. *See* TRUST **786**

——— **s. 92**, *who can sue under—Prayer of scheme—Enquiry as to properties belonging to*

charity—Hindu Law—Descendants of founder of charity, right of, to sue or nominate trustees—Interest, question of, how determined—Trustee not fit to hold office—Interference by Court—Administration of charity—Denial of existence of public trust bona fide—Disqualification for appointment as trustee.

The mere fact that a person suing under section 92 of the Civil Procedure Code is a Hindu and entitled to worship in a temple does not give him interest enough to maintain a suit under that section. But persons belonging to the family of the founder of a charity have an interest in the family charity and can, therefore, maintain a suit under the section.

The question whether a person instituting a suit under section 92 of the Code has an interest within the meaning of its provisions or not must be determined upon the facts of each case bearing on the relation of the plaintiff to the charity with reference to which the suit is brought.

Assuming that, under the Hindu Law, the surviving heir of the founder of a charity has a right to nominate a trustee in the absence of any provision to that effect in the deed of endowment, it is a right the exercise of which a Court is not bound to uphold if, in its opinion, the person nominated as trustee is not fit to hold the office. The interests of a trust are supreme and a Court must have regard to such interests in dealing with the question whether the persons appointed as trustees are persons who can be properly entrusted with the management of the institution.

When there is a gift in favour of a charity, it is within the competence of a Court, in a suit under section 92 of the Civil Procedure Code, to make a suitable provision for its administration in any scheme that is to be framed, especially where there exists no such provision already.

The mere denial by a person of the existence of a public trust, if *bona fide*, does not by itself disqualify him from being appointed or retained as trustee of the institution.

Under section 92, Civil Procedure Code, when a Court is asked to frame a scheme, one of the essential enquiries to be made is, what are the properties belonging to the charity. **M** VAITHINATHA AIYAR *v.* THEYAGARAJA AIYAR, 41 M. L. J. 20 **631**

——— s. 92, O. XL, r. 1—*Scheme suit—Trustee appointed by Temple Committee, supersession of—Receiver, appointment of, pending suit.*

The Court has power, in a scheme suit under section 92, Civil Procedure Code, to supersede a trustee appointed by a Temple Committee, and, though there is no prayer to that effect in the plaint, to appoint a Receiver in his place during the pendency of the suit. **M** KUPPUSWAMI MUDALIAR *v.* SUBRAMANIAM CHETTIAR, 41 M. L. J. 545; 16 L. W. 927 **565**

——— s. 99—*Witness, deposition of, not signed by Judge—Trial, whether vitiated—Irregularity—Re-trial, whether should be ordered.*

The mere fact that the deposition of a witness is not signed by the Judge who recorded it, would not vitiate the trial of the suit. The omission to sign is an irregularity merely, and, so long as there is no doubt whatever that the deposition was recorded by the Judge, section 99 of the Civil Procedure Code does not afford ground for a new trial. **N** ALAMSINGH *v.* GOPALDAS **664**

——— s. 102, 115—*Suit for recovery of price of fish removed from tank after declaration of title to fish—Money suit - Appeal, second, competency of—Declaration of title to tank by Court—Revision.*

No second appeal lies from a decree in a suit for declaration of right to and recovery of the price of fish alleged to have been removed from a tank by the defendant, when the value of the suit does not exceed Rs. 500.

Although in such a suit it is open to the Judge to decide the question of title to the tank incidentally in so far as it is necessary for the purpose of giving relief to the plaintiff, it is not within his jurisdiction to *declare* the plaintiff's title thereto, and it is open to the High Court, in second appeal, dealing with the question by way of revision to expunge so much of the decree of the lower Appellate Court as declares the plaintiff's title to the tank as being made without jurisdiction. **C** ARADHAN MONDAL *v.* ABHOYA CHARAN MONDAL **626**

——— s. 110—*Appeal to His Majesty in Council—Suit to set aside transfer as not justified by necessity—Necessity for sale of part of transferred property established—Appeal, valuation of.*

Where in a suit to set aside a transfer of property made by a Hindu widow on the ground that it was not justified by legal necessity, the Court finds that the transfer was justified only to the extent of a certain sum for which there was necessity, the value of the appeal to His Majesty in Council is the value of that part of the transferred property whose sale is not found to be for legal necessity, and if the value of the same be less than Rs. 10,000 leave to appeal will not be granted. **Pat** BISHUN PRASAD SINGH *v.* NARSINGH DAS, 3 P. L. T. 550 **663**

——— s. 110, *interpretation of—Appeal to H. M. in Council—Amount of subject-matter of suit, what is—Special leave to appeal, when to be granted.*

Section 110 of the Civil Procedure Code should be so interpreted that effect may be given to all its provisions, if this can reasonably be done, and the second paragraph of the section ought not to be read alone and as not being subject to the requirements of the first paragraph. It was not intended to make the second paragraph a separate provision.

For the purposes of an appeal to H. M. in Council the amount of the subject-matter of a suit in the Court of first instance is the amount for which a decree is recovered, including at most interest up to the date of the decree and the value of the subject-matter of a suit is the value at the time of the institution of the suit.

Where a case is otherwise unappealable to H. M. in Council, special leave can only be granted if the questions involved are not only substantial, but are of great public or private importance. **L B** MAUNG THWE *v.* A. L. A. R. CHETTY FIRM, 11 L. B. R. 335 **690**

——— s. 115—*Revision—Error of law in matter within jurisdiction—High Court, if should interfere.*

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The High Court should not interfere in revision under section 115 of the Code of Civil Procedure on the ground that a Court has committed a serious error of law in coming to a finding in a matter in which it had jurisdiction. **C** RAJENDRA NATH ROY *v.* SHEIK ABDUL **430**

——— s. 115, O. XIV, r. 2, O. XV, r. 3 (1)—*Selection of preliminary issues for determination—Interlocutory order—Revision—High Court, interference by—Amendment of plaint not changing character of suit, if to be allowed.*

A Court has power to select issues of law for determination as preliminary issues even after the date of the first hearing, specially when nothing is done in the suit beyond the settlement of issues and there has not been an actual first hearing.

As a general rule, the High Court does not in revision interfere with interlocutory orders But no hard and fast rule can be laid down as interference may be justified when the order sought to be revised is in fact perverse or irreparable injury would be caused if the order were allowed to stand.

The mere fact that an interlocutory order may possibly result in inconvenience and expense to a party to the suit is not a sufficient ground for interference by the High Court in revision.

A Court has discretion to allow an amendment of plaint and the High Court will not interfere in revision where the amendment does not change the nature of the suit or involve any material injustice to the defendant. **M** RAMAKRISHNA PILLAI *v* KRISHNASWAMI PILLAI, 15 L. W. 667; (1922) M. W. N. 521; (1922) A. I. R. (M.) 321 **167**

——— s. 115, O. XXIII, r. 1 (2)—*Order permitting withdrawal of suit—Revision.*

The High Court has jurisdiction to interfere in revision with an order under O. XXIII, r. 1 (2) of the Civil Procedure Code, permitting the withdrawal of a suit, on the ground that the order was improperly made. **L** GHULAM RASUL *v.* RAMZAN BIBI **753**

——— s. 122, O. XLI, r. 1. *See* LIMITATION ACT, ss. 5, 12 **777**

——— s. 141, O. IX, O. XXI, r. 57—*Execution transferred to Collector—Power of Collector to dismiss application—S. 141, whether applicable to execution proceedings—Execution of decree, application for—Dismissal in default—Power of restoration.*

In execution proceedings transferred to him by a Civil Court, a Collector has power to dismiss the application under r. 57 of O. XXI of the Civil Procedure Code, and on such dismissal the attachment ceases.

Section 141 of the Civil Procedure Code does not apply to execution proceedings, and a Court is not empowered thereby to restore to the file under O. IX an application in execution which has been dismissed in default.

In a proper case, however, a Court has the inherent power mentioned in section 151 of the Civil Procedure Code to restore to the file an application for execution which has been dismissed in default, and if the attachment has not in fact been removed such a restoration will revive it. **N** SHANKARRAO *v.* MANIKRAO **643**

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——— s. 144, *object of—Loss caused independently of execution of decree reversed, whether recoverable*

Under section 144 of the Civil Procedure Code a decree-holder can claim compensation only for the loss caused to him by reason of the *execution* of the decree reversed on appeal and not for any loss caused independently of the same.

A entered into possession of certain land in execution of a decree obtained against *B*, but was again dispossessed by the latter. By and by *B* got the decree set aside but it was sometime before he entered into possession under the same formally. *A* eventually got the decree restored in second appeal and claimed mesne profits under section 144 beginning from the time when *B* got the decree of the first Court set aside:

Held, that mesne profits could be claimed under that section only from the time when *B* entered into possession in pursuance of his decree formally and not from the date when he got the decree of the First Court set aside, as *A*, even though dispossessed by *B*, must be deemed to have been in possession in execution of the decree passed in his favour by the Court of first instance until he was formally evicted therefrom by the process of law. **L** CHHABER SINGH *v.* RADHU RAM, 4 L. L. J. 733 **807**

——— s. 144—*Object of section—Decretal amount, reduction of, in appeal—Restitution, application for, by judgment-debtor—Prejudice due to error in regulating order of said items, effect of.*

The object of section 144 of the Code of Civil Procedure is to remove, by means of restitution, any prejudice due to the erroneous terms of the original decree.

Where the amount of a decree is slightly reduced on appeal and the judgment-debtor applies for restitution in respect of certain items of property which, he contends, need not have been sold at all, restitution should not be granted, as his position as regards the sale is in no way affected by the variation in the decree and the prejudice, if any, is solely due to the order in which the items of property were sold. **M** BEZWADA SUNDARARAMA *v.* ENUGA RAGHAVA, (1922) M. W. N. 141; 42 M. L. J. 315; 16 L. W. 355; (1922) A. I. R. (M.) 96 **516**

——— s. 148—*Decree for possession subject to payment of certain amount—Time for making payment fixed—Decree-holder joining Army before expiry of time—Extension of time for payment—Indian Soldiers (Litigation) Act (IX of 1918), ss. 5, 6, 7, 11, application of.*

A Court has no power to extend the time allowed by a decree for the payment of money under section 148 of the Code of Civil Procedure If the decree provides for the payment of a certain sum of money on or before a certain date and specifies the penalty which will attach to non-payment, the enforcement of that penalty cannot be delayed or dispensed with by any order or direction issued in derogation of the decree.

A decree was passed in favour of *C.* and *M.* entitling them to get possession of certain property in terms of a compromise subject to their paying a certain sum in Court to the credit of the defendants

on or before a certain date On their failure to do so the suit was to stand dismissed. Before the time for payment had expired, *C.* joined the Army and in order to protect himself against the expiry of the period allowed him by the decree, a certificate under section 5 of Act IX of 1918 was sent at his instance to the Court which passed the decree, stating that the time allowed to him for payment should be extended till his return from the War:

Held, (i) that there was no proceeding pending before the Court at the time *C* joined the Army and that section 5 did not apply;

(ii) that the period of payment having been fixed not by any law for the time being in force but by the decree itself which was passed in accordance with the compromise, section 11 of the Act was also not applicable and the Court could not interfere with the operation of the decree or alter the condition prescribed. **O** BADAL *v.* CHHATTAR SINGH, 25 O. C. 74; (1922) A. I. R. (J. C.) 131 **205**

——— s. 151, *application under—Remedy by suit or proceeding open—Court, jurisdiction of.*

There is nothing in the language of section 151 which prevents a party to a suit from applying under that section simply because he has a remedy by a separate suit or proceeding. Courts cannot act under section 151 of the Civil Procedure Code if provision is made for a particular contingency by the Orders and Rules of the Code, but in cases not covered by them parties should not be put to the trouble, delay and expense of filing suits for relief which can be properly given in the suit itself. The language of section 151 of the Civil Procedure Code is wide and refers to inherent powers of a Court to make such orders as may be necessary for the sake of justice. A stranger to a litigation, however, cannot intervene after a suit or a proceeding is disposed of, and claim the protection of section 151 of the Code or appeal to the inherent powers of the Court to do justice.

Where a Corporation or Company is made a party to a proceeding but is not represented by a person having legal authority to do so and an order is passed adversely to it, it is competent to a Court to vacate the order under section 151, Civil Procedure Code on the application of a person through whom the Company can legally act. **M** PERUMAL MOOPAN *v* VENKATACHARIAR, 15 L. W. 586; 42 M. L. J. 563; (1922) M. W. N. 268; 2 M. L. T. 35; (1922) A. I. R. (M.) 193 **910**

——— s. 180, application of. *See* JURISDICTION **160**

——— O. II, r. 2—*Annuity, suit for arrears of —Suit dismissed in default—Appeal—Fresh suit for arrears of subsequent instalment—Appeal withdrawn during pendency of suit—Third suit claiming all arrears, whether maintainable.*

Plaintiff was entitled to an annuity to be paid to him by the defendant on the 1st January and 1st July of each year. On 28th June 1917 he instituted a suit to recover instalments which had fallen due from 1st January 1914 to 1st January 1917: on 8th July 1917 the suit was dismissed in default, and on 10th November 1917 the Court refused to set aside the order of dismissal: an appeal was preferred against this latter order but was withdrawn on 2nd March 1918. In the meantime, the instalment for 1st July 1917 fell due, and plaintiff obtained a decree for that particular instalment on 2nd April 1918. He then brought the present suit to recover arrears for the period 1st January 1914 to 1st July 1918:

Held, that under the provisions of O. II, r. 2 of the Civil Procedure Code the suit, so far as the arrears for 1st January to 1st July 1917, were concerned was barred, and that any protection which might have accrued to the plaintiff by reason of his appeal was taken away when the appeal was withdrawn. **A** ABDUL KARIM KHAN *v* MUHAMMAD JAN, 20 A. L. J. 590; 44 A. 663; (1922) A. I. R. (A.) 379 **970**

——— O. III, r. 4 (1), O. IX, r. 4—*General Rules and Circular Orders of Calcutta High Court, Chap. XI, r. 46 cls. (e), (f)—Court's power to refuse permission to Pleader to sign vakalatnama previously filed—Court, when justified to object to Pleader's appearance—Dismissal for default in presence of recognized agent, legality of.*

In view of the provisions of clauses *(e)* and *(f)* r. 46, Chapter XI of the General Rules and Circular Orders of the Calcutta High Court, which is followed by the Patna High Court, a Court has no power to refuse permission to a Pleader to sign a *vakalatnama* which is already on the file of the Court and in the body of which appears the name of that Pleader.

A Court can only object to a Pleader appearing in a case when he does not comply with the aforesaid rule regarding the acceptance and endorsement of the *vakalatnama.*

It is illegal on the part of a Court to dismiss a suit for default under O. IX, r. 4 of the Civil Procedure Code in the presence in Court of an authorised agent with his witnesses. **Pat** KUNJ BEHARI SINGH *v.* SHEODAHIN PANDEY, 3 P. L. T. 447; (1922) A. I. R. (PAT.) 501 **659**

——— O. V, r. 15. *See* SUMMONS **991**

——— O. VI, r. 14—*Plaint signed and presented by servant of plaintiff—Authority of servant not proved—Suit dismissed—Application to High Court—Extraordinary jurisdiction.*

Plaintiff sued to recover a certain sum of money from the defendant. The plaint was signed by an unauthorised servant of the plaintiff instead of by the plaintiff himself. When this fact came to the notice of the Court, it dismissed the suit. The plaintiff moved the High Court in the exercise of its extraordinary jurisdiction:

Held, setting aside the decree of the lower Court, (1) that if the plaintiff had applied to sign the plaint and present it on the day of the dismissal of the suit, he should have been allowed to do so;

(2) that he should be given the opportunity now of having his suit considered as if it was filed on the day of its dismissal subject to the question of limitation. **B** UTTAMRAM VITHALDAS *v.* THAKORDAS PARSUOTTAMDAS, 46 B. 153; 23 BOM. L. R. 911; (1922) A. I. R. B.) 113 **217**

——— O. VI, r. 17—*New case, when can be allowed to be introduced.*

Order VI, r. 17, Civil Procedure Code, will not exclude an amendment which has the effect of introducing a new case simply because it does so: but such an amendment would be refused if the new case sought to be introduced could more conveniently be the subject of a fresh action. **O** HAMID MIRZA BEG *v.* AHMAD MIRZA BEG, 9 O. L. J. 359; 4 U. P. L. R. (J. C.) 80 **986**

Civil Procedure Code—1908—contd.

——— O. VI, r. 17, O. XXII, r. 3— *Amendment of plaint by deceased plaintiff's legal representative—Limits of amendment—Conflict of interests—Proper course for legal representative.*

It is not open to the legal representative of a deceased plaintiff to assert any individual and hostile rights which he may have against the deceased plaintiff and those claiming through or under him and to seek to enforce those individual and paramount rights under the guise of an application to amend the plaint.

All that he can do is to take up the suit at the stage at which it was left by the deceased plaintiff and to continue the proceedings as legal representative.

The limits to amendment should be determined by the consideration whether it would have been granted if the deceased had made the application

The power to grant amendment is subject to the rule that the subject-matter of a suit cannot be changed by means of amendment nor can one distinct cause of action be substituted for another.

Therefore, the legal representative of a plaintiff who dies cannot be allowed to so amend the plaint as to convert a suit of one nature into one of another nature simply because he has in law the right to repudiate the transactions of the deceased as not binding on the estate to which he has succeeded.

In cases where there is a conflict of interests between the deceased plaintiff and his legal representative the proper course is for the latter to file a separate suit to enforce his rights. And it is not open to him in his capacity as legal representative to repudiate the transactions which have been admitted by the deceased to be valid and on the footing of the validity of which the deceased lodged his claim. **M** VENKATARAMA ROW *v.* VENKATALINGAMA NAYANIM, 15 L. W. 72; (1922) M. W. N. 42; 42 M. L. J. 43; 30 M. L. T. 204; (1922) A. I. R. (M.) 49 **703**

——— O. VII, r. 1, O. XLIII, r. 1 (u)— *Plaint, return of, for presentation to proper Court—Appeal—Remand by Appellate Court, whether competent—Remand, order of, if appealable.*

An Appellate Court has inherent power to remand a case to the Trial Court on appeal from an order under O. VII, r. 1 returning a plaint for presentation to the proper Court.

No appeal lies against such an order of remand. O. XLIII, r. 1 *(u)* has no application to such a case as that only contemplates an appeal from an order of remand passed under O XLI, r. 23 on appeal from a decree. **L** FIRM BHAWANI SAHAI-KANSHI RAM *v.* FIRM HARBANS SINGH-GOPAL DAS, 2 L. L. J. 587 **304**

——— O. VII, r. 6— *Limitation Act (IX of 1908), s. 19—Acknowledgment of liability not alleged in plaint—Subsequent reference in rebuttal admissible—Acknowledgment, nature of—Acknowledgment by manager of family, effect of—Mortgage otherwise invalid, if validated by pious obligation—Unregistered sub-mortgage, admissibility of.*

Where there is a clear acknowledgment of liability effectual enough to extend the period of limitation, but no mention is made of it in the plaint, it is open to the plaintiff to show in reply to the defence set up that his claim is within time from the acknowledgment referred to and such a plea in rebuttal is not inadmissible under O. VII, r. 6 of the Civil Procedure Code.

An acknowledgment need not specify every legal consequence of the thing acknowledged. From an acknowledgment of a debt follow the legal incidents which flow from the existence of a liability. In fact, an admission by a mortgagor of his liability carries with it an admission of all the remedies to which the mortgagee might be entitled under it

An acknowledgment by a person as the head and manager of a family is binding upon other members of the family and is sufficient to save limitation as against them.

The doctrine of the pious obligation of sons to pay the father's debts does not validate a mortgage or alienation made by the latter if the same is otherwise invalid. It may, however, support a mortgage if it is made in lieu of antecedent debts recoverable from a family, and a *bona fide* creditor, in such a case, is not bound to see to the application of the money.

An unregistered sub-mortgage is not admissible in evidence to prove a lien. **O** RAM AUTAR *v.* BENI SINGH, 25 O. C. 89; (1922) A. I. R. (J. C.) 135 **196**

——— O. IX, r. 8— *Plaintiff appearing when case first called for hearing—Adjournment for short while—Plaintiff not appearing when case again taken up—Dismissal of suit—Law applicable.*

Where on a date of hearing the plaintiff and his Pleader both appear and ask for a little time which is granted but fail to put in appearance when the case is again taken up on the same date, and the suit is dismissed, the dismissal is one under O. IX, r 8 of the Code of Civil Procedure, there being no appearance on behalf of the plaintiff. **Pat** BASDEO NARAIN SINGH *v.* HARAKH NARAIN SINGH **942**

——— O. IX, r. 8, O. XVII, rr. 2, 3— *Suit, hearing of, not commenced—Default in appearance on adjourned date—Dismissal of suit under O. IX, r. 8—Part heard case adjourned—Default in appearance at time fixed—Procedure—Equity considered.*

Ordinarily, if on an adjourned date of hearing either or both of the parties make default in appearance the Court should proceed to dispose of the suit in one of the modes indicated in O. IX of the Code of Civil Procedure: there is no necessity whatever to have recourse to O. XVII, r. 3 of the Code.

Where the hearing of a suit has not commenced and it is the plaintiff who is in default and there is no evidence to support his case, the suit should be dismissed under O. IX, r. 8, of the Code.

Courts should exercise extreme caution when on an adjourned date the parties or any of them fail to appear. They should in the first place have recourse to O. XVII, r. 2, of the Code rather than r. 3 and even in cases where r. 3 can be considered to apply, that is, where a case has been part heard and an adjournment granted, it would not be in accordance with justice to refuse a party, who has failed to appear on the adjourned date at the time fixed but appears at a later hour, the chance of having the suit restored If the equity of the case demands, he should certainly have an opportunity of satisfying

the Court that he had sufficient cause for not appearing. **B** RATANBAI SHIVLAL *v.* SHANKAR DEOCHAND, 24 BOM. L. R. 775 **514**

——— **O. IX, r. 13**—*'Sufficient cause,' meaning of—Party unable to be in Court in time.*

A Court should set aside an *ex parte* decree if it is satisfied that the defendant did his best to attend Court in time and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, mulcting, in proper cases, the delinquent in costs. No person should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or which cannot be put right, so far as the other side is concerned, by making the person to blame pay for it. **M** ARUNACHALA AIYAR *v.* SUBBARAMIAH, (1922) M. W. N. 600; 31 M. L. T. 257; 16 L. W. 583; 43 M. L. J. 632 **971**

——— **O. XIV, r. 1**—*Issue not arising on pleadings—High Court, whether will order remand for trial thereof.*

The High Court will not, in second appeal, remand a case to the lower Court for the trial of an issue which does not arise on the pleadings. **L** FATEH MUHAMMAD *v.* IMAM-UD-DIN, 2 L. L. J. 188 **106**

——— **O. XVI, r. 1 s. 99**—*Case not closed—Suit adjourned—Parties, right of, to summon witness—Discretion of Court—Exclusion of evidence—Merits of case not affected—Appellate Court, whether bound to interfere—Evidence believed to be based on hearsay—Court, if can refuse to record.*

As long as the hearing of a suit stands adjourned in the ordinary course of trial and so long as the party who wishes to summon witnesses has not closed his case, the Court is bound to summon them. There is nothing in O. XVI, r. 1 of the Civil Procedure Code to show that the adjournment of which a party may take advantage must be granted at his own instance; he can take advantage of the adjournment granted to his adversary.

Under section 99 of the Civil Procedure Code an Appellate Court is not bound to interfere in appeal unless the exclusion of evidence has affected the merits of the case.

A particular answer, after it is given by a witness, may be ruled out as irrelevant but no Court can say beforehand that the whole of the evidence to be given by the witness is going to be irrelevant, and the Court's belief that the evidence is biassed is not a valid ground for refusing to record it. **N** BHAGCHAND *v.* MUSAJI **272**

——— **O. XVI, rr. 19, 21, O. XXVI, r. 4.** *See* COMMISSION **9**

——— **O. XVIII, rr. 5, 6**—*Provisions about interpretations—Directory—Deposition interpreted by reader, Judge and Pleader not attending—Prosecution for perjury—Validity—Charge for perjury—Exact words in deposition not used—Irregularity whether curable—Criminal Procedure Code (Act V of 1898), s. 537.*

The provisions of O. XVIII, rr. 5 and 6 of the Civil Procedure Code are directory and non-compliance with them does not render the deposition inadmissible at a subsequent trial of the deponent for perjury.

If the deposition has not been read over to the witness in the presence of the Presiding Judge, it does not prove itself under section 80 of the Evidence Act, but it may be proved in some other way. The Judge who recorded it can prove it or the accused can admit it, section 91 of the Evidence Act merely excluding the oral contents of a deposition but not making it inadmissible in evidence.

If a deposition has been interpreted by the Reader working in the same room as the Judge, even though the Judge and the Pleaders for the parties did not attend to the interpretation, there has been sufficient compliance for all purposes with the provisions of O. XVIII, r. 5 of the Civil Procedure Code and a deposition so interpreted proves itself under the provisions of section 80 of the Evidence Act.

The failure to enter in a charge for perjury under section 193 Indian Penal Code the actual words used in a deposition is at the most an irregularity cured by section 537 of the Code of the Criminal Procedure. **N** MIRABAX *v.* EMPEROR, 23 CR. L. J. 500 **36**

——— **O. XX, r. 12**—*Suit for recovery of immoveable property—Finding by Appellate Court that plaintiff entitled to possession—Remand for determination of mesne profits with direction to pass decree in favour of plaintiff.*

In cases falling within O. XX, r. 12, Civil Procedure Code, the proper course for the Appellate Court to take is not to remand the suit where it finds that a person is entitled to possession but to pass a preliminary decree so far as possession is concerned and to direct an enquiry as to the mesne profits in cases where the lower Court has not dealt with the question. **M** SUBBE GOUNDAN *v.* KRISHNAMACHARI, 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; 45 M. 449; (1922) A. I. R. (M.) 112 **869**

——— **O. XXI, rr. 1, 2**—*Mortgage-decree—Adjustment out of Court—Adjustment notified by judgment-debtor—Court, duty of.*

O. XXI, r. 2, of the Civil Procedure Code, applies to a final decree in a mortgage suit and such a decree, like any other decree, is capable of adjustment out of Court. When, therefore, a judgment-debtor informs the Court that the decree against him has been adjusted, the Court is bound, under O. XXI, r. 2 (2) of the Civil Procedure Code, to issue notice to the decree-holder to show cause why the adjustment should not be regarded as certified. **N** LACHMANSINGH *v.* MARDANSINGH **443**

——— **O. XXI, r. 2, (1).** *See* EXECUTION OF DECREE **780**

——— **O. XXI, r. 2 (3)**—*Execution of decree—Payment, satisfaction or adjustment pleaded—Payment not certified—Duty of Court—Fraud, allegation of—Treatment of plea of payment as application for certifying payment—Fraud—Limitation Act (IX of 1908), s. 18, application of.*

The provisions of clause (3) of r. 2 of O. XXI of the Civil Procedure Code are not to be rendered nugatory by the application of the general provisions of section 47 of the same Code. The clause is equally applicable where adjustment is set up by the judgment-debtor in answer to an application for execution

The decree-holder is bound to certify an adjustment, and the judgment-debtor is also given a

right to apply to the Court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment-debtor, and he does not deserve the consideration of the Court if he fails to take the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court.

An adjustment not certified according to law cannot be enquired into by a Court even though fraud on the part of the decree-holder is alleged.

It is not for a Court of Justice to refuse to observe a provision of the law because hardship may result in consequence. The Court has merely to interpret and apply the law as laid down by the Legislature, and it would not be doing its duty if it acted otherwise.

It is, however, open to a Court to oppose a fraud so far as it can do so within the law, and where an application for execution is opposed on the ground of payment or satisfaction or adjustment, the Court may rightly treat the objection so taken as an application to the Court to certify the alleged payment or adjustment provided that the objection betaken within the period of limitation allowed by law.

In such a case, where the Court decides to treat an objection to execution on the ground of payment, as an application for certifying the payment, the judgment-debtor pleading fraud cannot extend the period of limitation under section 8 of the Limitation Act, for that section applies only where the *knowledge* of a right is fraudulently kept away, and not to a case where a person is prevented by fraud from *exercising* a right of which he is fully aware. **L B** P. R. P. L. CHETTY *v.* G LON POW, 11 L. B. R. 333 **924**

——— O. XXI, rr. 35 (2), 36—*Execution proceedings—Persons particularly concerned aware of such proceedings—Publicity, law as to, whether complied with.*

Where persons particularly concerned in execution proceedings have been made aware of those proceedings, and publicity thereof has thus been achieved, the provisions of the law contained in O XXI, rr. 35 (2) and 36 of the Civil Procedure Code should be deemed to have been substantially complied with. **L** JAUHRI LAL *v.* PEMAN, 2 L. L. J. 563 **182**

——— O. XXI, r. 36, application of. *See* ADVERSE POSSESSION **91**

——— O. XXI, r. 50 (2), (4)—*Deceased partner, whether covered by sub-r. (2)—Sub-r. (4), meaning of.*

The wording of sub-r. (2) of r. 50 of O XXI, of the Civil Procedure Code is wide enough to cover the case of a deceased partner and under it leave can be given against his legal representative

Sub-r. (4) of r. 50, O. XXI, of the Civil Procedure Code was intended to make clear the implication of sub-r (1), and it does not affect the provisions of sub-r. 2. **B** JIVRAJ LALLOOBHAI PATEL *v.* BHAGVANDAS GORDHANDAS, 24 BOM. L R. 1037 **627**

——— O. XXI, r. 58, applicability of. *See* MORTGAGE DECREE FOR SALE **271**

——— O. XXI, r. 66—*Auction sale—Notification of mortgage—Auction-purchaser, whether estopped from questioning validity of mortgage.*

Under O XXI, r. 66, of the Civil Procedure Code, if a mortgage-deed is notified, that notification is in no way conclusive as between the decree-holder or the purchaser on the one hand, and the holder of the encumbrance on the other, as to its validity, and where a sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale, the auction-purchaser is not estopped from questioning the validity of the mortgage. **A** ROSHAN LAL *v.* LALLU, 20 A. L. J. 722; (1922) A. I. R. (A.) 413 **790**

——— O. XXI, rr. 66, 89, 90—*Execution sale—Proclamation—Place of sale, omission of—Place well-known—Sale, setting aside of—Substantial injury—Partnership suit—Sale for realising assets—Sale, setting aside of, on deposit—R. 89, object of.*

The omission of the place of sale in the sale proclamation, although a clear irregularity, would not justify the setting aside of the sale, if the place of sale being well-known, no body is misled by the proclamation and no prejudice is caused to the applicant.

O. XXI, r. 89 of the Civil Procedure Code provides modes of relieving judgment-debtors from the hardships to which they are exposed by Court sales in execution of decrees against them at great undervalues, and is inapplicable to the case of sale in a partnership suit on behalf of all parties to the suit for the purpose of realisation of the assets of the partnership. **M** TULJARAM ROW *v.* RAMACHANDRA ROW, 41 M. L. J. 465; 14 L. W. 515; (1921) M. W. N. 736 **916**

——— O. XXI, r. 89, *application under—Execution sale—Private sale by judgment-debtor before confirmation—Purchaser, application by, for setting aside sale on deposit, whether competent.*

A purchaser from a judgment-debtor of his immoveable property after its sale in execution of a decree and before the confirmation of the sale, is not entitled to make a deposit under O. XXI, r. 89, of the Code of Civil Procedure, and to apply to have the sale set aside. **C** SARADA KRIPALALA *v.* HORENDRA KUMAR DAS, 26 C. W. N. 149; 49 C. 454; (1922) A. I. R. (C.) 271 **289**

——— O. XXI, r. 89, *application under—No specific prayer to set aside sale—Prayer to receive deposit—Prayer to withhold payment of money to decree-holder made but withdrawn on objection—Object of deposit—Deposit, whether conditional.*

An application under O. XXI, r. 89, without containing a specific prayer to set aside the sale, prayed that the decretal amount may be received in deposit, but that it may not be paid to the decree-holder pending disposal of an appeal. On the latter's objection the prayer as to withholding payment was withdrawn:

Held, (1) that, though there was no specific prayer to set aside the sale yet that was clearly the purpose of the deposits;

(2) that, as the prayer regarding withholding payment to the decree-holder was withdrawn by the judgment-debtor the deposit was valid and not conditional. **Pat** RAMSHIVENDRA NARAYAN OJHA *v.* AWADH BIHARY SARAN **629**

——— O. XXI, r. 90—*Execution of decree—Previous application against one judgment-debtor dismissed—Subsequent application against all judgment-debtors, whether in continuation.*

Where a previous application for execution has been dismissed because of a successful application made under O.. XXI, r. 90 of the Civil Procedure Code, a subsequent application for execution is an application in continuation of the previous application. But where an application has been made against one of several judgment-debtors and has been dismissed for this reason, a subsequent application made against all the judgment-debtors cannot be treated as an application in continuation of the previous application. **Pat** KAMAL NAIN SINGH *v.* KESHO PRASAD SINGH, 1 PAT. 701; (1922) A. I R. (PAT.) 310 **633**

——— O. XXI, r. 92—*Execution sale, application to set aside—Notice of application, when to be given—Time for giving notice not limited.*

It is not necessary that the notice required by r. 92, O. XXI, Civil Procedure Code, to be given of an application to set aside an execution sale, should be served on all the parties affected by the sale within thirty days of the date of the sale. The rule prescribes no limitation for giving such notice. Once notice is given to all the parties affected by a sale, the Court has authority to proceed to decide the application on its merits, **O** ABDUR RAHMAN *v.* HAR NARAYAN, 9 O. L. J. 211; 4 U. P. L. R. (J. C.) 72; (1922) A. I. R. (J. C.) 129 **238**

——— O. XXI, r. 98, 99, 100, 101, 103—*Dispossession by decree-holder or auction-purchaser—Application complaining of such dispossession—Dismissal of application for default—Suit to establish right to present possession—Limitation Act (IX of 1908), Sch. I, Art. 11A, applicability of.*

In cases coming under O. XXI, rr. 98, 99 or 101 of the Code of Civil Procedure an order to be conclusive under r. 103 must be an order passed after investigation.

Where, therefore, an application under r. 100 complaining of dispossession by a decree-holder or auction-purchaser is dismissed for default without holding some sort of investigation, as expressly laid down by sub-rule (2) of r. 101 and r. 103, the special rule of limitation contained in Art. 11A of the first Schedule to the Limitation Act has no application and a suit to recover possession on establishment of title instituted more than one year after the date of the order of dismissal for default is not barred by limitation **C** NIRODE BORONI DASSI *v.* MONINDRA NARAYAN CHANDRA, 25 C. L. J. 567; 26 C. W. N. 8; (1922) A. I. R. (C.) 229 **524**

——— O. XXI, r. 100. *See* LIMITATION ACT, SCH. I, ARTS. 165, 18 **349**

——— O. XXI, r. 100, *application under—Person in joint possession with judgment-debtor*

A claimant who has an interest in land of which possession has been delivered in execution of a decree, either as a member of a family or otherwise, and who is affected by the delivery of possession, can claim to be in possession on his own account within the meaning of O. XXI, r. 100 of the Civil Procedure Code, and is entitled to maintain an application under the rule and claim to be in joint possession of the property with the auction-purchaser. **N** MISS A. K SINGH *v* RAMPRASAD **174**

——— O. XXI, r. 103—*Suit for possession by decree-holder—Limitation.*

A suit for possession by the decree-holder under O. XXI, r. 103 Civil Procedure Code, is governed by Art. 11A of the Limitation Act. **A** BHIKHARI DASS *v.* ABDULLAH, 20 A. L. J. 578; 44 A. 607; (1922) A. I. R. (A.) 403 **241**

——— O. XXII, rr. 3, 10—*Preliminary decree in mortgage-suit—Death of decree-holder—Application to bring representative on record—Limitation—"Right to sue," meaning of.*

Where after obtaining a preliminary decree in a mortgage-suit, the plaintiff dies, an application to bring his legal representatives on to the record must be made within the period prescribed by sub-r. (1) of r. 3 of O XXII of the Civil Procedure Code, otherwise the suit will abate under sub-r. (2) of that rule. Such a case does not fall within the purview of r. 10 of that Order.

The right to sue mentioned in sub-r. (1) includes the right to proceed with the suit until the latter terminates, and, in a mortgage-suit the right to sue includes the right to obtain a final decree after the passing of a preliminary decree. **M** DAKOJU SUBBARAYUDU *v.* MUSTI RAMADASU, 5 L. W. 309; 42 M. L. J. 301; 30 M. L. T. 202; (1922) M. W. N. 375 **942**

——— O. XXII, r. 4—*Joint contract—Appeal—Death of respondent—Abatement*

A contract entered into by one or more promisors can be enforced as against all or any of them

Therefore, where one of several promisors who are respondents in an appeal dies and his legal representatives are not brought on the record, the appeal does not abate as a whole the right to prosecute it survives as against the surviving respondents **L** FIRM GURDAS RAM-KOTU RAM *v.* BHAGWAN DAS (1922) A. I. R. (L.) 182 **815**

——— O. XXII, r. 4 (1)—*Preliminary decree—Death of defendant—Representative not brought on record—Abatement of suit—Locus standi of heirs to apply for final decree.*

A preliminary decree does not put an end to a suit which remains pending till the final decree.

Therefore where after the passing of a preliminary decree the defendant dies and no application is made under O. XXII, r. 4 (1) of the Civil Procedure Code for the substitution of his legal representatives within the period of limitation following his death, the suit abates and his heirs have no *locus standi* to apply for a final decree. **A** JAGAR NATH *v.* RAM KARAN SINGH, 20 A. L. J. 565; 4 U. P. L. R. (A.) 182; (1922) A. I. R. A. 396 **251**

——— O. XXII, rr. 4 (1), 11. *See* ABATEMENT OF APPEAL **194**

——— O. XXIII, r. 3—*Compromise decree—Court competent to grant relief agreed to by parties—"So far as it relates to the suit," meaning of—Decree, compromise, interpretation of.*

In a decree passed on the basis of a compromise there is nothing whatsoever in the terms of O XXIII, r. 3, Civil Procedure Code, to prevent a Court from granting a relief to a defendant which can be put in execution, so long as that relief has been agreed to by the parties and is one of the lawful considerations on which the compromise is based.

The phrase "so far as it relates to the suit", as used in O. XXIII, r. 3, Civil Procedure Code, does not mean that in a compromise decree only such reliefs can be granted as the Court might have granted on the trial

of a suit. All conditions which are considerations for the compromise are conditions relating to the suit and as such should be embodied in the decree.

In order to interpret a compromise which has been embodied in a decree, it should be read as a whole.

In a suit for pre-emption in respect of a 2-annas share in a village, a decree was passed in terms of a compromise according to which the plaintiff's suit in respect of 1-anna share was dismissed and the defendant was held entitled to receive possession of 1-anna share immediately after the termination of the lease under which the plaintiff was holding the village. It was contended that the suit being a simple pre-emption suit the defendant could not be given a decree for possession and that it should be construed as merely declaratory of his rights :

Held, that it was not merely a declaratory decree but one for possession and that the defendant was entitled on the expiry of the lease to apply for delivery of possession in execution of the decree under section 47, Civil Procedure Code, and that a separate suit for possession would not lie **O** BISHESHAR SINGH *v.* MOHAMMAD YASIN ALI KHAN, 25 O. C. 58; 9 O. L. J. 276; (1922 A. I. R. (J. C.) 150 **232**

——— O. XXIII, r. 3, Sch. II, paras. 20, 21—*Arbitration without intervention of Court—Award, application to file—Compromise modifying award Court, power of, to pass decree in terms of compromise Appeal.*

Where after an application under paragraph 20 of Schedule II to the Civil Procedure Code, for filing an award made without the intervention of the Court has been made, the parties enter into a compromise, the effect of which is to modify the award, it is not illegal or *ultra vires* for the Court to pass a decree in terms of the award as modified by the compromise.

Except in so far as such a decree is in excess of, or not in accordance with, the modified award, an appeal against the decree is not competent. **O** FAZAL AHMAD *v.* ANAYAT AHMAD, 9 O. L. J. 219; (1922 A. I. R. (J. C.) 189; 2 O. C. 213 **209**

——— O. XXV, r. 3—*Suit for dissolution of partnership, for accounts and for recovery of plaintiff's* stridhan *property, if suit for payment of money.*

A suit for dissolution of partnership, for accounts and for recovery of the plaintiff's *stridhan* property is not a suit for payment of money within the provisions of O. XXV, r. 3 of the Code of Civil Procedure **C** AMULYA SUNDARI DASSYA *v.* SYAMA SUNDAR SAHA **607**

——— O. XXVI—*Commissions for valuation of things—Procedure.*

When the report of a Commissioner appointed to make a valuation of anything under O. XXVI of the Civil Procedure Code is objected to, the Court should hear the objections in open Court and decide, with the aid of such evidence as it may take, whether the valuation should be varied and, if so, in what direction.

The filing of objections to a report is no ground for appointing another Commissioner and in all cases where a second Commissioner is appointed to do the same work, the reasons for adopting such a course must be recorded in writing to enable the Appellate Court to see whether the judicial discretion has been properly exercised.

There may be cases in which the Commissioner may have so misconceived his duties as to render his report and valuation useless for a decision. In such cases a new Commissioner may be appointed. But this would mean that the old report and valuation were superseded. The Court has no power, after the issue of a second Commission, to still treat the report and valuation obtained under the first as available data on which, if it was so minded, it might base its decision. **M** KUTHIRAVATTATH KONGASSELI MOKSHATH THOTTAMMA *v.* SUBRAMANIYAN, 14 L. W. 620; (1921) M. W. N. 843; 45 M. 79; 1922 A. I. R. (M.) 219 **469**

——— O. XXX, r. 1, O. XXXII, r. 7—*Suit against firm—Minor member—Arbitration—Sanction of Court.*

Where a suit is brought against a firm the mere fact that one of the members of the firm is a minor would not bring the suit within the purview of O. XXXII of the Civil Procedure Code. The sanction of the Court, therefore, is not required when such a suit is referred to arbitration to validate the reference. **L** SUKHA NAND *v.* BEHARI RAM-ISHAR DAS **750**

——— O. XXXII, r. 7. *See* GUARDIANS AND WARDS ACT, 1890, s. 29 **997**

——— O. XL, r. 1—*Receiver, application for appointment of—Procedure—Estate in possession of Muhammadan widow—Receiver, appointment of, whether justified—Refusal to appoint Receiver, whether bars subsequent application for appointment.*

In dealing with an application for the appointment of a Receiver, the Court should examine the grounds given for such appointment, and take the pleadings of both parties on the application, and then dispose of it according to law, as laid down in O. XL, r. 1, of the Civil Procedure Code The application should not be dismissed summarily.

There is nothing in the law, as laid down in O. XL, r. 1, of the Civil Procedure Code, which prohibits a Court from appointing a Receiver in a case under Muhammadan Law in which a widow or her heirs claim to remain in possession of the estate of her husband until her dower has been paid and the accounts have been settled, provided there are good grounds within the scope of the section for a Receiver being appointed.

The mere fact that a Receiver had not been previously appointed is not in itself a sufficient ground for refusing to appoint one at the later stage of a case. **N** ZAHROS SYED ALI *v.* AHMAD SYED **502**

——— O. XL, r. 1—*Receiver, appointment of—Applicant's duty to convince Court of* prima facie *case.*

In cases where an application is made for the appointment of a Receiver, the applicant should at least present a *prima facie* case and convince the Court that there is a fair chance of his succeeding in the suit. **Pat** BANWARI LAL *v.* MOTI LAL, 3 P. L. T. 4[illegible]; (1922) A. I. R. (PAT.) 493 **656**

——— O. XL, r. 1—*Receiver, appointment of—Vesting of property, when takes place.*

The mere appointment of a Receiver under O. XL, r. 1 *(a)* of the Civil Procedure Code, does not

immediately vest the property in him. It is only when the provisions of clauses *(b)*, *(c)* and *(d)* of the rule have been complied with, that the property vests him. **N** RAMKRISHNA *v.* GANPATI **432**

——— **O. XLI, r. 10 (2)**—*Security for respondent's costs—Failure to furnish security within time allowed, effect of—Appellant's whereabouts unknown, whether sufficient reason for extending time.*

Where an appellant fails to furnish security for the costs of the respondent within the time allowed, his appeal is liable to be dismissed.

The fact that the delay in furnishing security is due to the whereabouts of the appellant being unknown, is not a sufficient reason for not following O. XLI, r. 10 (2), of the Civil Procedure Code. **L** PARMA NAND *v.* RAM PARKASH, 2 L. L. J. 391 **306**

——— **O. XLI, r. 19**—*Appeal dismissed for default—Re-admission—Sufficient cause—Counsel engaged in other Court.*

It is the duty of Counsel to see that their clients are properly represented when their cases are called on for hearing. If a Counsel is unable to appear himself he should arrange for another to take his brief for him when the case is called on for hearing. Courts cannot be expected to await the convenience of Counsel.

An appeal was dismissed in default, and upon an application for its re-admission on the ground that when the appeal was called on for hearing Counsel for the appellant was engaged in arguing a case before another Court at the time and had sent word to the Reader of the Court asking to be allowed ten minutes' time:

Held, that this was not a sufficient cause within the meaning of r. 19 of O. XLI of the Civil Procedure Code for re-admitting the appeal. **L** SAIF ALI *v.* CHIRAGH ALI **785**

——— **O. XLI, r. 23, O. XLIII, r. 1 (4)**—*Remand, order of—Appeal, when lies—Appeal, second, when competent—Punjab Courts Act (VI of 1918), ss. 41, 42.*

An appeal from an order of an Appellate Court remanding a case under O. XLI, r. 23, Civil Procedure Code, lies in all cases except those in which absolutely no right of second appeal against an appellate decree is given in the body of the Code or by any other law.

In order to determine whether an order of remand is appealable or not, the test is, suppose, the Court instead of making an order of remand passed a decree on the strength of the adjudication constituting the order of remand, would there be a second appeal from that decree? If a second appeal would lie from the decree, then the order of remand is appealable, otherwise not.

Per *Martineau, J*—The competency of a second appeal is not dependent on the question whether the decision of the lower Appellate Court is based on a finding of fact or on a finding of law, for even when the decision is based on a finding of fact a second appeal will lie on one of the grounds mentioned in section 4 (1) *(b)* and *(c)* of the Punjab Courts Act. Whether or not a second appeal lies depends on the nature and value of the suit, a second appeal being barred by section 42 (2) only in a suit of the nature cognizable by a Court of Small Causes where the amount or value of the subject-matter of the suit does not exceed Rs 500. Section 42 (1) merely restricts the grounds on which a second appeal can be entertained to those mentioned in section 41. **L** UMRI *v.* SHAH MOHAMMAD, 4 L. L. J. 359; 3 L. 218; (1922) A. I. R. L. 178 **849**

——— **O. XLI, r. 25**—*Remand—Reconsideration of law competent.*

In the case of a remand under O. XLI, r. 25, Civil Procedure Code, it is open to an Appellate Court to re-consider the view of the law on which the remand was based. **O** SHYAM NARAIN *v.* JADUNATH SINGH, 25 O. C. 41; (1922) A. I. R. (J. C.) 118 **242**

——— **O. XLI, r. 27**—*Evidence, admission of, in appeal—Jurisdiction.*

The power of a Court to admit evidence in appeal is restricted and can be exercised only under the provisions of r. 27 of O. XLI of the Civil Procedure Code.

If an Appellate Court allows fresh evidence to be taken on behalf of a party, it must also allow the other party an opportunity to produce such evidence as they think fit to rebut the additional evidence adduced. **C** HRIDAY KRISHNA PAL *v.* RAJANI KANTA PAL **292**

——— **O. XLI, r. 27, O. XLVII, r. 1**—*Admission of evidence at appellate stage—Insufficient ground—Proper remedy.*

The fact that the plaintiff in a case was unaware of certain important documents during the hearing of the case is no sufficient ground for their admission in evidence at the appellate stage under O. XLI, r. 27, Civil Procedure Code. The plaintiff's proper remedy is by an application for a review under O. XLVII, r. 1. **C** MANMOHINI DEBI *v.* RAM KISHORE **334**

——— **O. XLI, r. 31**—*Judgment of Appellate Court affirming that of Trial Court—Short form of judgment, if contrary to law.*

Whether or not a judgment of an Appellate Court is in accordance with the provisions of O. XLI, r. 31 of the Civil Procedure Code depends upon the facts and circumstances of each case. There is, firstly, that difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the First Court. Then there is to be considered the nature of the judgment affirmed, its fullness and accuracy and so forth.

Where the First Court has fully discussed in its judgment all the matters which were placed before it, the Appellate Court's judgment affirming that of the First Court is not contrary to law, because it is given in a short form and is unaccompanied by reasons. **C** MOHAMMAD HOSSAIN CHAUDHARY *v.* RABIA KHATUN **467**

——— **O. XLIII, r. 1 (u).** *See* CIVIL PROCEDURE CODE, 1908, O. VII, R 1 **304**

——— **Sch. I. App. E, Form 29.** *See* EXECUTION SALE **305**

——— **Sch. II, paras. 18, 22**—*Arbitration—Subsequent institution of suit about same subject-matter—Arbitration, supersession of.*

The institution of a suit has not *ipso facto* the effect of superseding a previous reference to arbitration dealing with the same subject-matter, but if

Civil Procedure Code—1908—concld.

after the institution of the suit neither party applies for a stay of the hearing of the suit under paragraph 18 of Schedule II, Civil Procedure Code, either at the time of the settlement of issues or before it, the effect of such a failure is to supersede the arbitration for good and any decision which might be arrived at in that suit would be binding on the parties as if no reference to arbitration had been made prior to the suit.

Where no application for stay of the suit is made within limitation, the effect of the institution of the suit and its decision would be to supersede the arbitration and render any award made therein after the institution of the suit unenforceable.

A private reference to arbitration of a subject of dispute does not prevent either party from filing a suit in a Court of Law in respect of the same matter, for the effect of paragraph 22, Schedule II, Civil Procedure Code, is to remove the bar which existed to the institution of such a suit **O** ZAINAB *v.* BUDHNA, 25 O. C. 63; (1922) A. I R. (J. C.) 158 **235**

Commission—*Application by defendant asking for commission to examine himself—Discretion of Court—Appellate Court, interference by—Civil Procedure Code (Act V of 1908), O. XVI, rr. 19, 21, O. XXVI, r. 4.*

Rules 19 and 21 of O. XVI of the Code of Civil Procedure have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. A case of this description is governed by O. XXVI, r. 4 of the Code.

In cases under O. XXVI, r. 4 of the Code of Civil Procedure a distinction must be observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. Where an application is made by a defendant who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a *forum* of his choice though he resides beyond the jurisdiction of such Court.

A Court of Appeal should exercise great caution when invited to interfere with an order of the Trial Court made with jurisdiction in the exercise of its discretion as to the granting of a commission. Each case must depend upon its own circumstances and no rule as to the exercise of that discretion can be laid down.

In this case the suit was instituted in the Burdwan Court and the defendant resided in the Rajshahye District; the lower Court refused the application of the defendant to be examined on commission. This order was set aside by the High Court, and the defendant was allowed to be examined on commission in Calcutta on payment of Rs. 1,000 as costs to enable the plaintiff to make arrangements for his cross-examination, the sum to be retained by the plaintiff irrespective of the result of the suit. **C** SARAT KUMAR RAY *v.* RAM CHANDRA CHATTERJEE, 35 C. L. J. 78; (1922) A. I. R. (C) 42 **9**

Companies—*Contract entered into on behalf of Company before incorporation—Company, ratification by—New contract.*

A contract entered into by the promoters of a Company prior to its incorporation, is not binding on the Company; nor can a Company ratify or adopt such a contract: it may enter into a new contract embodying the terms of that contract or adopting it.

The mere affixing of a copy of an agreement to the Articles of Association is not equivalent to effecting a new contract by the Company and would not estop the Official Liquidator from objecting to a claim on behalf of the persons with whom that contract was entered into. **L** SURRENDRO AND COMPANY *v.* LIQUIDATOR, PUNJAB TANNERY CO. LTD. **787**

Companies Act (VI of 1882), s. 163.
See COMPANIES ACT VII OF 1913, S. 284 **792**

Companies (Act VII of 1913), s. 234—*Companies Act (VI of 1882), s. 163—Winding-up commenced under old Act—Appeal—Notice.*

Under section 284 of the Companies Act, 1913, where proceedings for the winding-up of a Company have commenced before the commencement of the said Act, all subsequent proceedings connected with such winding-up, continue to be governed in all respects by the provisions of the Companies Act of 1882. Therefore where an appeal arises out of such proceedings notice of appeal must be served in accordance with the provisions of section 163 of the Companies Act of 1882. **L** HEM RAJ *v.* BEANT SINGH, VAKIL, LIQUIDATOR THE PUNJAB TANNERY CO. LTD. **792**

Composition deed, *setting aside of—Position of parties.*

When a compromise-deed is set aside, the parties are remitted to their original rights as they stood before the compromise. **M** RAJARAJESWARA SETHUPATHI AVERGAL *v.* KUPPUSAMI IYER, 41 M. L. J. 474; (1921) M. W. N. 722 **352**

Confession *by co-accused, value of—Co-accused not intending to implicate himself.*

A confession made by one of several accused persons by which he does not intend to implicate himself, although he actually does so, may be taken into account as against the accused making the confession, but should not be taken into account as against his co-accused. **L** HAYAT *v* EMPEROR, 4 L. L. J. 41; 23 CR. L J 661; (1922 A. I. R. (L.) 119 **401**

——— *of co-accused.*

A confession made by a co-accused after the whole of the prosecution evidence has been recorded can be used as evidence against the person making it, but cannot be used as against his co-accused either as evidence in itself or as corroboration of the testimony of an accomplice. **L** NARAIN DAS *v.* EMPEROR, 4 L. L. J. 91; 3 L. 144; 9 P. W. R. 1922 CR; 23 CR. L. J. 513; 1922) A. I. R. L.) 119 **113**

Construction of Statutes—*Courts to follow long established decisions.*

Where an Act of Parliament has received a judicial construction, putting a certain meaning on its words, and the Legislature in a subsequent Act in *pari materia* uses the same words, there is a presumption that the Legislature used these words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be

so construed even if they were such that they might originally have been construed otherwise. C ISHAN CHANDRA BAKSHI *v.* SEFATULLA SIKDAR, 35 C. L. J. 219 36; 26 C. W. N. 03

Contingent contract—*Contract to sell balance of goods, after satisfying certain other demands, if void for uncertainty—Damages, ascertainment of—Contract Act (IX of 1872), s. 73.*

Where a person agrees to sell the balance of certain goods in stock after satisfying the demands of certain other persons, but on account of a rise in the price of goods neither sells the goods to the buyer nor to those other persons within the time specified, the contract is not void for uncertainty but is a contingent contract enforceable in the ordinary manner and damages for its breach can be ascertained in the usual manner N KANCHEDILAL *v.* MOTIRAM, (1922) A. I. R. (N.) 192 720

Contract—*Earnest money—Question of fact—Appeal, second.*

The question as to what is and what is not earnest money turns on the construction of the document which contains the contract, but where there is no written contract, the question must be decided according to the evidence on the record, and becomes a question of fact and a decision on that question cannot be disturbed in appeal. A MADHO DAS *v.* GOKAL DAS, 20 A. L. J. 742; 4 U. P. L. R. (A.) 208; (1922) A. I. R. (A.) 478 761

Contract Act (IX of 1872), ss. 11, 12—*Unsoundness of mind—Presumption in favour of sanity—Temporary aberrations of intellect—Burden of proving insanity.*

In all transactions there is a presumption in favour of sanity of the contracting parties, and the test of soundness of mind is, that a person entering into a transaction, is capable of understanding the business, and of forming a rational judgment as to its effect upon his interests. Where, therefore, in a suit challenging the validity of certain deeds, the plaintiff relies on unsoundness of mind, he must establish it sufficiently to satisfy this test Mere weakness of mind is not sufficient, nor is it necessary to prove utter mental darkness or congenital idiocy.

Mistaking one person for another, dusting the wall, drinking tea from tea pot and mistaking grapes for pieces of stone indicate only temporary "aberrations of intellect" or temporary "insane delusions" and when occurring in isolated cases, few and far between, would not necessarily indicate that the person subject to them was incapable of managing his affairs. Pat MOHAMMAD YAKUB *v.* ABDUL QUDDUS 372

——s. 16—*Undue influence—Indebtedness, effect of.*

The mere fact that a person at the time of entering into a contract is indebted to the other party would not by itself be sufficient to establish undue influence. N MAHADEO *v.* KISANLAL, (1922) A. I. R. (N.) 219 597

——s. 16—*'Undue influence,' proof of, requisites of—Suit to set aside gift for undue influence—Cause of action.*

A person is said to be in a position to exercise undue influence over another, when the former is in a position to dominate the latter's will. If when

in such a position of dominance he uses it to obtain an unfair advantage over the person dominated, the transaction brought about by such use is voidable by the latter.

The expression 'undue influence' cannot be properly used unless either (1) confidence has been reposed on the person charged, as where the latter is a solicitor, trustee, guardian, etc, or (2) unless the influence of the man exercising it is such that the person influenced stands in some sort of respect, awe or fear of him.

Where a legacy bequeathed by a Will or a gift *inter vivos* is sought to be set aside on the ground of undue influence, it is not sufficient to prove that the legatee was in a position to exercise influence, but it must also be proved that the influence was unduly exercised, the burden of proving this latter circumstance being on the party attacking the legacy.

Courts do not look with favour on attempts to attack bequests on the ground of undue influence. M RAJARAJESWARA SETHUPATHI AVERGAL *v.* KUPPUSAMI IYER, 41 M. L. J. 474; (1921) M. W. N. 722 352

——s. 23—*Mortgage—Consideration—Promise to abandon prosecution of non-compoundable criminal case.*

Where the consideration of a mortgage-bond is an agreement on the part of the mortgagee to abandon the prosecution of the mortgagor in a non-compoundable criminal case the bond is void, even if part of the consideration of the bond was good in law. C KARUNA KRISHNA *v.* RAKHALDAS 721

——s. 23, operation of. *See* GOVERNMENT SERVANT 648

——s. 25 (3)—*Bond executed by Hindu father in lieu of time-barred debt—Contract, validity of—Sons, liability of, on death of father.*

It is within the competency of a Hindu father to execute a bond in lieu of a time-barred debt, and the bond amounts to a valid contract against him, under section 25 (3) of the Contract Act; on his death, therefore, his sons are liable to pay the money which he was bound to pay. A RAM KISHAN RAI *v.* CHHEDI RAI, 20 A. L. J. 577; 44 A. 628; (1922) A. I. R. (A.) 402 235

——s. 63—*Acceptance of smaller sum than amount due—Discharge—Presumption—Question of fact.*

Where a plaintiff agrees to accept a smaller sum in full payment of the amount due to him, it is not open to him to go behind that admission and claim the recovery of the balance. On the other hand, if he does not agree to accept that amount in full satisfaction of his claim, he cannot claim the benefit of section 63 of the Contract Act, for that section only applies where a promisee agrees to remit wholly or in part the performance of a promise made to him or accepts instead of it any satisfaction which he thinks fit.

Where a debtor sends to his creditor a cheque for a smaller amount than what he owes, the mere retention and encashment of the cheque by the creditor, who at the same time refuses to receive the amount in full discharge of the payment of the debt, does not raise any conclusive presumption that he had accepted the cheque as a conditional offer by the debtor,

A finding that a plaintiff did not really agree to accept a smaller sum in full discharge of his debt a question of fact. **A** BASDEO RAM SARUP *v.* DILSUKHRAI SEWAK RAM, 20 A. L. J. 717; (1922) A. I. R. (A.) 461 **783**

——— ss. 63, 73—*Sale of goods—Extension of time—Breach—Damages, measure of.*

Section 63 of the Contract Act does not entitle a promisee for his own purposes and without the consent of the promisor to extend the time for the performance of the contract to his own advantage. There must be an agreement or mutual understanding to waive.

The measure of damages in a case of non-delivery of goods contracted to be sold is the sum by which the contract price falls short of the price at which the purchaser might have obtained goods of like quality at the time when the goods should have been delivered **L** ASMAT ULLAH *v.* BIHARI LAL & SONS **912**

——— ss. 69, 70—*Sale of* dar-patni *in execution of decree for arrears of rent against some only of* dar-patnidars—*Sale set aside by deposit of decretal amount by co-sharer—Contribution, suit for.*

The plaintiff and the defendants were co-sharers in a *dar-patni* which had been sold by the *patnidar* in execution of a decree obtained in a suit for arrears of rent in which the plaintiff had not been made a party. The plaintiff had the sale set aside by depositing the decretal amount together with the statutory compensation due to the auction-purchaser. In a suit by the plaintiff for contribution against the defendants:

Held, that the suit was maintainable under section 70 of the Contract Act, and not under section 69, and the defendants were liable to contribute in respect of the amount due under the decree as also towards the statutory compensation. **C** KANGAL CHANDRA PAL *v.* GOPINATH PAL, 24 C. W. N. 1068 **104**

——— s. 73. *See* CONTINGENT CONTRACT **720**

——— s. 73. *See* INTEREST **678**

——— s. 74. *See* INTEREST **497**

——— s. 74—*Penalty, nature of—Damages for breach of contract stated in agreement—Damages, award of.*

A penalty clause in a contract providing for the payment of a fixed sum of money by the person committing a breach of the same should not be looked upon as a mere *brutum fulmen*, an agreement that neither party had any intention of enforcing at all to any extent. The object of such a clause is to fix a maximum for damages which would be difficult to estimate in money. Therefore, even if a Court is not disposed to enforce such a clause this would not deprive the aggrieved party of his right to damages that he has actually suffered. **N** BALAJI *v.* SUKAMIYA **605**

——— s. 78—*Contract to purchase ascertained goods—Delivery postponed by agreement—Property in goods, when passes—Suit to recover price of goods, maintainability of.*

When a purchaser of goods agrees to take the goods as ascertained, but at his request delivery is postponed, the property in the goods passes to the purchaser, under section 78 of the Contract Act, as soon as the proposal for sale is accepted, and a suit to recover the price of goods is maintainable. **A** DWARKA DAS-AJODHYA PRASAD *v.* RAM RATAN, 20 A. L. J. 679; (1922) A. I. R. (A. 458 **239**

——— s. 78—*Sale—Specific or ascertained goods—Seller and buyer, position of.*

Where specific goods are sold and agreed to be delivered wholesale at a certain rate, it is for the buyer to get the goods weighed and delivered to him and the latter cannot by delay in weighing the goods prevent the transfer of the ownership to him.

The sale of an entire heap of bark stored in a godown approximately of a certain weight, is, practically, a sale of specific or ascertained goods within the meaning of section 78 of the Contract Act, and the seller is entitled to claim the price, less earnest-money, if any, already paid therefor. **O** ANNAN *v.* DUBAR, 9 O. L. J. 339; 4 U. P. L. R. (J. C.) 95 **969**

——— Ch. IX, s. 151—*Hotel-keeper and guest—Hotel-keeper, liabilities of, by what law regulated—Theft of property of guest—Hotel-keeper, liability of.*

The liabilities of a hotel-keeper in India to his guests are regulated by the Contract Act, and not by the Common Law of England in force against innkeepers, and in the absence of any specific agreement in a given case, the rules in Ch. IX of the Contract Act are applicable.

It is the duty of a hotel-keeper to keep his premises in such a condition of safety as would reasonably prevent theft and take such care of the property of his guests as a man of ordinary prudence would, under the circumstances, take of his own goods. Where he fails in such a duty, he is, in case of a theft of the property of a guest, liable for its value. **A** JAN AND SON *v.* CAMERON, 20 A. L. J. 728; (1922) A. I. R. (A.) 471; 4 U. P. L. R. (A.) 214 **679**

——— s. 178—*Documents of title—Railway Receipts, negotiability of—Transfer of Property Act (IV of 1882), s 137, scope of.*

Railway Receipts are "Mercantile Documents of Title to Goods" within the meaning of section 178 of the Contract Act, but they are not by law negotiable: in order to give them the attribute of negotiability, it must be established by the custom of merchants that they are treated as negotiable in the particular trade and at the particular place where the claim to negotiability is advanced. From the mere fact that they have acquired the attribute of negotiability in one City in a particular trade, it does not follow that they are invested with that attribute in another City in an altogether different trade.

Section 137 of the Transfer of Property Act merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made. In order that such a transfer should, in the case of Railway Receipts, have the effect of transferring the ownership of the goods, it must be established that they are negotiable. They are not negotiable by law, nor are they rendered negotiable by section 137 of the Transfer of Property Act. **L B** ARUNACHALAM CHETTY *v.* PO KO YAN, 11 L. B. R. 341 **694**

Contract Act—contd.

——— **s. 231, cl. (1),** application of. *See* HINDU LAW—JOINT FAMILY **462**

——— **s. 238**—*Principal and agent—Fraud or misappropriation by agent—Liability of principal—Fraud need not be for principal's benefit.*

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This is in accordance with the law as enacted in section 238 of the Indian Contract Act. There is nothing in that section to show that, in order to render the principal liable, the fraud must be committed for the benefit of the principal.

Defendants Nos. 2 to 4 who were *manjhis* or boatmen, as agents of defendant No. 1, the owner of the boat, entered into a contract with the plaintiff to carry his goods from one place to another. The goods having been misappropriated on the way by defendants Nos 2 to 4 the present suit was brought for the recovery of the price thereof:

Held, that the defendant No. 1 (and not defendants Nos 2 to 4 only) was liable for the loss occasioned to the plaintiff's goods by reason of the goods having been misappropriated by his agents, the defendants Nos. 2 to 4, as there was no question that the goods were entrusted to them and were being carried by them in the course of their business when the misappropriation took place **C** DINA BANDHU SAHA *v.* ABDUL LATIF, 27 C. W. N. 18 **439**

——— **s. 253 (10)**—*Limitation Act (IX of 1908), Sch. I, Art. 106—Dissolution of partnership—Death of partner—Contract to continue partnership.*

Section 253 (10) of the Contract Act, which provides for the dissolution of a partnership on the death of a partner, must be read as qualified by the introductory words "in the absence of any contract to the contrary."

Where parties to a contract agree expressly or by necessary implication to continue the partnership, as if no dissolution had taken place, upon the death of one of them, a suit for accounts would not be barred under Art. 106, Sch. I, to the Limitation Act. **L** HARI CHAND *v.* JUGAL KISHORE, (1922) A. I. R. (L.) 349 **722**

——— **s. 264**—*Partnership, dissolution of—Notice, absence of, effect of—"Persons dealing with firm," meaning of—Retirement of partner—Liability.*

Section 264 of the Contract Act is an illustration of a particular form of estoppel by conduct, and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of notice excited in him a belief which caused him to do something that he would not otherwise have done. The section must not be construed as an absolute proposition of law but must be read with section 115 of the Evidence Act.

The expression "persons dealing with a firm" in section 264 of the Contract Act, indicates only such persons who have been in the habit of dealing with the firm previously. The section does not contemplate such persons who deal with a firm for the first time after the retirement of some of the partners.

Where a partner retires from the partnership and the remaining partners carry on the business of the

Contract Act—concld.

firm under the old name and style, the fact that the business is so carried on does not make the partner who has retired liable for the transactions entered into subsequent to his retirement. **L** BICHHIA LAL *v.* MUNSHI RAM **932**

Contribution, suit for. *See* CONTRACT ACT, 1872, ss. 69, 70 **104**

Conveyance, *forms of, in Mofassil.*

In India the forms of conveyance are not strictly observed, especially in the Mofassil. **M** VAITHINATHA AIYAR *v.* THEYAGARAJA AIYAR, 41 M. L J. 20 **631**

Conviction—*Proof.*

An accused person must be convicted upon evidence which is on the record and on nothing else.

A conviction cannot be based upon evidence which it is believed the witnesses might have given but have not in fact given. **L** MURAD *v.* EMPEROR, 23 CR L. J. 606 **830**

——— *Separate sentences—Solitary confinement—Period spent in lock-up.*

Where a person is convicted of separate offences, separate sentences of solitary confinement are not illegal, but as a matter of practice a sentence of more than three months' solitary confinement should not be passed on a person convicted at one trial of more offences than one

A Magistrate in awarding a sentence has no jurisdiction to direct that any portion of the period during which the accused has been detained in custody as an under-trial prisoner should count as part of the sentence. **L** DANGAR KHAN *v.* EMPEROR 23 CR L. J. 593 **817**

Co-sharer—*Suit for partition—Limitation—Possession of one co-sharer, when adverse to the others—Exclusion and ouster—Knowledge.*

There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy: and if no notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights

The possession of one co-owner is the possession of all for the purpose of limitation, although the sole possession of one co-owner for a very long period may, having regard to other circumstances, show exclusion or ouster. The principle does not depend upon whether the parties are members of a joint family but rests upon the ground that they are co-owners, and is applicable to all cases of co-owners.

In order to prove dispossession of one co-sharer by another it must be shown that there was exclusion or ouster to the knowledge of the former. **C** JOGENDRA NATH MUKHERJEE *v.* RAJENDRA NATH BHATTACHARJEE, 26 C. W. N. 850; (1922) A I. R. (C.) 54 **200**

Co-sharer landlords—*Suit for possession against trespasser—One co-sharer, whether may sue to recover entire holding.*

One of several joint owners of a holding cannot bring a suit for possession of the entire holding

Co-sharer landlords—concld.

where the person in occupation of the land is not a tenant but a mere trespasser He can only sue for possession of his own share. L DIPA *v.* LAL CHAND, 69 P.L R 1922; (1922) A. I R. (L.) 393 **428**

Costs, *award of, in revision cases—Revision creature of Statute.*

A High Court has no power to grant costs to the successful party on a revision petition brought by a private prosecutor against an acquittal

Where a Statute gives a Court power to grant costs in specific instances and the same Statute gives the Court its whole criminal jurisdiction, it excludes any other right of granting costs. The Code of Criminal Procedure excludes any such right except where it confers it specifically, *viz.*, among others, under sections 148, 434, 485, 526 and 545.

Per *Coutts-Trotter, J.*—Revision is not an inherent power of any Court, the whole machinery of revision is a creature of Statute and has to be found within the four walls of the Code of Criminal Procedure, and a Court cannot posit an inherent power to supplement that purely statutory machinery by assuming the power of supplementing it by the awarding of costs. M SANKARALINGA MUDALIAR *v* NARAYANA MUDALIAR, 16 L W. 413; 43 M. L J. 361; (1922) M. W. N. 579; 31 M. L. T. 342; 23 CR L J 583; (1922) A. I. R. (M.) 502 **615**

—— in proceedings under s 145. *See* CRIMINAL PROCEDURE CODE, 1898, ss 1 5, 148 **44**

—— *Question of principle—Second appeal.*

When the question is one of principle a second appeal lies to the High Court on the question of costs only. C RAMESH CHANDRA SIRKAR *v* CHANDRA GUHA DEB BARUA, 35 C. L. J. 156 **600**

—— *Taxation—Appeal preferred in case where none allowed—Appeal, dismissal of—Counsel's fees, taxation of—Refresher, if allowable—Rules and Orders of the Original Side, Calcutta High Court, Chap. XXXVI, r 57.*

When an appeal is preferred in a case where no appeal lies, the fees of only one Counsel should, having regard to the provisions of Chapter XXVI, r 57, be allowed on taxation on the dismissal of the appeal. No refreshers, too, are allowable in such a case C SARAT CHANDRA *v.* BIRAJ MOHUN, 26 C. W. N. 826 **451**

Court Fees Act (VII of 1870), ss. 5, 7 (iv) (c)—*Taxing Officer, decision of, final—Value of suit—Plaintiff to fix value—Arbitrary or incorrect value—Suit under s 7 (iv), valuation of—"Confirmation of possession," meaning of.*

The Taxing Officer of a High Court has jurisdiction to fix the amount of the Court-fee payable on a memorandum of appeal to that Court, and if he decides that the value put by the appellant upon the relief is incorrect, he has the power to correct it, and the High Court has no jurisdiction to interfere with his decision, even though he has done something which the law does not allow him to do.

Section 7, clause *(iv) (c)* of the Court Fees Act requires that the plaintiff shall truly state the value of his relief, but it is not open to him to give an arbitrary and incorrect valuation.

In the absence of rules framed under the Suits Valuation Act for the value of an interest in land

Court Fees Act—contd.

which is the subject-matter of a suit under section 7, clause *(iv)* of the Court Fees Act, the value of the suit is the value of the subject-matter of the relief, that is to say, the money value of the loss which the plaintiff apprehends.

The words "confirmation of possession" mean and include a prayer for recovery of possession if the Court thinks the plaintiff is out of possession, and is, therefore, consequential relief within the meaning of section 7 *(iv) (c)* of the Court Fees Act. Pat RAM SEKHAR PRASAD SINGH *v.* SHEONANDAN DUBEY, (1922) PAT. 337 **316**

—— **s. 7 cls. (iv) (c) and (v)**—*Alienation by widow—Gift—Reversioner's suit for possession after widow's death—Declaratory decree—Consequential relief—Unnecessary prayer for relief—Duty of Court—Interpretation of Statutes—Fiscal Act—Relief asked for necessary or unnecessary—Court-fee.*

Per *Special Bench, (Coutts, J.* dissenting):—Where a plaintiff claims relief, to which he is not entitled until some decree or alienation of property which stands in his way has been avoided, or until his legal character or title, which has been called in question, has been declared by a decree of the Court, his suit is one for a declaratory decree with consequential relief and comes under clause *(iv) (c)* of section 7 of the Court Fees Act, even though the declaration, which it is necessary for him to obtain before the further relief can be granted, has not been in terms asked for in the plaint. But where such a declaration is not necessary to enable the plaintiff to obtain possession of property or other relief for which the suit is really brought, the suit does not fall under clause *(iv) (c)* merely because a declaratory decree is sought. The prayer for such a decree should be treated by the Court as a mere surplusage.

In a suit by a reversioner on the death of a widow to recover possession of immoveable property of her husband from her donee, it is unnecessary for the plaintiff to seek a declaration that the gift is not binding on him And even if such an unnecessary declaration is asked for the suit comes under clause *(v)* and not under clause *(iv) (c)*, section 7, Court Fees Act.

The Court is, in all cases, bound to adjudicate upon the matters in issue between the parties and it is unnecessary for the parties to pray that this should be done

Per *Coutts, J*—The Court Fees Act is a purely fiscal Act, and in deciding what Court-fee is payable on a plaint the question whether any relief asked for is necessary or not does not arise Pat RAMASUMRAN PRASAD *v* GOBIND DAS (1931) PAT 29; 4 U. P. L R. (PAT) 75; 3 P. L T 704 **700**

—— **s. 7 cls. (iv) (c), (v) (a)**—*Suit for cancellation of sale-deed and possession—Suit essentially for recovery of possession—Property in suit assessed to revenue—Valuation for purposes of Court-fee—Decree for possession—Appeal—Court-fee.*

The share of the plaintiff in a joint property was sold by his co-sharer without his concurrence The suit, which he brought, however, instead of being framed as one for recovery of possession pure and simple, asked for the cancellation of the sale-deed

Court Fees Act—contd.

as well. The property being *Zemindari* property, the plaintiff valued the suit for purposes of jurisdiction at Rs. 10,000 but paid Court-fee on ten times the Government revenue under section 7 *(v) (a)* of the Court Fees Act which worked out only at Rs. 75. The lower Court gave a decree for possession merely and the defendant appealed, also paying Rs 75 as Court-fee. On a stamp reference that the suit as well the appeal should have been assessed under section 7 *(iv) (c)* of the Court Fees Act on the stated value of the property:

Held, (1) that the essential relief sought being recovery of possession, the suit could have been framed for recovery of possession pure and simple:

(2) that it was against the intention of the legislature that in a suit or appeal where the question in issue is the possession of land assessed to revenue, the valuation of the property for purposes of the Court-fee assessment should be otherwise than under section 7 *(v)* of the Court Fees Act;

(3) that, however, the plaint as worded fell within the purview of section 7 *(iv) (c)* and the plaintiff must pay Court-fee accordingly unless he was permitted to amend either *(a)* the plaint itself or *(b)* the statement of "the amount at which the relief sought is valued" in the said plaintiff at the hearing of the appeal:

(4) that the position of the appellant was different who was entitled to appeal against the decree as it stood and to value his appeal for purposes of Court-fee under section 7 *(v) (a)* of the Court Fees Act. **A** RUP NARAIN *v.* ISHWA NATH SINGH, 20 A. L. J. 857; 4 U. P. L. R. (A.) 192; 44 A. 628; (1922) A. I. R. (A.) 858 **265**

——— s. 7 (v), Schs. I and II—*Decree directing payment of certain amount as condition precedent to getting possession—Appeal against the conditional order—Court-fee payable.*

Where, in a suit for possession, the Court decrees possession on condition of the plaintiff paying a specified amount to the defendant, and the plaintiff appeals, the memorandum of appeal is chargeable with Court-fees calculated *ad valorem* on the amount from which he seeks to escape liability.

The value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which a party wishes to get rid of. **M** PORKODI ACHI, *In re*, 14 L. W. 624 41 M. L. J. 57; (1921) M. W. N. 854; 30 M. L. T. 88; 45 M. 246; (1922) A. I. R. (M.) 211 **444**

——— s. 7 (v) (c)—*"Garden," what is—Garden assessed to revenue with house, suit in respect of—Court-fee*

Where a sale-deed describes the thing sold as a garden together with a house and out-houses and trees of all kinds, the property sold is a garden within the meaning of section 7 *(v) (c)* of the Court Fees Act and even though the same be assessed to land revenue a suit, in respect of it, must, for the purposes of the Court Fees Act, be assessed at its market value and not on ten times the amount of the revenue. **L** BEHARI LAL *v.* NAND LAL, 2 L. L. J. 362 **345**

——— s. 17, *applicability of. See* VALUATION OF SUIT **226**

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——— Sch. II, Art. 6—*Security bond by claimant in claim case—Stamp duty payable.*

A security-bond given by a claimant in a claim case agreeing to be liable for a certain sum of money in case he failed to produce the property attached, should bear a Court-fee stamp of eight annas under Art. 6, Sch II, of the Court Fees Act **C** SARBO MUSSALMANI *v.* SAFAR MANDAL **730**

Court of Wards Act (IV of 1912), s. 45—*Ward of Court, death of—Property retained under superintendence by Court of Wards—Successor of ward, whether disqualified from incurring liability.*

Where a Court of Wards takes under its superintendence the property of a disqualified proprietor, and on the death of that person retains superintendence over the property under section 45 of the Court of Wards Act, the successor to the property of the deceased does not thereby become a Ward of Courts, and is not disqualified from incurring any liability which might affect the property after the debts and liabilities of the deceased have been discharged **A** DALEEP SINGH *v.* KHURSHED HUSSAIN, 20 A. L. J. 75; (1922) A. I. R. (A.) 459; 4 U. P. L. R. (A.) 216 **747**

Criminal Procedure Code (Act V of 1898), ss. 4 (h) 199—*Penal Code (Act XLV of 1860), s. 498—Enticing married woman, charge of—Complaint to Police, if sufficient.*

A "complaint" within the meaning of s 4 *(h)* of the Criminal Procedure Code can only be made to a Magistrate Therefore a complaint to the Police of an offence under section 498, Indian Penal Code, is not sufficient for the purposes of section 199 of the Criminal Procedure Code. **M** ARUMUGA MUDALIAR, *v.* EMPEROR, 16 L. W. 494; 31 M. L. T. 251; 43 M. L. J. 564; (1922) M. W. N. 801; 23 CR. L. J. 592 **624**

——— ss. 54, 59, 60, 177, 491—*Martial Law Ordinance (II of 1921), cls 6, 16—Offence committed in Martial Law area—Arrest of offender outside area, legality of—Summary Magistrate, remand by, of offender arrested outside Martial Law area, legality of*—Habeas corpus, *writ of—Jurisdiction of High Court.*

It is not illegal for a Summary Magistrate appointed under Martial Law Ordinance II of 1921 to remand a person arrested by the Police outside the Martial Law area but charged with the commission of coguizable offences within the said area Nor is the arrest by the Police outside the area illegal, as the Police only purport to exercise powers vested in them under the Criminal Procedure Code.

The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law The Courts constituted under the Ordinance will follow, as far as possible, the procedure laid down in the Code

Per *Spencer, J.*—The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender, may be found that determines the Court which has jurisdiction to try the offence.

Quære.—Whether the jurisdiction of the High Court to issue writs of *habeas corpus* is not excluded by clause 16 of Martial Law Ordinance II of 1921,

Criminal Procedure Code—contd.

Per *Kumarasawami Sastri, J.*—Clause 16 of the Martial Law Ordinance does not refer to the general jurisdiction of the High Court to issue writs of *habeas corpus*. The section does not apply where the acts of the Martial Law Magistrates are wholly without jurisdiction.

A Magistrate appointed under clause 6 of the Ordinance cannot try offences committed outside the Martial Law area or hold Court outside. But where he has powers as a Magistrate under the Criminal Procedure Code, there is nothing in the Ordinance to prevent the exercise of functions assigned to such Magistrate outside the area when the proceedings have not reached the stage of a trial but are only in the course of investigation preliminary to the offender being charged before a Magistrate.

When a Magistrate, who is vested with more than one power, under one of which only he has power to order a remand, purports to act in the exercise of another power which gives him no authority to do so, the case is one of irregularity which can be curred by the amendment of the order where there is no prejudice to the accused. **M** KOCHUNNI ELAYA NAIR, *In re*, 41 M. L J. 411; 14 L. W. 465; (1921) M. W. N. 708; 45 M. 14; 23 CR. L. J. 490; (1922) A. I. R. (M.) 215 **26**

——— **s. 103.** *See* PUBLIC GAMBLING ACT, 1867, ss. 3, 4, 5 **845**

——— **ss. 107, 145**—*Dispute about land—Complainant out of possession—Proceedings justified under s 145—Opposite party, whether may be bound over under s. 107.*

A dispute about land which would justify proceedings under section 145 of the Code of Criminal Procedure does not bar proceedings under section 107 of that Code. But if the complainant is out of possession of the land in dispute, and there is no danger of a breach of the peace unless he resumes possession, he should be referred to his remedies under section 145 of the Code of Criminal Procedure or in the Civil Courts, and the facts that his attempting to resume possession may cause a breach of the peace and that his dispossession was illegal are not sufficient grounds for binding over the opposite party to keep the peace. **N** DHUMA *v.* EMPEROR, 23 CR. L. J. 567 **407**

——— **ss. 107, 514**—*Proceedings under s. 514 initiated within period of bond—Expiry of period under bond no bar to prosecution.*

Where proceedings under section 514 of the Criminal Procedure Code are initiated within the period prescribed in a bond furnished under section 107 of the Code, the expiry of the period before the completion of the case is no legal bar to its prosecution under section 514 of the Code. **A** UMA DUTT MISIR *v.* EMPEROR, 20 A. L. J. 693; 44 A. 657; 23 CR. L. J. 623; (1922) A. I. R. (A.) 503 **847**

——— **s. 110**—*Sureties—General repute, hearsay evidence of, inadmissible.*

A Court is not justified in refusing as "unfit" persons who are offered as sureties under section 110 of the Criminal Procedure Code, on mere hearsay evidence of general repute, especially where the sureties offered are men of means and have sufficient influence to exercise control over the persons required to furnish security. **O** SHEOPAL *v.* EMPEROR, 9 O. L. J. 353; 4 U. P. L. R. (J. C.) 92; 23 CR. L. J. 639; (192) A. I. R (L. C) 227 **959**

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——— **ss. 133, 137, 537**—*Conditional order under s 133—Enquiry referred to another Magistrate—Final order passed by First Magistrate—Illegality—Consent of parties, effect of.*

It is open to a Magistrate making an order under section 133, Criminal Procedure Code, to direct the party to appear before himself or before some other Magistrate of the First or Second Class at a certain time and place to be fixed by the Court. If, however, he orders the party to appear before himself, he cannot refer the matter for enquiry to some other Magistrate and then pass the final order on the report submitted by that Magistrate. It is incumbent upon him, under section 137 of the Code, to himself take evidence as in a summons case.

The failure to act according to the manner abovementioned vitiates the final order and even the consent of the parties cannot cure the illegality.

Per *Shah, J.*—The record of evidence by one Magistrate and decision thereon by another is opposed to the scheme and provisions of the Criminal Procedure Code bearing on the point. **B** *In re* KARIYAPPA NINGAPPA, 24 BOM. L. R. 807; 23 CR. L. J. 587; (1922) A. I. R. (B) 384 **619**

——— **s. 144**, *scope of—Order under section, when may be rescinded—High Court, power of, to interfere—"Made under this section", meaning of—"Alter or rescind," meaning of—Possession, dispute as to, remedy, proper—Proceeding under s. 144—Magistrate, power of, to convert, into inquiry under s. 145—High Court, when to be resorted to.*

Clause (1) of section 144 of the Criminal Procedure Code is not confined to cases where there has been a change of circumstances since the original order was made, and, although a Magistrate ought not to interfere with an order once made under the section unless very good reasons are disclosed for doing so, he may rescind such an order, if he is satisfied that it ought never to have been made.

Per *Mullick, J.*—The expression "made under this section" in clause (1) of section 144 of the Criminal Procedure Code, means, "legally made or purporting to be made" under this section.

Section 144 of the Criminal Procedure Code is of general aplication and contains nothing which ousts the Magistrate's jurisdiction in cases of *bona fide* dispute as to possession of land. But where section 107 or section 145 will meet the requirements of the case, section 144 is not an appropriate remedy, and ought not to be used as a substitute for those sections.

The words "alter or rescind" in clause (1) of section 144, Criminal Procedure Code, clearly empower a District Magistrate to modify or cancel an order under that section upon any ground whatsoever.

Per *Jwala Prasad, J.*—When one party is clearly in the wrong and threatens to usurp the rights of another who is in actual possession of the land in dispute, the proper remedy is an order under section 144 or section 107 of the Criminal Procedure Code.

Where in a proceeding under section 144, Criminal Procedure Code, a Magistrate comes to the conclusion that there is a *bona fide* dispute as to the possession of the parties, then he is bound

to start an enquiry under section 145 either in continuation of his order under section 144 or in supersession thereof, for section 145 is the only section under which an enquiry in the case of a danger of a breach of the peace concerning a dispute as to land can be made.

The words "rescind or alter" in clause (4) of section 144 are wide enough to vest the Magistrates mentioned in that clause with unlimited power to deal with an order passed under clause 1 of the section on the question of jurisdiction as well as upon the merits.

Ordinarily, a party should exhaust all remedies in the Courts below before he comes to the High Court. This is a very desirable practice, but there is, however, no absolute bar in law to the party coming direct to the High Court under section 107 of the Government of India Act. **Pat** SHEBALAK SINGH *v.* KAMARUDDIN MANDAL, 3 P. L. T. 573; (1922) PAT. 241; 4 U. P. L. R. (PAT.) 57; 23 CR. L. J. 549; (1922, A. I. R. (PAT.) 435 **149**

——— ss. 144, 145—*Proceedings under s. 144—District Magistrate, jurisdiction of, to direct substitution of proceedings under s 145—Procedure.*

A District Magistrate setting aside an order by a Subordinate Magistrate under section 144 of the Criminal Procedure Code, has no jurisdiction to direct him to substitute therefor a proceeding under section 145 of the Code As the Superior Court, the District Magistrate can only recommend to the Magistrate concerned to draw up a proceeding under section 145, if he is satisfied that the dispute is likely to cause a breach of the peace, and it is open to the Magistrate to look into the circumstances and to find out whether, in the circumstances of the case, a proceeding under section 145 of the Code should or should not be instituted **Pat** TILOKI RAI *v.* EMPEROR, 2 P. L. T. 392; 23 CR. L. J. 498 **4**

——— s. 145, *dispute relating to claim to weigh grain and realise weighment dues, whether covered by*

A claim to weigh grain in a market and realise the weighment dues is not covered by section 145 of the Criminal Procedure Code. **A** MAQBUL AHMAD *v.* EMPEROR, 20 A. L. J. 663; (1922) A. I. R. (A.) 430; 23 CR. L. J. 612 **836**

——— s. 145, *proceedings under—Attachment of property by Deputy Magistrate—District Magistrate, jurisdiction of, to interfere—Procedure.*

An order passed by a Deputy Magistrate in a proceeding under section 145 of the Criminal Procedure Code cannot be upset by the District Magistrate; the remedy is to move the High Court in revision, or to go to the Civil Court for a decision of the claims of the parties. **Pat** RAMKUMAR LAL *v.* THAKUR OJHA, 4 U. P. L. R. (PAT.) 57; (1922) PAT. 224; 3 P. L. T. 648 23 CR. L. J. 562; (1922) A. I. R. (PAT.) 554 **402**

——— ss. 145, 148 - *Costs in proceedings under s. 145—Jurisdiction.*

In awarding costs in proceedings under section 145, Criminal Procedure Code, a Magistrate is restricted to the amount awarded as Pleader's fees (if any) and costs for witnesses; any order about costs passed arbitrarily is without jurisdiction and must be set aside. **Pat** HIRA MAHTON *v.* RAJKUMAR MARTAN, 3 P. L. T. 484; 23 CR. L. J. 558 **44**

——— s. 110—*Security for good behaviour—Powers when to be used.*

The powers conferred by section 110, Criminal Procedure Code, ought to be exercised very sparingly and in those cases only where the evidence is very clear and precise. Evidence of general repute, or that the person proceeded against has a bad character, without any specific instances, is not sufficient to justify an order against him under section 110 nor would the fact that on three occasions - the last one being sixteen years ago—he has been required to furnish security. **L** JAGAT SINGH *v.* EMPEROR, 2 L. L. J. 237; 23 CR. L. J. 507 **43**

——— ss. 164, 364—*Incomplete* chalan—*Statement of accused, record of, by Magistrate—Section applicable—Confession—Informal procedure, effect of—Dead body, pointing out of.*

If an incomplete *chalan* is sent up and the evidence available is recorded by a Magistrate, the statement made by the accused is not a statement made under section 164 of the Code of Criminal Procedure but a statement recorded under section 364 of the Code

Where proceedings as to the recording of a confession are not in conflict with any section of the Criminal Procedure Code, the confession of the accused person should not be rejected simply on the ground of informality of procedure

The mere pointing out of the dead body by the accused would not by itself be sufficient evidence for sustaining a conviction for murder, but it would be otherwise where the accused fails to explain how he came by his knowledge of the place where the body lay **L** BHAI KHAN *v.* EMPEROR, 4 L. L. J. 229; (1922) A. I. R. (L.) 189; 23 CR. L. J. 617 **841**

——— s. 179. *See* INCOME TAX ACT, 1918, s 40 **843**

——— s. 195—*Sanction to prosecute—Application by person not party to suit.*

No Court should entertain an application for sanction to prosecute made under section 195 of the Code of Criminal Procedure by a person, not a public servant, who was not a party to the suit out of which the proceedings have arisen. **L** PRABH DIAL *v.* GURDIT SINGH, 4 L. L. J. 89; 22 CR. L. J. 510; (1922) A. I. R. (L.) 94 **46**

——— ss. 195, 407 (2)—*Sanction to prosecute, refusal of Magistrate specially empowered to hear appeals, if can grant sanction.*

A Magistrate of the First Class upon whom special powers of appeal have been conferred by the provisions of section 407 (2) of the Code of Criminal Procedure, is not a Court to which an appeal "ordinarily" lies under section 195 (7) of the Code from the orders of a Magistrate exercising Second Class powers.

Accordingly, where sanction to prosecute under section 195 of the Code is refused by a Magistrate of the Second Class it is not open to a Magistrate specially empowered under section 407 (2) of the Code to hear appeals to grant the sanction on appeal. **L** JIWANI *v.* EMPEROR, 2 L. L. J. 660; 23 CR. L. J. 572 **412**

——— ss. 195, 476—*Grounds of inquiry—Duty of Court.*

If a Court believes that a false charge has been made in proceedings before it and there is a fair possibility

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that enquiry will lead to the discovery of evidence sufficient to make a conviction highly probable these are grounds for an enquiry of which section 476 of the Criminal Procedure Code speaks, and the Court fails in its duty if it does not hold an enquiry of its own motion under that section and leaves it to be taken by a party under section 195 of the Criminal Procedure Code. **N** TULSIRAM *v.* TILOKCHAND, 24 CR L. J. 605 **829**

——— ss. 195, 476—*Jurisdiction of Court to investigate offence committed before it, after transfer of case—Revision—High Court, duty of.*

If a Court is of opinion that there is ground for enquiry into any offence referred to in section 195 of the Criminal Procedure Code committed before it in the course of a judicial proceeding, it can proceed under section 476 of the Code even though the case has passed out of its hands and been decided by another Court which has arrived at a different conclusion on the merits.

In such a case, however, when the matter is brought to the notice of the High Court in revision it is its duty to satisfy itself that there has been no unreasonable delay, that the order passed under section 476 is not vexatious and that the charges are not of a flimsy character. **A** SUNDAR LAL *v.* EMPEROR, 20 A. L. J. 666; (1922 A. I. R. (A.) 233; 41 A. 642; 23 CR. L. J. 603 **827**

——— s. 195 (1) (a)—*Public servant, order of, disobeyed—Public servant also Court—Sanction to prosecute—Subordination for purposes of sanction*

Under clause *(a)*, sub section (1), of section 195, if a public servant making the order is a Court, in respect of that order, the Court to which that Court would be subordinate would be the Court to which appeals would ordinarily lie. **B** BADIUDDIN SARFUDDIN, *In re*, 24 BOM. L. R. 810; 23 CR. L. J. 576 **416**

——— ss. 195 (6), 439—*"Any sanction given or refused," meaning of—Order of Sessions Judge passed on application against order of Subordinate Court—High Court's power of interference—Inveterate enmity between parties—Sanction, whether should be given.*

The words "any sanction given or refused" under section 195 (6) of the Criminal Procedure Code are applicable only to a sanction given or refused upon an original application, and sub-section (6) does not provide for interference by a third Court. Consequently, the High Court has no power to interfere under that section with an order granting or refusing sanction passed by a Sessions Judge on an application against the order of a Subordinate Court.

A High Court has, however, power to interfere with such an order of the Sessions Judge in the exercise of its revisional jurisdiction under section 439 of the Criminal Procedure Code.

Where there is inveterate enmity between parties, it is neither desirable nor in the interests of justice that sanction to prosecute should be granted. **O** NAZIR HASAN *v.* MOHAMMAD YAMIN, 9 O. L. J. 282; 23 CR. L. J. 574; (1922) A. I. R. (J. C.) 225 **414**

——— s. 195 (7)—*Sanction to prosecute—Judge of High Court exercising Original Civil Jurisdiction, refusing to grant sanction—Appeal, forum of.*

A Judge of a High Court sitting in the exercise of Original Civil Jurisdiction is a Court subject to the Appellate Jurisdiction of that High Court, so where a Judge in the exercise of such jurisdiction grants, or refuses to grant, sanction to prosecute, an appeal lies by virtue of clause 7) of section 195 of the Criminal Procedure Code, to the same High Court, on the Appellate Side

Per *Shah, C. J. Quære*:—Whether an order refusing to grant sanction to prosecute under section 195, Criminal Procedure Code, is a judgment within the meaning of clause 15 of the Bombay High Court Letters Patent **B** ABDUL LATIF *v* TAR MAHOMED, 24 BOM. L. R. 817; 23 CR. L. J. 497 **33**

——— s. 193—*Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Husband minor—Complaint by father-in-law.*

Except where the husband of a woman is absent and she is left in the care of her father-in-law, the latter cannot lodge a complaint under section 498 of the Penal Code in respect of enticing the woman away, even though the husband may be a minor.

There is nothing to prevent a minor husband from lodging a complaint under section 498 of the Penal Code. **L** WALIA *v.* EMPEROR, (1922 A. I. R. (L.) 168; 23 CR. L. J. 613 **837**

——— s. 209—*Case triable by Sessions Court—Inquiry—Committing Magistrate, power of, to discharge.*

Where in the course of an inquiry held by a Magistrate into a case triable by the Court of Session he finds that the evidence tendered by the prosecution is totally unworthy of credit, it is his duty, under section 209 of the Criminal Procedure Code, to discharge the accused. **L** AHMAD *v.* EMPEROR, 23 CR. L. J. 601; 4 U. P. L. R. (L.) 108 **825**

——— s. 250 (Prov.)—*Compensation to accused—Duty of Magistrate to hear complainant—Absence of complainant on days of hearing—Effect.*

A Magistrate is bound to hear the complainant before making any order against him under proviso to section 250 of the Criminal Procedure Code.

No inference can be drawn against the complainant from the mere fact that he has been absenting himself on the appointed days of hearing. **B** MAHADEV RAMKRISHNA KARKARE, *In re*, 24 BOM. L. R. 605; 23 CR. L. J. 574; (1922) A. I. R. (B.) 409 **414**

——— s. 288—*Statement made before Committing Magistrate—Transfer to Sessions record.*

The Sessions Court has absolute discretion to allow the statement of a witness made before the Committing Magistrate to be transferred to its own record under section 288 of the Criminal Procedure Code, but it should not allow the statement to be read out to the witness before the defence has had an opportunity of cross-examining him. **L** NARAIN DAS *v.* EMPEROR, 4 L. L. J. 91; 3 L. 144; 9 P. W. R. 1922 CR.; 23 CR. L. J. 513; (1922 A. I. R. (L.) 1 **113**

——— ss. 366, 367, 435, 439, 537—*Judgment—Order directing release of accused—Full judgment, delivery of, later—Irregularity*

Where a Sessions Judge agreeing with the assessors simply makes an endorsement that the accused is acquitted and directs that he be set at liberty and writes the full text of his judgment assigning reasons for his order a few days later, he commits an irregularity under section 537 of the Code of Criminal Procedure, but such irregularity does not vitiate

Criminal Procedure Code—contd.

the proceedings. M SANKARALINGA KUDALIAR *v.* NARAYANA MUDALIAR, 16 L. W. 413; 43 M. L. J. 33; (1922 M. W. N. 579; 31 M. L. T. 342; 23 CR. L. J. 583; (1922) A. I. R. (M.) 703 615

——— **s. 370 (1)**—*Judgment not stating reasons for finding.*

A Criminal Court should, in its judgment, state reasons for its finding as required by section 370 (1), Criminal Procedure Code M VARADARAJULU PILLA, *In re*, 16 L. W. 826; 31 M. L. T. 430, 23 CR. L. J. 702 826

——— **s. 421**—*Appeal through Jail Authorities summarily rejected—Appeal subsequently through Counsel, whether entertainable*

An order dismissing an appeal under section 421 of the Criminal Procedure Code is a final order, therefore, where a petition of appeal by a prisoner in Jail is received through the Superintendent of the Jail and is summarily rejected, he is not entitled to be heard upon a petition of appeal presented subsequently on his behalf by Counsel. A KHIALI *v.* EMPEROR, 20 A. L. J. 759; 23 CR. L. J. 505; 4 U. P. L. R. (A.) 163; (1922) A. I. R. A. 430 41

——— **s. 435**—*District Magistrate as Court of Appeal, whether inferior to Sessions Judge*

A District Magistrate sitting as a Court of Appeal is an inferior Criminal Court to the Sessions Court for the purposes of section 435 of the Criminal Procedure Code L KALLU *v.* EMPEROR, 3 L. 23; (1922) A. I. R. (L.) 85; 23 CR. L. J. 507 609

——— **s. 437**—*Order of discharge—Further inquiry, direction of, when justified—Improper direction—Revision*

The essential matter for consideration in setting aside an order of discharge and directing a further inquiry under section 437, Criminal Procedure Code, is the prospect of any public advantage from the case being re opened Where there is no such prospect, by reason of the comparatively insignificant character of the offence, of the considerable time which has elapsed since its commission and of the evidence being of no special strength, an order directing further inquiry would be without jurisdiction and liable to be set aside by the High Court in revision. M KRISHNA PILLAI, *In re*, 16 L. W. 555; 43 M. L. J. 655; 31 M. L. T. 419; 25 CR. L. J. 600 824

——— **s. 476**—*Sanction to prosecute—Perjury—Forgery—Duty of Court—Sanction to private persons.*

It is the duty of every Court to take action of its own motion in every apparent case of forgery or perjury which is committed before it, or is brought to its notice, and to institute proceedings in all such cases if there is a reasonable probability of the prosecution resulting in a conviction

If a Court holds that a case is a proper one for prosecution but that a sanction to prosecute should not be granted to a private person, it is its duty to take action under section 476 of the Criminal Procedure Code.

If a sanction has been granted to a private person it is too late to substitute official agency for the prosecution by means of a complaint under section 476 of the Act. N GANGA PRASAD *v.* SHYAMLAL, 23 CR. L. J. 600 45

——— **s. 522**—*Criminal force essential to confer jurisdiction—Appellate Court, finding of, that force not used—Possession, order for, reversal of.*

The use of criminal force is an essential ingredient to give Criminal Courts jurisdiction to act under section 522 of the Criminal Procedure Code. Where, therefore, an Appellate Court reverses a conviction on the ground that no force was used, it ought also to reverse the order awarding possession, and to restore the parties to their original positions M RAJATHAMMAL *v.* RAJAMANIKKAM PILAY, 15 L. W. 533; (1922) M. W. N. 356 31 M. L. T. 20; 23 CR. L. J. 502; (1922) A. I. R. M. 188 33

——— **s. 537.** *See* CIVIL PROCEDURE CODE, 1908, O XVIII, RR 5, 6 36

Criminal proceedings, *stay of—Civil suit—Subject-matter of both identical—Cheating—Charge, contents of.*

Where the subject-matter in both a criminal proceeding and a civil suit is identical, and the main questions for decision are the same, the criminal proceedings should be stayed, pending the decision of the civil suit, if the same was brought without undue delay.

Obiter.—In framing a charge for cheating, the manner in which the alleged cheating was committed should be set out. L JANKI DAS *v.* EMPEROR, 23 CR. L. J. 595; 38 P. L. R. 1922; 4 L. L. J. 409; (1922) A. I. R. (L.) 124 819

Criminal revision. *See* PRACTICE 32

Cross-objections—*Petition stating reasons for supporting decree—Court-fees, payment of.*

If, for the purpose of supporting the decree of the Trial Court dismissing the plaintiff's claim, the defendant files a petition in the Appellate Court stating the reasons on which he supported the decree, that would not amount to cross-objections for which an *ad valorem* Court-fee would be payable. A RAM PRASAD KALWAR *v.* AJANASIA, 44 A. 577; (1922) A. I. R. (A.) 250 861

Custom—*Exclusion of daughters, whether amounts to their exclusion from mother's or maternal grandmother's property—Strict proof of custom necessary.*

The existence of a custom of the exclusion of daughters and their issue from inheriting their father's or maternal grandfather's property, as the case may be, does not lead to a necessary inference of the exclusion of the same from their mother's or maternal grandmother's property, without strict proof of such a custom. O BIJAI BAHADUR SINGH *v.* MATHURA SINGH, 9 O. L. J. 327; 4 U. P. L. R. (J. C.) 66; (1922) A. I. R. (J. C.) 278 555

——— *Succession—Exclusion of half blood—Janjuhas of Shadia, Tahsil and District Mianwali.*

Among *Janjuhas* of Shadia, Tahsil and District Mianwali, the whole blood excludes the half blood in cases of collateral succession L KHUDA YAR *v.* AMIR, (1922) A. I. R. L. 169 681

——— *Succession—Jats of Ludhiana District—Daughter-in-law, whether succeeds along with son.*

Among Jats of the Ludhiana District the widow of a predeceased son succeeds to the property of her father-in-law along with the latter's surviving sons. L JAGIR SINGH *v.* SANTI, 3 L. 181 711

——— *Succession—Non-proprietors.*

By ordinary village custom a near collateral is entitled to retain possession of the house of a deceased *Kamin* in the village *abadi* in preference to a proprietor.

Custom—concld.

A collateral in the third degree is 'a near collateral' within the meaning of this rule.

Where the custom of a particular village is uncertain, the rule of general custom should be applied. **L** HARJAS v. HARKE, 46 P. L. R. 1922; (1922) A. I. R. (L.) 306 **885**

——— *Succession—Non-proprietor—Grandson of first cousin.*

As a general rule, a grandson of a first cousin has no right to succeed to the rights of a non-proprietor in a village. **L** SHER DIL v. GHULAB **767**

——— *Succession—Re-marriage of widow—Issue, whether legitimate*—Manjh Rajputs *of Jagraon Tahsil, Ludhiana District.*

Although among certain sections of *Manjh Rajputs* of the Jagraon Tahsil, in the Ludhiana District, the re-marriage of widows is not recognised, yet where such a re-marriage takes place the issue of the marriage are legitimate and have an equal right of succession to the property of their father, along with the issue of any other marriage. **L** MAULA BAKHSH KHAN v FATEH JANG, (1922) A. I. R. (L.) 358 **857**

——— *Succession—Right of predeceased appointed hair's son.*

In the absence of a special custom to the contrary, the son of an appointed heir who predeceased the appointer is not entitled to succeed to the property of the latter. **L** MELA SINGH v. GURDAS, 3 L. 262 **853**

——— *Succession—Self-acquired property—Sonless proprietor—Daughter, whether excluded by collaterals*—Gill Jats *of Amritsar District—Property originally ancestral, purchase of, by collateral*

Where property, originally ancestral, is acquired by a collateral, other than by descent or through relationship to a common ancestor, it loses its ancestral character in the hands of the collateral.

Among Gill *Jats* of the Amritsar District daughters are not excluded by collaterals from succeeding to the self-acquired property of a sonless proprietor.

Ordinarily, daughters exclude collaterals in succession to self-acquired property, the onus of proving a custom opposed to the general custom is, therefore, on the collaterals. **L** GURDIT SINGH v. ISHAR KAUR, 3 L. 257; (1922) A. I. R. (L.) 392 **551**

——— *Widow, act of, prejudicing estate—Creation of occupancy rights—Reversioner, position of.*

An act of a widow prejudicing the estate of her deceased husband is not binding on the reversioners except for the life of the widow, and the reversioners are not bound to contest the widow's act during her lifetime.

The creation of occupancy rights by a widow, being a transfer of valuable rights, can be challenged by the reversioner. **L** NAND SINGH v. DHAN KAUR, 2 L. L. J. 573 **299**

——— *Widow—Partition.*

A widow governed by agricultural custom and having only a life-estate in the land left by her husband is entitled to claim partition in cases in which she cannot secure the full enjoyment of her rights other wise. **L** SHADI v. JEONI, 3 L. 236; (1922) A. I. R. (L.) 362 **553**

Cutchi Memons—*Succession—Hindu Law, applicability of—Ancestral property, son, whether takes vested interest in.*

The application of the rules of Hindu Law by custom to Cutchi Memons is limited to rules of inheritance and succession, and does not extend to the rules relating to the joint property as applicable to Hindus.

A son of a Cutchi Memon has no vested interest by birth in the ancestral property of his father, and dealings with the property belonging to Cutchi Memons are conducted on this basis. **B** HAJI OOSMAN HAJI ISMAIL v. HAROON SALLEH MAHOMED, 24 BOM. L. R. 978 **862**

Decree, *fictitious, if requires to be set aside.*

A decree which is fictitious does not require to be set aside. **C** SASHI KUMAR SORKHEL v. CHANDRA KUMAR SAMADDAR, 35 C. L. J. 318 **322**

——— *mortgage, for foreclosure of village—Khudkasht fields specified—Decree-holder, whether can claim field not specified*

If a mortgage-decree foreclosing a village specifies particular *khudkasht* fields by their number and does not refer in a general way to lands held in *khudkasht* right it is not open to the decree-holder to claim a particular field not specified in the decree. **N** H ZARILAL v. HAZARIMAL **476**

Deed, *alteration of—Explanatory alteration immaterial—Deed not vitiated.*

A deed is vitiated and deprived of all its effect by the making in it of a material alteration without the knowledge of the party affected by it. But the alteration must be material, the mere addition to a deed of words explaining it, would not vitiate it. **N** GANGA PRASAD v. MOTIRAM, (1922) A. I. R. (N.) 191 **268**

Definitions:—

Against a Carrier for losing or injuring goods. *See* LIMITATION ACT, 1908, SCH. I, ARTS. 30, 31 **981**

Agent duly authorised. *See* LIMITATION ACT, 1908, s. 20 **100**

Alter or rescind. *See* CRIMINAL PROCEDURE CODE, 1898, s. 141, SCOPE OF **149**

Any sanction given or refused. *See* CRIMINAL PROCEDURE CODE, SS. 195 (1), 439 **414**

Appeal. *See* LIMITATION ACT, 1908, SCH. I, ART. 182 (2) **728**

Confirmation of possession. *See* COURT FEES ACT, 1870, ss. 5, 7 *(iv) (c)* **316**

Co-sharer. *See* U. P. LAND REVENUE ACT, 1901, s 107 **989**

Creditor. *See* PROVINCIAL INSOLVENCY ACT **460**

Engagements. *See* ABWAB **161**

Execution of Law. *See* POLICE ACT, 1861, ss. 30, 30A, 32, SCOPE OF **945**

Garden. *See* COURT FEES ACT, 1870, s. 7 *(v) (c)* **345**

Holding. *See* MADRAS ESTATES LAND ACT, 3 (3) **907**

Include. *See* PENAL CODE, ss. 361 EXP. 366 **620**

Law. *See* POLICE ACT, 1861, ss. 30, 30A 30A, SCOPE OF **945**

Made under this section. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 144, SCOPE OF **149**

Definitions—concld.

Malik. *See* HINDU LAW 555
Marketable Title. *See* SPECIFIC RELIEF ACT, 1877, s. 25 562
May apply. *See* CIVIL PROCEDURE CODE, 1908, s. 50, O. XXI 667
Moveable. *See* LIMITATION ACT, 1908, SCH I, ARTS, 89, 115, 116, 132 562
Opium *See* OPIUM ACT, 1878, ss. 3, 9 612
Orasa. *See* BUDDHIST LAW—BURMESE 49
Ordinary Law. *See* OUDH ESTATES ACT, 1869, ss 22 (1), 23 1000
Person against whom. *See* CIVIL PROCEDURE CODE, 1908, O XXI, R 103 271
Physical possession. *See* PUNJAB PREEMPTION ACT, 1913, s. 20 811
Plaintiff. *See* LIMITATION ACT, 1908, SCH. I, ART 9 352
Premises. *See* CALCUTTA RENT ACT, 1920 907
Price. *See* TRANSFER OF PROPERTY ACT, 1882 ss 9, 54, 118 687
Provable debt. *See* PROVINCIAL INSOLVENCY ACT, 1920 340
Public place. *See* PUBLIC GAMBLING ACT, 1867, s. 13 613
Rajaswa. *See* CESS ACT, 1880, s. 41 937
Resistance. *See* POLICE ACT, ss. 30, 30A, 32, SCOPE OF 945
Right to sue. *See* CIVIL PROCEDURE CODE, 1908, O XXII, RR 3, 10 942
Sir. *See* WILL—INTERPRETATION 876
Sirat. *See* WILL—INTERPRETATION 876
Sirat Makbuza. *See* WILL—INTERPRETATION 876
So far as it relates to the suit. 232
Street. PUNJAB MUNICIPAL ACT, 1911, ss 3 (13), 172, 193 675
Successor. *See* MUHAMMADAN LAW—SUNNI ACT, 254
Sufficient Cause. *See* LIMITATION 1908, s 5 812
——— *See* CIVIL PROCEDURE CODE, 1908, O. IX, R 13 971
Tenant. *See* CALCUTTA RENT ACT, 1920, s 11 361
Wrongful gain. *See* PENAL CODE, 1860, ss. 21 (10), 24, 403, 405 157
Wrongful loss. *See* PENAL CODE, 1860, 21 (10) 24, 403, 405 157
Wrongful loss. *See* CATTLE TRESSPASS ACT, 1871 47

Dharmakartha, *position of.*

The position of a *dharmakartha* is not that of a *shebait* of a religious institution, or of a *mahant* of a *mutt*, which functionaries have a much higher right with larger power of disposal and administration and have a personal interest of a beneficial character.

A *dharmakartha* is literally and no more than the manager of a charity and his rights are never in a higher legal category than that of a mere trustee. **P. C.** SRINIVASA CHARIAR *v.* EVALAPPA MUDALIAR, 31 M. L. T. 1; 16 L. W. 247; 45 B. 565; 43 M. L. J. 536; 24 BOM. L. R. 1214; (1922) A. I. R. (P. C.) 325; 36 C. L. J. 574 1

Divorce Act (IV of 1869)—*Divorce, suit for—Husband or wife, uncorroborated evidence of, if sufficient—Adultery, charge of, against known person—Necessary co-respondent.*

In an action for divorce under the Divorce Act, the evidence of the husband or wife alone ought never to be accepted without corroboration either by witnesses, or at least by strong surrounding circumstances.

Where charges of adultery are made against a known person, that person must be made a co-respondent unless the Judge otherwise directs. M PENDURTI JOSEPH *v.* PENDURTI RAMAMMA, 43 M. L. J. 441; (1922) M. W. N. 637; 16 L. W. 689; 31 M. L. T. 416 931

Document, *admission of—Appellate Court, duty of.*

When a document is admitted in evidence at the appellate stage and is relied upon by the Appellate Court in its judgment, it ought to record an order admitting the document in evidence and should also record its reasons for admitting it in the appellate stage. **C** AMBICA CHARAN SEN *v.* GIRISH CHANDRA SEN 719

——— *Construction—Sale by legal and beneficial owner—Suit for specific performance—Limitation—Limitation Act (IX of 1908), Sch I, Art. 113.*

The suit villages originally belonged to the plaintiff's deceased father. They were sold in Court auction in 1879 and purchased by the defendant. The plaintiff alleged that this purchase was made on behalf of the plaintiff's father, that a part of the purchase-money was paid out of his funds and the balance obtained from one *K* to whom the suit villages were sold by the defendant subject to a condition of re-conveyance on payment of a stipulated sum. A suit to compel such re-conveyance was instituted and a decree directing the re-conveyance obtained in 1889. In 1885 during the pendency of the suit an agreement was entered into between the plaintiff's father and the first defendant which recited :—

"Under these circumstances, under the orders of *M* (plaintiff's father) the accounts were looked into in respect of items due to *S*, first defendant, relating to the said villages, and also relating to the transactions between *S* and *M*. On looking into the accounts the amount found due to *S* was Rs. 99,568-4-3. *S* consented to receive the same and sell the aforesaid villages to *M*." The agreement further stated that on the defendant's succeeding in his suit against *K*. he should sell the suit property to the plaintiff's father on payment of the sum found due to the defendant. There was also a stipulation in the contract for the payment of interest until payment of the sum above mentioned and for the plaintiff's father's giving a mortgage to the defendant to secure the payment of the sum. The plaintiff in 1909 instituted the present suit for possession of the villages on payment of such sum, if any, as may be found due :

Held, that whatever might have been the nature of the original purchase by the defendant, the contract of 1885 treated him as the beneficial and legal owner and the plaintiff's suit, being one for the specific performance of a contract, was barred by Art. 113 of the Indian Limitation Act. **P. C.** SUBBARAYA PILLAI *v.* VENKATA PERUMAL, 16 L. W. 169; 31 M. L. T. 140; 45 M. 645; (1922) A. I. R. (P. C.) 345 172

Document—concld.

———, *interpretation of—Will—Power to sell, whether includes power to mortgage.*

Where by a Will power is given to sell property to pay off debts, that power includes the power to mortgage, unless there be some reason to be gathered from the will itself why it should be excluded. **M** PARTHASARATHI NAIDU *v* MUKUNDAMMAL, 43 M. L. J 551; 16 L W. 670; (1922) M. W. N. 729; 45 M. 867 **856**

———, *proof of, waived—Effect of wavier.*

Formal proof of a document when it is required to be proved in a certain way may be waived by any of the parties whose interests it may affect, but such waiver would not affect the legal character of the document **Pat** BAIJNATH SINGH *v.* BRIJRAJ KUER, (1922) A. I. R. (PAT.) 514 **383**

Easement—*Rights to go on another's land to gather fruit—Right unknown to law.*

The right to go on to a neighbour's land to collect the fruit of a tree which falls therefrom from such portion of a tree which belongs to the asserter of such right is not an easement within the meaning of the Easements Act. Such a right is unknown to the law. **M** SARANGAPANY IYENGAR *v.* SADAGOPA NAIDU, 16 L. W. 98; (1922) M. W. N. 421; 3 M. L. T 78; 43 M. L. J. 152 (1922) A. I. R. (M) 398 **968**

Easements Act (V of 1882), s. 60—*License—Personal—Successor or transferee of grantor not bound—Revocation, notice of.*

A license under the Easements Act is of a personal character, not merely as regards the grantee but also as regards the grantor. With the latter's death it comes to an end and his successor is entitled to treat the licensee as a trespasser even without a notice of revocation. **N** KARELAL *v.* BADRIPRASAD, 18 N. L. R. 76 (1922) A. I. R. (N.) 162 **107**

Ejectment of tenant—*Tenancy right, extinction of.*

Ejectment of a tenant merely extinguishes the tenancy right, it does not transfer it to the ejector. **N** GANPAT TELI *v.* DAJI **855**

Endowments—*Temple property—Origin traceable to trust—Conversion by trustee*—Onus *on trustee.*

Where the discoverable origins of property show it to be trust property, the *onus* of establishing that it must have illegitimately come into the trustee's own right does not rest upon the beneficiaries The *onus* lies heavily on the trustee to show by the clearest and most unimpeachable evidence the legitimacy of his personal acquisition

In the absence of unique circumstances, a property discovered to be originally trust property, cannot be allowed to be converted into the private property of the trustee. **P. C.** SRINIVASA CHARIAR *v.* EVALAPPA MUDALIAR, 31 M. L. T. J; 16 L. W. 247; 45 B. 165; 43 M. L J. 536; 24 BOM. L. R. 12 4; (1922) A I R. (P C.) 325; 26 C. L. J. 524 **1**

Estates Partition Act (V B. C. of 1897), ss. 7, 99—*Joint estate—Partition by private arrangement—Tenure, creation of—Partition, regular, under Act—Tenure, voidance of.*

Section 99 of the Estates Partition Act has no application to a case where the tenure sought to be avoided was created by a co-sharer in respect of land allotted to him under a private partition and which was held by him in severalty at the time of the creation of the tenure.

The main test of the applicability of section 99 is holding the land in severalty under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under section 7 of the Act **C** PROSANNA KUMAR BEDANTA TIRTHA BHATTACHARJYA *v.* MADHU BADYA **500**

Evidence, *admissibility of—Copy of copy when admissible.*

Where a copy of a person's statement is a copy of a copy, it is inadmissible in evidence, except when the statement has been put to the person making it and admitted as having been made by him. **O** PARBATI *v.* MUHAMMAD HADI, 9 O. L. J. 304 **534**

———, *admissibility of—Document, invalidly registered.*

A deed which is not legally registered is invalid and a nullity and as such is inadmissible in evidence. **L** HAR BHAGWAN *v.* HUKAM SINGH, 4 L. L. J 245; 3 L. 242; (1922) A. I. R. (L) 243 **769**

———, *admissibility of—Recitals of boundaries in documents between third parties, if admissible—Evidence Act (I of 1872), ss. 11, 13, 32 (3).*

Recitals of boundaries in documents between third parties where they throw light on the question of the ownership of the property in suit are not admissible in evidence under section 11 or 13 of the Evidence Act. But they may be admissible under clause (3) of section 32 of the Act when they are the statements made by persons of the character described in the opening sentence of that section, that is to say, persons who are dead or who cannot be found or for other reasons there stated cannot be examined as witnesses. **C** ABDUL RAHIM *v.* JONABALI SIKDAR **329**

———, *admissibility of—Unstamped receipt—Secondary evidence—Payment, independent proof of.*

An unstamped receipt cannot be proved at all either by primary or by secondary evidence. But in order to prove the payment, evidence other than the document is not excluded by the existence of the document. **N** RAMPRASAD *v.* NATHURAM **494**

——— *Burden of proof, question of, when immaterial.*

The question of *onus* of proof loses its importance when both parties to a litigation have adduced evidence in support of their respective cases and the Court, on an examination of such evidence, shifts the burden of proof from one party to the other. **C** SHIB CHANDRA SINGHA *v* GOUR CHANDRA PAL, 35 C. L. J. 473; (1922) A. I. R (C.) 160; 27 C. W. N. 184 **86**

——— *Document relevant as evidence of transaction—Recitals, if and when relevant.*

Where a document containing assertions by a person who is alive is admitted in evidence as evidence of a transaction, the recitals in the document do not become part of the evidence unless the person making the assertions is brought before the Court. **C** NEHAR BEWA *v* KADOR BAKAS MOHAMMED **282**

——— *Entire evidence before Court—Question of onus academical.*

Evidence—concld.

Where the entire evidence on both sides is once before a Court, the question as to onus becomes purely academical **P. C.** CHIDAMBARA SANNADHIGAL *v* VEERAMA REDDI, 31 M L. T. 54; 16 L. W. 102; 45 M. 588; (1922) M. W. N 749, 43 M. L. J. 619; (1922) A. I. R (P. C.) 292 **538**

——— *Evidence, improper, admitted—Exclusion by High Court—High Court, appraisement of remaining evidence by.*

It is not possible for the High Court in second appeal to say whether, after the exclusion of evidence improperly admitted, there is sufficient evidence left to justify the decree of the lower Appellate Court. This is a matter which must be considered by that Court. **C** UJIR ALI SIRDAR *v.* SHADHAI BEHARA, 35 C. L. J. 182; (1922) A. I. R. (C) 185 **1003**

Evidence Act (I of 1872), ss. 11, 13, 32 (3). *See* EVIDENCE, ADMISSIBILITY OF **329**

——— **ss. 11, 13, 32 (2)**—*Documents containing recitals as to boundaries, admissibility of—Persons making them alive and testifying to them—Documents, admissibility of, whether affected.*

Documents not *inter partes* containing recitals as to boundaries and throwing light on the question of the ownership of the property in suit, are not admissible under section 11 or section 13 of the Evidence Act, but are admissible under section 32 (2) of that Act. The mere fact that the persons concerned in the transactions are alive and actually testify to them, would not render such documents inadmissible. **N** TRIMBAK *v.* GANESH **314**

——— **ss. 13, 35,** applicability of. *See* LANDLORD AND TENANT **676**

——— **ss. 18, 21, 32 (5)**—*Relevancy of statement about relationship—Means of special knowledge—Statement by deceased person as to his adoption while small child—Admission under s. 18, relevancy of.*

The statement of a person made when he was thirty-six years of age that he was adopted when he was four years old is admissible in evidence after his death to prove the fact of his adoption under section 32 (5) of the Evidence Act, as he possessed the special means of knowledge about the relationship required by the section. The fact that the person making the adoption died while the person adopted was too young to remember him would not be material, as the latter would surely be able to declare positively that he had been adopted from that acquaintance with the history of his family which he would necessarily possess.

Section 18 of the Evidence Act does not by itself make relevant the admissions therein mentioned. **N** GULAB THAKUR *v* FADALI **566**

——— **s. 24**—*"Person in authority," if include the prosecutor—Confession suspected to be obtained by inducement—Prosecution to show that confession freely made*

The words "person in authority" in section 24 of the Evidence Act include the prosecutor.

If, in the circumstances of a case, it appears to the Court that there is reason to suspect that a confession was obtained by inducement so as to bring it under the provisions of section 24 of the Evidence Act, the prosecution, to make the confession admissible in evidence against the accused, must show that it was freely made. **C** ASHTOSH DUTT *v.* EMPEROR, 26 C. W. N. 54; 23 CR. L. J. 573 **413**

Evidence Act—contd.

——— **s. 27**—*Confession—Material corroboration.*

The discovery of the dead body of a person, alleged to have been murdered, at a place indicated in a confession, would be material corroboration of the confession, but where it is difficult to say whether the discovery was made before the confession or afterwards the confession ought not to be accepted. **O** HINGA *v* EMPEROR, 9 O. L. J. 190; 4 U. P. L. R. (J. C.) 50; 23 CR L. J. 481; 1922) A. I. R. (N) 202 **17**

——— **ss. 68, 69, 70, 71.** *See* ATTESTED DOCUMENT **86**

——— **s. 91**—*Ejectment suit—Tenants pleading permanency—Settlement papers not produced—Oral evidence—Inference of lease being temporary—Tenant building while landlord stands by—Estoppel.*

In an ejectment suit where the tenant pleads permanency of title but does not produce settlement papers in support of it, section 91 of the Evidence Act prevents him from giving any oral evidence at all as to the terms of the settlement of land with him and the only inference that can be drawn is that his lease is temporary and that he is a tenant-at-will.

In such a case if the landlord stands by while the tenant builds his house, there can be no question of estoppel because the tenant knows his rights perfectly well and any inaction on the part of the landlord cannot deceive him.

Obiter.—Where by the terms of a lease no power whatsoever is given to the tenant to erect anything in the nature of a permanent building and the landlord either by his omission to interfere or by his active intervention encourages the tenant in the mistaken idea that he has power to build such a house and that he has permanent interest in the land, the landlord cannot afterwards turn round and say that he had only a temporary interest.

In such case it must also be shown that the landlord was aware of what his rights were and had power to prevent the tenant from building. **Pat** BUDHAN TELI *v.* MADAN MOHAN LAL, 3 P. L. T. 485 **653**

——— **s. 92**—*Pro-note—Separate oral agreement to pay additional interest, whether provable*

Where in a suit on a promissory-note the plaintiff alleges an oral agreement to pay interest at a higher rate than mentioned in the pro-note, he is not entitled to prove the alleged oral agreement by parol evidence. **O** HABIB ALI KHAN *v* RAM NARAYAN, 9 O. L. J. 273; 4 U. P. L. R. (J. C.) 69; (1922) A. I. R. (J. C.) 270 **520**

——— **s. 92**—*Unconditional promise to pay—Oral agreement, calculated to make it conditional, admissibility of.*

Where there is an absolute, unconditional promise to pay a certain amount as liquidated damages, oral evidence of a contemporaneous agreement which has the effect of making it conditional and defeasible, is inadmissible. ... SUBBAYYAR *v.* SUBBARAYALUA IYER, 1921 M. W. N 736; 14 M. L. J 541 **75**

——— **ss. 105, 114 ill (b), 133, 154**—*Cross-examination of witness by party producing him—Accomplice—Corroboration.*

Evidence Act—contd.

A Public Prosecutor is not bound to produce witnesses whom he considers to be false and the Court should not allow him to cross-examine prosecution witnesses immediately they are produced.

The burden of proving the existence of circumstances bringing a case within any of the general exceptions of the Penal Code rests upon the accused and section 105 of the Evidence Act says the Court shall presume the absence of such circumstances.

Section 133 of the Evidence Act lays down the rule of law regarding the testimony of accomplices, and section 114, illustration *(b)*, is merely a guide to assist the Court, though in a vast majority of cases prudence requires that there shall be corroboration. No hard and fast rules can, however, be laid down to regulate the extent and nature of this corroboration, this being dependent entirely on the circumstances of each case.

The evidence of one approver cannot be said to corroborate that of another except where both have, at the earliest opportunity, and before there has been any chance of corroboration, deposed to the same acts as having been committed by a particular accused person.

The Court should insist on there being unanimity as to the incidents deposed to, or a sufficient number of them, by two approvers before their uncorroborated testimony is deemed sufficient to warrant a conviction thereon. **L** NARAIN DAS *v.* EMPEROR, 4 L. L. J. 91; 3 L. 144; 9 P. W. R. 1922 CR.; 23 CR. L. J. 513; (1922) A. I. R. (L.) 1 **113**

——— **s. 112**—*Presumption of paternity—Facts necessary to be proved.*

A person relying on the presumption of paternity under section 112 of the Evidence Act must establish all the facts mentioned in the section before he can ask the Court to treat them as conclusive proof of his paternity. **N** MAROTI *v.* BHAGI **465**

——— **s. 114**—*Presumption—Court, duty of—Document produced by obligor.*

When a document creating an obligation is produced by the obligor the strength of the presumption authorised by section 114 of the Evidence Act varies in different circumstances and the Court has to take into regard any facts or circumstances indicating that the document might have been stolen.

In a suit upon a bond if the latter is produced by the defendant with an endorsement of payment on it, the burden of establishing that the debt was still outstanding, or in other words, of showing that the bond came in the possession of the defendant by dishonest means and that the signatures to the endorsements were either forgeries or unauthorised, is on the plaintiff. **O** RAM NATH *v.* RAGGHA SAH, 25 O. C. 125; (1922) A. I. R. (N. 24) **892**

——— **s. 114, ill. (e)**—*Appeal—Objection taken in grounds of appeal not mentioned in judgment—Presumption.*

In illustration *(e)* of section 114 of the Evidence Act it is laid down that the Court may presume that judicial and official acts have been regularly performed, a presumption which, like all other presumptions, may be rebutted but, unless rebutted, is conclusive

Evidence Act—concld.

Where it is the duty of a Court to do a particular thing it must be assumed that the Judge of that Court did his duty.

It is the duty of a District Judge to record a finding on all points argued before him, and where a judgment makes no mention of an objection taken in the grounds of appeal, the presumption, in the absence of evidence to the contrary, is that the objection was abandoned. **L** ABDUL KARIM *v.* THAKAR RAM-JAGGU RAM **740**

——— **s. 120**—*Testimony of party to suit, value of—Omission to call important witness—Presumption.*

There is no rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit. When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness.

Per *Buckland, J.*—If a party wishes not to have a presumption raised against him by the fact that an important witness has not been called, he should exhaust to the utmost of his power every means to bring that witness before the Court. **C** JOGENDRA KRISHNA ROY *v.* KUPPAL HARSHI & Co, 35 C. L. J. 175; 49 C. 345 **993**

——— **s. 159**—*Police diary—Investigating Police Officer permitted to refer to, to refresh memory—Defence, right of, to inspect diary.*

When an Investigating Police Officer appears as a witness for the prosecution, and is permitted by the Magistrate to refresh his memory in respect of a particular question by referring to the Police diary, the accused is entitled to an inspection of that portion of the diary only from which the witness refreshed his memory, and not to the whole diary. **Pat** LACHMI SINGH *v.* EMPEROR, 3 P. L. T. 562; 23 CR. L. J. 591; (1922) A. I. R. (PAT.) 562 **623**

Execution of decree—*Application for issue of notice—Step-in-aid of execution—Objection as to limitation not taken—Objection, if can be taken in subsequent proceedings*—Res judicata.

An application praying for issue of notice upon the judgment-debtor is an application in aid of execution.

Where after due notice upon the judgment-debtor the Court decides that the execution is in order and that it should proceed, it is not open to the judgment-debtor in subsequent execution proceedings to challenge that order and set up a plea that the previous execution proceedings were barred by limitation. **Pat** GOUR CHANDRA RAY *v.* JANARDAN PRASHAD THAKUR **337**

——— *Auction-sale—Reversioners not allowed to go behind decree.*

Where an alienee, who is an outsider, finds that the alienor's debt is a decretal debt, he need not make any further enquiry and the reversioners will not be allowed to go behind the decree This rule, however, does not apply where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances or where it is proved that he actually had knowledge of the bad faith of the decretal transaction. **L** RAN SINGH *v.* RULLIA, 3 L 139; (1922) A. I. R. (L. 299 **99**

Execution of decree—contd.

——— *Decree-holder seeking to certify payment made to him out of Court—Limitation—Application to certify payment, if must be distinct from application to execute decree—Civil Procedure Code (Act V of 1908), O XXI, r. 2 (1)—Limitation Act (IX of 1908), Sch I, Arts. 174, 181, application of.*

Where a decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor under sub-rule (1) of r. 2 of O. XXI of the Code of Civil Procedure, the Article of the Limitation Act applicable to an application for the purpose is Art. 181, and the right of the decree-holder to apply accrues as soon as he receives payment.

The Code of Civil Procedure does not prescribe that an application to certify payment by a judgment-debtor must necessarily be distinct from an application for execution of the decree; there can be no objection to a combined application embodying a two-fold prayer, namely, first, that the alleged payment be recorded, and secondly, that the decree be executed for the balance of the judgment-debt.

Art. 174 of Schedule I to the Limitation Act is applicable only to a case under sub-rule (2) of r. 2 of O. XXI of the Code of Civil Procedure. It has no application to a case under sub-rule (1). C BALEY MAHAMMAD SAHI v. AIJANMAI, 35 C. L. J. 71; 25 C. W. N. 529; (1922) A. I. R. (C.) 30 **780**

——— *Limitation—Application for execution, when may be treated as one in continuance or revival of a previous application.*

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction.

On the 24th June 1915 an application was made for the execution of a decree passed on the 26th June 1915, and the process and process-fees filed. The judgment-debtor filed a petition under O. XXI, r. 2 of the Code of Civil Procedure to the effect that the decree had been satisfied out of Court. This objection was numbered as a separate case. On the 9th December 1916 the objection case as well as the execution case came up for consideration. The objection case was dismissed for default. With regard to the execution case the following entry was made in the order sheet: "The Pleader for the decree-holder has no objection to his case being dismissed provided he gets his costs. The execution case is dismissed for default. The decree-holder will get his costs." In a subsequent application for execution of the decree presented on the 17th November 1919 objection having been taken by the judgment-debtor that the application was barred by limitation inasmuch as it was presented more than 3 years after the 24th June 1916, when the previous application for execution had been made:

Held, that as soon as the objection was abandoned, it became the duty of the Court to proceed with the application for execution so that the order for dismissal passed on the 9th December 1916 must be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court. Consequently, the subsequent application for execution was not barred by limitation. C AJODHYA NATH PAHARY v. SRINATH CHANDRA PAHARY, 35 C. L. J. 84; 26 C. W. N. 348 **207**

——— *Limitation—Execution stayed by order of Court—Period of stay, if can be deducted.*

In computing the period of limitation for an application for execution of a decree, the decree-holder is entitled to deduct the period during which the execution of the decree was stayed by an order of Court. C CHABU CHANDRA v. FANINDRA NARAIN **897**

Execution proceedings—*Execution application, dismissal of, in default—New application filed before dismissal—Proceedings, whether independent—Limitation, plea of, not raised in previous proceeding—Objection, whether entertainable in subsequent proceeding.*

Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

An application for the execution of a decree was made more than three years after the last application for execution. One of the judgment-debtors appeared and raised various objections but did not take any objection about limitation. This application was dismissed for want of prosecution. Before the dismissal of the above-mentioned application, another application for execution was made:

Held, (1) that the present application for execution was substantially an independent proceeding;

(2) that the judgment-debtor, not having raised an objection about limitation in the previous execution proceeding, was precluded from raising the said objection in regard to that execution in the present execution proceeding. O GANGA DIN v DIP SINGH, 25 O. C. 13; (1922) A. I. R. (J. C.) 117 **267**

———, *revival of—Execution, application for, defective—Defect immaterial—Application returned for amendment—Re-filed after expiry of limitation—Decree-holder prepared to fall back on previous application—Previous application, whether revives.*

On 25th September 1915 a preliminary decree for sale was passed. On 11th December 1918 the decree-holder made an application for the preparation of a final decree for sale, but since it was not correct, the Court returned it to the decree-holder on 21st December 1918 for amendment, without fixing any time for its presentation after amendment. The only amendment needed in the application was in respect of the amount claimable under the decree, which was entered less than what was actually due to the decree-holder, and a defective description of the mortgaged property. The decree-holder did not file the application after amendment till 29th May 1919, but was, however, prepared to accept a decree for the amount stated in the original application:

Held, that in view of the decree-holder's attitude the application dated 29th May 1919 was in any case an application for the continuation or revival of the

Execution proceedings—concld.

previous application and was, as such, not barred by time. A KALLU MAL v. KASHI NATH, 20 A. L. J. 880; 4 U. P. L. R. (A.) 190; (1922) A. I. R. (A.) 446 **175**

Execution sale—*Knocking down of property and acceptance of deposit by Nazir, whether make sale final—Discretion of Court to accept or reject bid—Civil Procedure Code (Act V of 1908), Sch. I, App. E, Form 29.*

An execution sale is not concluded when a property is knocked down to a bidder and the necessary deposit of 25 per cent. made by him and accepted by the Nazir. Having regard to the provisions of the third condition of sale set out in Form No. 29, Appendix E, of the First Schedule to the Civil Procedure Code, the Court has a discretion in the matter of accepting or rejecting the bid and the Court's order directing a re-sale of a property after it has been knocked down and the deposit accepted by the Nazir, is not without jurisdiction. C FAZIL MEAH v. PROSANNA KUMAR ROY **305**

Factum valet—*Mortgage—Foreclosure proceedings—Voluntary surrender by mortgagor of equity of redemption—Mortgagee in proprietary possession for great length of time—Redemption, suit for, on ground of defects in foreclosure proceedings and surrender, maintainability of—Adverse possession, plea of, by mortgagee.*

A mortgagee applied for foreclosure under Bengal Regulation XVII of 1806 but the case was consigned to the records before the period of one year's grace usually allowed for payment had expired. Subsequently, when the mortgagee was contemplating the filing of a suit for proprietary possession of the mortgaged property, the mortgagor voluntarily gave him possession and got mutation effected in his favour. The mortgagee remained in possession of the property for a number of years when the plaintiffs filed a suit contending that the surrender was not valid for want of registration and that they were entitled to redeem the mortgage on payment of the amounts due thereon:

Held, (i) that the subsequent proceedings taken by the mortgagor to deliver possession and get mutation effected in favour of the mortgagee operated as a surrender by the mortgagor of his equity of redemption in recognition of the validity of the previous foreclosure proceedings;

(ii) that even if there was any defect in the original foreclosure proceedings, the mortgage could not be treated as subsisting and the transaction re-opened after the lapse of a large number of years from the date when the equity of redemption was surrendered;

(iii) that even if the rights conferred by the private settlement were defective and inchoate or legally insufficient for the extinction of the equity of redemption, the acts of the parties had been such as to supply all defects; and

(iv) that although exclusive possession by a mortgagee for any length of time short of the statutory period of sixty years would not invest him with an adverse title, yet in this case the possession for more than 12 years of the mortgagee obtained *aliunde* in recognition of his proprietary right after the termination of the foreclosure proceedings operated as a bar

Factum valet—concld.

or defence to a suit for redemption, more so as by virtue of the mortgage the mortgagee was not entitled to possession of the mortgaged property. O BASHIR HUSAIN v. CHANDRAPAL SINGH, 25 O. C. 83; (1922) A. I. R. (O. C.) 133 **223**

Family Settlement—*Consideration.*

Although in a deed of family settlement the Court should not scan with much nicety the quantum of consideration, yet to make the compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge and with sufficient advice and protection.

A family arrangement to be operative must be without fraud; it would not be supported if founded on mistake of either party to which the opposite party was an accessory, or if either party has been misled by the concealment of material things, for the essence of the matter is mutual communication of all relevant circumstances. C SATIS CHANDRA GHOSH v. KALIDASI DASI, 34 C. L. J. 529; 26 C. W. N. 177; (1922) A. I. R. (C.) 203 **577**

Father, if representative. *See* REGISTRATION ACT, 1877, ss. 3, 74 **754**

Finding *as to custom—Finding not disputable in second appeal without certificate—Punjab Courts Act (VI of 1918), s. 41, 3.*

When the decision of a case depends upon a finding as to custom such decision cannot be disputed in second appeal without a certificate. L FATEH MUHAMMAD v. IMAM-UD-DIN, 2 L. L. J. 188 **106**

General Rules and Circular Orders of Calcutta High Court, Chap. XI r. 46, cls. (e) (f). *See* CIVIL PROCEDURE CODE, 1908, O. III, R. 4 (1), O. IX, R. 4 **659**

Gift—*Gift of income, whether gift of property.*

A gift of the income of a property without any limitation is a gift of the property itself. M VAITHINATHA AIYAR v. THEYAGARAJA AIYAR, 41 M. L. J. 20 **631**

——— *Intention—Gift to adopted son—Adoption declared invalid—Gift, validity of, how determined—Motive of donor—Construction of document—Reference to similar documents*

Where a person makes a gift to another describing him as his adopted son and the adoption turns out to be invalid, the validity of the gift depends upon the question whether the donor merely described the donee as his adopted son or intended that the validity of the gift should be conditional on the validity of the adoption.

The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances.

The Court should not strain to adopt a construction, which would defeat the intention of the testator, unless it is absolutely certain from the words of the Will that the testator intended to make the gift to the donee conditional on the adoption being valid.

A Hindu adopted his daughter's son *J.* Some nine years after the adoption he by Will made a gift of his property, "to my adopted son *J.*" After the death of the testator the adoption was declared

Gift—concld.

invalid and the question was about the validity of the gift:

Held, that it was clear that the testator made the gift out of natural love and affection and that in making his Will he merely described the donee as his adopted son in the ordinary course without intending that the gift should be conditional on the validity of his adoption.

The language of one instrument does not afford much assistance in the construction of another. B BAI DHONDUBAI *v.* LAXMANRAO TRIMBAKRAO JAVADEKAR, 24 BOM L. R 794; (1922) A. I R. (B.) 352 **504**

Government of India Act, 1915, s. 107. *See* CALCUTTA RENT ACT, 1920, ss. 15, 18 **274**

Government servant—*Acquisition of immoveable property* benami—*Government Servants Conduct Rules—Fraud—Public policy—Contract Act (IX of 1872), s. 23, operation of.*

The acquisition of an interest in immoveable property by a Government servant in the name of another to evade the rules made in that behalf for regulating the conduct of public servants, may be very reprehensible by reason of his violation of the said rules, but it cannot simply for that reason be described as fraudulent or opposed to public policy so as to attract the operation of the law laid down in section 23 of the Contract Act.

No Court can invent a new head of public policy or condemn an agreement because, in its opinion, it is not consistent with public interest.

Government Servants Conduct Rules are rules of conduct and not statutory prohibitions, so that a disregard of those rules does not necessarily taint transactions by Government servants with immorality or illegality. C DHIRENDRA KUMAR BOSE *v.* CHANDRA KANTA ROY, 36 C. L. J. 82 **648**

Guardian, *unauthorised, sale by—Suit for possession by minor—Compensation to vendee—Relegation of parties to original position—Specific Relief Act (I of 1877), ss 38, 41.*

An unauthorised guardian sold certain property of a minor. Out of the sale-proceeds certain other property of the minor was freed from a mortgage charge. In a suit by the minor for possession of the property, the vendee contended that the sale should be set aside only on the condition of his being compensated by the minor for the money that he had expended:

Held, (1) that as the action of the unauthorised guardian was *ultra vires*, the sale must be regarded as void *ab initio* and the minor must be given a decree for possession of the land free from all payments:

(2) that, however, having regard to the provisions of sections 38 and 41 of the Specific Relief Act, the parties were to be relegated to the position which they held before the deed of sale was executed. L FATEH KHAN *v.* LANGRA, 2 L. L. J. 154; 4 U P. L R. (L.) 91 **15**

Guardian and ward—*Court's duty—Minor's welfare.*

In matters of guardianship the main question for a Court is the welfare of the child and it need not assign the personal guardianship of the child to a person merely because, in other respects, he has the best title to be guardian. O GANGA JALI *v.* DIP NARAIN, 9 O. L. J. 325; (1922) A. I. R. (O. C.) 123 **553**

Guardians and Wards Act (VIII of 1890), s. 7—*Minor—Guardianship of property—Relatives desiring appointment of somebody else—Mother, claims of, if can be ignored.*

The bare desire of the relatives of a minor that some person other than the mother should be appointed a guardian of his property is not a sufficient reason for depriving the mother of her recognised claim to be the guardian of her minor child's property, if she is otherwise fit to be appointed as such by her character and capacity. N LAXMIBAI *v.* ABDUL KADIR **474**

——— **ss. 11, 13, 48**—*Application for appointment as guardian refused—No appeal—Second application by same person, whether entertainable—Application for appointment as guardian after removal of existing guardian, rejection of—Appeal—Procedure under Act, whether summary—Provisions of Act ignored—Material irregularity.*

Where an application for appointment as guardian of a minor is refused, and there is no appeal against the order of refusal, a subsequent application by the same person for a similar purpose, cannot be entertained.

No appeal lies from an order rejecting an application charging a guardian with misappropriation and asking for the appointment of the applicant as guardian, but it is open to the High Court to treat the appeal as an application for revision, under section 48 of the Guardians and Wards Act.

Proceedings under the Guardians and Wards Act are not intended to be summary, and the procedure of a District Judge in appointing a guardian would be materially irregular, if he ignored the procedure enacted in sections 11 and 13 of the Act, and failed to consider whether the guardian was by character and capacity a fit person, and whether his appointment was for the welfare of the minor. N GOPALRAO *v.* SHRAWAN **291**

——— **ss. 19, 25**—*Hindu father—Guardianship of minor son, application for—Application to be treated as one for custody.*

An application under section 19 of the Guardians and Wards Act by a Hindu father to be appointed the guardian of his minor son who is living with his mother is not competent, because, under the Hindu Law, the father is already the natural guardian of his minor son. Any such application should be treated as one made under section 25 of the Act for the custody of the minor and decided accordingly. B BAI TARA *v.* MOHANLAL LALLUBHAI, 24 BOM. L. R. 775; (1922) A. I. R B.) 405 **518**

——— **s. 29**—*Civil Procedure Code (Act V of 1908), O XXXII, r. 7—Lease by guardian in terms of compromise entered into with leave of Court—Consent of Collector, if necessary*

Where, in accordance with a compromise entered into on behalf of a minor with the sanction of the Court under O. XXXII, r. 7 of the Civil Procedure Code, the guardian of the minor grants a lease, the consent of the Collector under section 29 of the Guardians and Wards Act is not necessary. C ABDUR RASHID *v* SHEIKH KHANDKAR, 35 C. L. J 206 **997**

Gujrat Talukdars Act (Bom. Act VI of 1888), s. 29E—*Notification by Talukdari Settlement Officer—Claims, submission of—Claim already known, whether must also be submitted.*

Gujrat Talukdars Act—concld.

Upon the issue of a Notification under section 29B of the Gujrat Talukdars Act by a Talukdari Settlement Officer, as Managiag Officer of a Talukdari estate, every person who has a claim against the estate must give a notice in writing of such claim. The fact that such officer is otherwise aware of a claim—in this case a mortgage—would not save the claimant from the consequences of the failure to give the notice required. **B** TALUKDARI SETTLEMENT OFFICER *v.* AKUJI ABHRAM MUSE, 24 BOM. L. R. 762; 46 B. 993; (1922) A. I. R. (B.) 359 **487**

Habeas Corpus, writ of—Jurisdiction of High Court. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 54, 58, 60, 177, 491 **26**

High Court, *power of, to determine issue or remit case for finding on that issue.*

A High Court has the power of determining an issue, left undetermined by a lower Appellate Court, on the evidence on the record or of remitting the case to the lower Court for a finding on that issue, with liberty to the parties to adduce additional evidence if they choose to do so. **P. C.** CHIDAMBARA, SANNADHIGAL *v.* VEERAMA REDDI, 31 M. L. T. 54; 16 L. W. 102; 45 M. 586; (1922) M. W. N. 749; 43 M. L. J. 649; (1922) A. I. R. (P. C.) 292 **538**

Hindu Law. *See* CIVIL PROCEDURE CODE, 1908, s. 92 **631**

——— *Concubine — Right of residence—Maintenance.*

Under the Hindu Law, the concubine of a deceased Hindu has no right of residence in a co-parcenary house, but the person who succeeds to the house is bound to maintain her, the amount of the maintenance being a charge upon the house. **N** BANSILAL *v.* ACHRAJ KUNWAR **394**

——— *Extinction of claims by efflux of time*

Hindu Law does not recognise any rule as to the extinction of claims by efflux of time. **A** RAM KISHAN RAI *v.* CHHEDI RAI, 20 A. L. J. 577; 44 A. 625; (1922) A. I. R. (A.) 402 **235**

——— *Jaiswar Kalar—School, by which, governed—Situation of property—Residence—Determination of domicile and personal law.*

A person belonging to the Jaiswar sub-division of the Kalar caste and living in a village in the Central Provinces is *prima facie* governed by the Benares School of Hindu law.

The place where a person's property is situated is not a decisive factor in the determinatiou of his domicile.

A Hindu residing in a particular province is subject to the particular doctrines of Hindu Law recognised in that province. **N** GOVIND *v.* RADHABAI KALAR **325**

——— **Adoption**—*Full operation postponed for two lives—Validity of adoption.*

An adoption with a condition that the adopted son shall not get any interest in the property of his adoptive father, till after the death of the survivor of two living persons, is valid. **N** KOLHI *v.* CHOTTIBAI, **294**

——— ——— *of great-grand-father's great-grandson, validity of*

Under Hindu Law the adoption of a cousin standing in the same degree from the common ancestor, such as paternal great-grandfather's great-grandson, is not invalid.

Hindu Law—contd.

Obiter—One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested, even though that other was his own father. **N** GULAB THAKUR *v.* FADALI **566**

——— **Adoption** *of married man, validity of.*

Under Hindu Law, among the twice-born classes a boy may be adopted at any time before his investiture with the sacred thread, and among *Sudras* an adoption is valid only up to the time of marriage and not later. **L** HIRA *v.* HARDAT SINGH, 47 P. L. R. 1922 **763**

——— **Antecedent debt,** *what is.*

In order to validate a transaction of mortgage of family property by a father or manager on the ground that it was entered into to pay off an antecedent debt, there must be shown not only formal antecedency but antecedency in date combined with real dissociation in fact. Mortgages brought into existence merely to cover a breach of trust and what is called an unreal antecedency should not be given effect to by Courts. **A** PEARE LAL *v.* SUNDER SINGH, 20 A. L. J. 658; (1922) A. I. R. (A.) 436 **805**

——— **Debts**—*Joint family property—Liability for father's debts—Pious obligation of sons to pay father's debts during his lifetime—Property passed out of family in satisfaction of father's debts—Sons' right to recover back.*

Under the Hindu Law, subject to certain limited exceptions, the whole of the undivided estate of a point family is liable in the hands of sons for the debts of their father, unless the debts are taken for illegal or immoral purpose. There is a pious obligation on the sons to pay such debts. This liability, however, so long as the father is alive is only contingent.

Although where the father is alive the sons may be able to question a debt incurred by their father before the family property is sold in satisfaction of the same, if the property has passed out of the family without any objection having been taken by them or on their behalf, and rights of persons outside the family have sprung up with regard thereto, those rights cannot be defeated by the sons simply questioning the necessity for the debt. They have further to establish that the debt was one for the payment of which there was no existing or contingent obligation on them to discharge; or, in other words, that it was a debt taken for illegal or immoral purposes. **O** BINDESHARI SINGH *v.* AUDESH PRASAD SINGH, 25 O. C. 16; (1922) A. I. R. (J. C.) 85 **253**

——— **Gift**—*Father's power to gift moveable property to daughter.*

A father has the power under the Hindu Law of making, within reasonable limits, gifts to a daughter of moveable property including gifts of sums of money. **P. C.** RAMALINGA ANNAVI *v.* NARAYANA ANNAVI, 20 M. L. T. 265; (1922) M. W. N. 389; 43 M. 489; 26 C. W. N. 929; 43 M. L. J. 428; 16 L. W. 639; 24 BOM. L. R. 1203; 20 A. L. J. 889; (1922) A. I. R. (P. C.) 201 **451**

——— ——— *from father—Property, whether self-acquired in hands of donee.*

In the absence of any express limitation or condition to the contrary, all property obtained by gift or devise becomes self-acquired in the hands of the donee or devisee. Consequently, any property

obtained by virtue of a gift from the father, grandfather or great-grandfather would be self-acquired in the hands of the donee if it was not ancestral property in the hands of the donor or was acquired by him without detriment to the joint estate **O** KANHAI LAL *v.* RAM RATAN, 2 O. C. 80; 1922 A. I. R. J. C. 138 **217**

——— **Gift**—*Gift by Hindu lady with reservation of usufruct for her life, validity of.*

A Hindu lady who is the full proprietor of immoveable property can by a registered document, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her lifetime and without retaining power of alienation over it.

There is nothing in the Hindu Law which on principle would make a reservation of the usufruct of a part of the property for life by the donor, or the postponement of the enjoyment by the donee of a part of the profits till after the donor's death, a repugnant condition and render the gift invalid. **A** LALLU SINGH *v.* GUR NARAIN, 20 A. L. J. 744; (1922) A. I. R. (A.) 457 **798**

——— ——— *subject to mortgage—Acceptance by donee—Donee, whether can avoid mortgage on ground of absence of legal necessity—Alience for value, and donee of gift, difference between.*

Although it is open to an alienee for value to raise the question of legal necessity, a donee who accepts a gift burdened with a mortgage cannot plead the absence of legal necessity for the mortgage. **N** NARAYAN *v.* SHANKERLAL **503**

——— **Joint family** — *Acquisition during jointness—Presumption—Burden of proof*

Where one finds people living as joint and properties are acquired during this time the presumption is that they are acquired for the benefit of the joint family as a whole. The burden of adducing evidence to rebut the presumption is on the side who denies the jointness. **S** SASHI KUMAR SORKHEL *v.* CHANDRA KUMAR SAMADDAR CHOWDHURI, 35 C. L. J. 348 **322**

——— ——— *Co-parcener, contract by—Contract in own name but really as agent of manager—Liability of manager and family—Personal liability—Contract Act (IX of 1872), s. 23, cl. 1, application of.*

Where a single member of a joint Hindu family enters into a contract in his own name but really as the agent of the manager, the manager as well as the whole family is bound

So far as the manager is concerned, it is a case of an undisclosed principal and has reference to the Law of Agency. So far as the family is concerned, it is a case of the application of the Hindu Law wherein the acts of the manager are binding on the family.

In such a case, therefore, the contracting member, and (with reference to the first clause of section 23 of the Contract Act the manager may be personally liable but not the other members. **A** OBILISETTI VENKATA KRISHTNIAH *v.* ATAYAM SUBBIAH, 14 L. W. 530; 41 M. L. J. 554; (1921) M. W. N. 810 **462**

——— **Joint family**—*Debt—Father, decree against—Liability of father's interest in family property*

Under the Mitakshara Law a simple money-decree against a Hindu father which is not shown to have been on the basis of a debt which was tainted with immorality, can be executed against the ancestral property, and the father's interest therein can be attached and sold. **A** KALYAN SINGH *v* DHARAM SINGH, 20 A. L. J. 721; (1922) A. I. R. (A.) 489 **794**

——— ——— *Debt incurred by* karta—*Presumption.*

There is no presumption that fathers of joint Hindu families or managers or *kartas* necessarily go out of their way to borrow money for purposes which they know to be unlawful and which can confer no benefit upon the general body of the family to which they belong **A** PEARE LAL *v.* SUNDER SINGH, 20 A. L. J. 658; (1922) A. I. R. (A.) 436 **805**

——— ——— *Father adjudged insolvent—Son's estate, whether can be dealt with by Receiver.*

Where the father of a joint Hindu family is adjudged an insolvent, the estate of the sons cannot be dealt with by the Receiver **L** SHIB CHARAN *v.* MUHAMMAD ISMAIL, 2 L. L. J. 401 **179**

——— ——— *Father and son—Initial presumption of jointness.*

There is an initial presumption in favour of jointness in a Hindu family and this presumption is particularly strong in the case of a father and his only son. **O** PARBATI *v.* MOHAMMAD HADI, 3 O. L. J. 304 **53**

——— ——— *Invalid alienation by manager—Suit for possession by co-parcener—Alienation declared valid to extent of alienor's share—Plaintiff, right of, to possession of entire property—Mesne profits, determination of—Alienee, suit by, for partition of item sold, whether maintainable.*

A Hindu co-parcener has the right to require an alienee of joint property to deliver possession of the entire property in cases where the alienation by the manager is not binding on the plaintiff. The purchaser cannot sue for a partition of the item sold to him and obtain an allotment by metes and bounds of his vendor's share in that portion of the property but is bound to file a suit for a general partition.

In such a case where there has been no repudiation of the alienation on the part of the other co-parceners before the institution of the suit, the claim for mesne profits would be limited to the period from the date of suit **M** SUBBE GOUNDAN *v.* KRISHNAMACHARI, 34 M. L. T. 217; 15 M. L. J. 475; 15 L. W. 537; (1922) M. W. N. 269; 45 M. 449; (1922) A. I. R. (M.) 112 **869**

——— ——— *Partition—Notice of intention to separate, effect of—Partial partition.*

Under the Hindu Law it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family

Under the Law of the *Mitakshara* an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and

Hindu Law—contd.

to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness **P. C.** KAMALINGA ANNAVI *v.* NARAYANA ANNAVI, 30 M. L. T. 255; (1922) M. W. N. 399; 45 M. 439; 26 C. W. N. 929; 43 M. L. J. 425; 16 L. W. 639; 24 BOM. L. R. 1219; 20 A. L. J. 839; (1922) A. I. R. (P. C.) 201 **451**

——— **Joint family** *property — Legal necessity—Improvident transaction - Presumption—Jurisdiction—Relief for possession not claimed in plaint—Appellate Court, if can decree formal possession.*

Where a father, as manager of a joint Hindu family, enters into an agreement to sell the family immoveable property in his hands, the mere facts that he repents of the agreement and that his sons apply to contest the suit brought with the object of enforcing the agreement, raise a presumption that the agreement is an improvident one.

The mere existence of an antecedent secured debt cannot of itself justify the father in alienating practically the whole of the immoveable property belonging to himself and his sons if the debt can be discharged by alienating only a part of the property.

An alienation of joint family property effected by the concerted action of the adult members of the family, raises a presumption in favour of the alienation having been made for real family necessity.

Where the father enters into an improvident transaction to rid himself of his immediate embarrasments without due regard to the necessities of the case and the interests of the minor members of the undivided family, the vendee must be held to have taken the risk involved therein.

Per *Piggott, J.*—In a suit to avoid alienation in which no relief for possession is asked, a formal decree directing the plaintiff to be restored to possession, whether conditional or otherwise, cannot and ought not to be passed.

Per *Walsh, J.*—When an Appellate Court is seized of the whole matter, it should not hesitate to pass such orders as are necessary to terminate the controversy and to do justice between the parties. Consequently, in a suit by sons to avoid alienation made by the father, although no relief as to possession may be claimed, it is not incompetent for the High Court on appeal to decree possession to them. **A** GOVIND DASS *v.* RAM CHARAN SONIA, 4 U. P. L. R. (A.) 25 **307**

——— **Mitakshara** *as interpreted in Berar—Power of undivided co-sharer to sell—Severance of estate how effected—Agreement to divide, effect of*

According to the law of *Mitakshara*, as interpreted in Berar, an undivided co-sharer can sell his share in joint family property without the consent of his co-owners

In the case of a joint Hindu family, subject to the law of *Mitakshara*, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place, and the commencement of a suit for partition is sufficient to effect a severance in interest even before decree. So also is a claim by one member of a co-parcenary for his share followed by an agreement under which all the members appoint an arbitrator to divide their property and agree to accept whatever partition he might make. **P. C.** KASAM *v.* MORAWAR SINGH, 31 M. L. T. 46; 15 L. W. 223; 5 N. L. J. 209; 18 N. L. R. 127; 43 M. L. J. 676; (1922) A. I. R. (P. C.) 3 **573**

——— **Mitakshara**—*Insanity — Inheritance and partition, exclusion from—Insanity need not be congenital.*

Under the Mitakshara Law, a person is disqualified from succeeding to property, if he is insane when the succession opens, and cannot demand a partition or share in one when it actually takes place.

Insanity, as a ground for exclusion from inheritance under Hindu Law, need not be congenital. **N** VITHOBA *v.* WAMAN, 18 N. L. R. 80; (1922) A. I. R. (N.) 161 **111**

——— ——— Vyavahara Mayukha—*Common passage—Partition—Indivisibility.*

On the authority of the *Mitakshara* and the *Vyavahara Mayukha*, land which is reserved as common passage is not divisible. The rule applies equally to a common passage reserved at the time of a partition. **B** SHANTARAM BALKRISHNA *v.* WAMAN GOPAL, 24 BOM. L. R. 1079 **682**

——— **Mortgage** *of family property*—Onus *of necessity on creditor, when shifted.*

The onus of proof to support a mortgage of family property lies upon a creditor.

In the absence, however, of evidence tending to shake confidence in the transactions themselves or in the conduct and care of a manager or a creditor, the onus is shifted back on to the sons or members of the family who desire to repudiate the transactions. **A** PEARE LAL *v.* SUNDER SINGH, 20 A. L. J. 654; (1922) A. I. R. (A.) 46 **805**

——— **Partition** — *Partial partition—Presumption*—Onus *of proof.*

Where a partial partition of the property of a joint Hindu family is admitted, the presumption is that there was a complete partition embracing the whole of the family property: where, therefore, it is subsequently alleged that some property is still undivided, the proof of such allegation rests upon the person making it. **L** KISHEN CHAND *v.* BEHARI MAL, 2 L. L. J. 570 **297**

——— **Succession** — *Illegitimate son—Succession Certificate Act (VII of 1889)—Illegitimate son of* Sudra *Succession by survivorship—Succession Certificate, whether necessary*

Under the Hindu Law an illegitimate son in the three high classes never takes by inheritance but is only entitled to maintenance from the estate of the father. The illegitimate son of a *Sudra* might, under certain circumstances, inherit either jointly or separately.

The illegitimate son of a *Sudra* can be a co-parcener with his father, when he would be competent to sue to recover a debt due to his father without the production of a Succession Certificate. **N** GANULAL *v.* KASHIRAM **417**

——— ——— *Widow, death of—Next reversioners, not seeking to obtain possession of estate—Remoter reversioners, right of.*

One *K* died leaving a widow after whose death a dispute arose as to succession. *K.'s* daughter sued for declaration and obtained a decree against next reversioners. Upon a suit brought by the remoter

reversioners who alleged a custom excluding daughters from inheritance, which they said, the next reversioners being in collusion with the daughter had failed to urge in the previous suit :

Held, that the suit was not maintainable, inasmuch as even if the custom as alleged were found to exist, the persons entitled to succeed would be the next reversioners and if the latter did not choose to avail themselves of their right to the possession of the property, such inaction on their part would not confer any right on the remoter reversioners. **A** BIND BAHADUR SINGH *v.* RITURAJI, 20 A. L. J. 702; (1922) A. I. R. (A) 420 **776**

——— **Widow**—*Accumulations—Personal estate—Intention—Accumulations, physical possession of, whether essential.*

A widow has full power during her lifetime to invest or otherwise dispose of accumulated income accruing during her possession of a widow's estate.

The question whether such property would after her death form part of her personal estate, depends on whether she has shown any intention of appropriating it for her own benefit in her lifetime. A mere expression of opinion as to what she would do with it, would not amount to an act of appropriation. But where she has entered into an agreement showing how the property will be appropriated, her intention that it should form part of her personal estate, is sufficiently manifest.

It is not necessary that such property should have come into her physical possession during her lifetime and a widow is competent to appropriate property to which she has established her title even though the same be wrongfully withheld from her by a person in unlawful possession of it. **O** SHYAM NARAIN *v.* JADUNATH SINGH, 25 O. C. 41; (1922) A. I. R. (J. C.) 118 **242**

——— ——— *Alienation, validity of—Reversionary heir, rights of—Consent of immediate reversioner—More remote reversioners, right of, to impugn alienation—Inaction of reversioner, effect of—Gift by Hindu widow, validity of, against reversioner.*

A sale or mortgage by a Hindu widow which purports to pass or hypothecate the absolute title is valid against everyone except the reversioners and unless the reversioners elect to treat it as a nullity it subsists as against every one else

A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may, at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property.

The consent of the immediate reversioner to a gift by a Hindu widow does not bar the right of a more remote reversioner to challenge the transaction.

A gift of the whole of her husband's property made by a Hindu widow, not challenged by the reversioners during her lifetime and acquiesced in by those who would take a vested interest after her death, can be challenged by the reversioners alone and by no one else If they choose not to challenge it, and the donee remains in possession under a claim of right for 12 years, he will acquire an indefeasible title even against the reversioners.

In considering the validity, as against the reversioner, of a gift by a Hindu widow, the true view is that it is not binding upon him and he can elect to treat it as a nullity and sue for possession at any time within 12 years of his interest becoming vested without first suing to have the gift set aside, notwithstanding Art. 9 of the Limitation Act. He may, on the other hand, elect to treat it as valid but no third person can claim this option or set up the plea that such a gift is void merely because it may have been but was not so treated by the reversioner. **Pat** KESHO PRASAD SINGH *v.* CHANDRIKA PRASAD SINGH, 3 P. L. T. 797 **394**

——— **Widow,** *assignee of—Accretions.*

The position of an assignee of a Hindu widow in possession of the estate of her deceased husband is the same as that of the widow, so that where he omits to recover any sums due to the estate during the lifetime of the widow, they become an accretion to the estate and the right to recover them passes to the reversioners. **O** MOHAMMAD HADI *v.* PARBATI, 9 O. L. J. 512; 25 O. C. 2; (1922) A. I. R. (J. C.) 31 **549**

——— ——— *Mortgage—Legal necessity—Necessity for particular rate of interest and terms—Onus—Redemption postponed for long period—Reversioners of widow's husband, if bound—Suit before expiry of period, if competent.*

In case of a mortgage made by a Hindu widow of her deceased husband's immoveable property, it is incumbent on the mortgagee to show not only that there was a necessity to borrow but also that it was not unreasonable to borrow at some such high rate and upon such terms, and if this is not shown, the rate and terms would not stand, even though the charge might be upheld.

Where in a mortgage executed by a widow the terms and conditions are such as to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor and in fact to render redemption practically impossible, they are clearly oppressive and unreasonable, intended more to fetter the right of redemption than to secure any advantage to the mortgagor and a reversioner of widow's husband is not bound by them and can bring a redemption suit before the expiry of the stipulated period. **O** DARYAO SINGH *v.* KALI SINGH, 9 O. L. J. 213; 4 U. P. L. R. (J. C.) 63; (1923) A. I. R. (J. C.) 175 **164**

——— ——— *Surrender to reversioner, validity of—Bona fides—Question of fact.*

In the case of a surrender by a Hindu widow in favour of the next reversioner the question whether an undertaking by the reversioner to discharge the existing debts of the widow would revalidate the surrender depends upon the circumstances of each case, the test to be applied being to see whether the transaction is a *bona fide* surrender or a mere device to divide the estate with the reversioner. **O** GOBIND *v.* BASUDHAR, 5 O. L. J. 370; 4 U. P. L. R. (J. C.) 93 **972**

Hindu Law—concld.

——— **Will** *in favour of wife, devising* milkiat *of property—Absolute estate—*'Malik,' *meaning of.*

Where a Hindu makes a Will in favour of his wife wherein it is stated that she is the *malik* of the property devised and has interest of *milkiat* in the same, she acquires an absolute estate in such property under the Will

The word "*malik*" is not a term of art, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. O BIJAI BAHADUR SINGH *v.* MATHURA SINGH, 9 O. L. J. 327; 4 U. P. R. (J. C.) 66; (1922) A. I. R. (J. C.) 278; 25 O. C. 345 555

Hindu Law or custom—*Alienations—Will—Aroras of Taunsa, Town, District Dera Ghazi Khan—Pre-sumption—Revocation of Will—Part of property alienated during testator's lifetime.*

The Aroras of Taunsa, in the District of Dera Ghazi Khan, are not governed in the matter of alienations by agricultural custom.

An Arora belonging to a mercantile community and residing in a town, is presumably governed by his personal law in the matter of alienation

A Will is an ambulatory document and operates only upon the property which exists at the time of the testator's death. The mere fact that the testator during his lifetime disposed of part of the property specified in the Will, would not be regarded as a revocation of the Will. L ASA NAND *v.* ROSHNI BAI, 2 L. L. J. 178 92

Hindu widow, *possession, adverse, against—Possession, whether adverse against reversioners.*

Possession which commences during the lifetime of a Hindu widow with a limited interest cannot be adverse to reversioners. O PARBATI *v.* MOHAMMAD HADI, 9 O. L. J. 364 534

———, *suit against—Husband's estate, representation of.*

Where a *bona fide* suit is brought against a Hindu widow in respect of a genuine debt incurred by her husband, the widow, for the purposes of the suit, represents the husband's estate and the estate would be bound by the decision thereof.

But where the suit is a fictitious one, the decree would not bind the estate or the reversioners. C SASHI KUMAR SORKHEL *v* CHANDRA KUMAR SAMADDAR, 35 C. L. J. 348 322

Hyderabad Assigned Districts Land Revenue Code of 1816—"*Ante-jagir tenant*" *of alienated land, payment by, whether revenue or rent—Charge under s.* 56.

Under section 4 (12) of the Hyderabad Assigned Districts Land Revenue Code an ante-*jagir* tenant of alienated land is an inferior holder and not a tenant and the amount payable by him to the *jagirdar* is not rent as defined in section 4 (24) of the Code, but land revenue which, under section 56 of the Code, is a paramount charge on the holding. N SHAMRAO *v.* SHRI SITARAM MAHARAJ 289

Inam, *meaning of—Intention of donor.*

The term "*inam*", an Arabic word meaning a reward, does not give any indication of the intention of a donor. P. C. CHIDAMBARA SANNADHIGAL *v.* VEERAMA REDDI, 31 M. L. T. 54; 16 L. W. 102; 45 M. 586; (1922) M. W. N. 748; 43 M. L. J. 640; (1922) A. I. R. (P. C.) 292 538

Inam—concld.

——— *grant—*Varam—*Presumption.*

There is no presumption of law that an *inam* grant of a village is *prima facie* a grant of *melvaram* right only or of both *melvaram* or *kudivaram*. Each case must be considered on its own facts, with special regard to the evidence and circumstances therein. P. C. CHIDAMBARA SANNADHIGAL *v.* VEERAMA REDDI, 31 M. L. T. 54; 16 L. W. 102; 45 M. 586; (1922) M. W. N. 748; 43 M. L. J. 640; (1922) A. I. R. (P. C.) 292 538

Income Tax Act (VII of 1918), ss. 19, 51—*S.* 19, *meaning of—Income of firm—Year of registry and prior year in which firm not registered—Adjustment.*

S. 19 of the Income Tax Act, 1918, means that if, at the end of the year, it is found that the amount at which the income was assessed has been either exceeded or reduced, there is a right and a duty to deal with the matter accordingly.

An adjustment of income-tax can be made during a Financial year in which the Collector's certificate of registration under section 12-A of the Income Tax Act is in force in respect of the income of a firm for the previous year in which the firm was not registered. M SECRETARY TO THE BOARD OF REVENUE *v.* MOHAMMAD SHERIFF HUSSAIN MEAH, 16 L. W. 333; 43 M. L. J. 434; (1922) M. W. N. 583 655

——— **s. 40**—*Penal Code (Act XLV of 1860), s.* 177—*Criminal Procedure Code (Act V of 1898), s* 179—*False verification in income-tax petition, complaint of—Forum, proper—Place where return received, Court having jurisdiction over, competency of, to try offence.*

The offence of making a false verification in an income-tax petition is legally triable only by a Court having jurisdiction over the place where the verification was made. The place where the petition was received by the authorities does not determine the jurisdiction. M MOHIDEEN PAKKIRI, *In re*, 16 L. W. 335; 31 M. L. T. 282; 43 M. L. J. 475; (1922) M. W. N. 690; 23 CR. L. J. 619; 45 M. 839 843

——— **s. 46**—*Notice, service of—Method of service.*

Section 46 of the Income Tax Act, (VII of 1918), does not require that service of a notice under it must be effected by the officer of the Court himself placing the notice in the hands of the person named therein: the section in no way excludes any of the other forms of service permitted by O V of the Civil Procedure Code of 1908, and allows a notice to be sent by post. N LOCAL GOVERNMENT *v.* ISMAIL BHAI, (1922) A. I. R. (N.) 187; 23 CR. L. J. 591 623

Indian Soldiers (Litigation) Act (IX of 1918), ss. 5, 6, 7, 11, application of. *See* CIVIL PROCEDURE CODE, 1908, s. 48 369

Insolvency—*Manager of joint Hindu family adjudicated insolvent—Official Assignee, rights of.*

The Official Assignee, on the insolvency of the managing member of a joint Hindu family, succeeds to,—

(a) the undivided interest of the insolvent in the joint property, and

(b) his rights as managing member, so far as they can be exercised for his benefit;

Insolvency—concld.

he is not entitled to have vested in him the shares of the other members, although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency.

The Official Assignee is entitled to all the rights of the insolvent, including the right to possession, except such rights as are in their nature personal to a member of the family as such. **M** OFFICIAL ASSIGNEE OF MADRAS *v.* RAMACHANDRA AIYAR, 16 L. W. 559; ('92) M. W. N. 653; 43 M. L. J. 569 **898**

Interest—*Bond—High rate of interest—Court not to interfere unless interest penal—Contract Act (IX of 1872), s 74.*

Unless satisfied that the rate of interest charged in a bond is a penalty within the meaning of section 74 of the Contract Act, a Court cannot interfere with the stipulated rate of interest, as it is not open to it to make a new contract between the parties. **C** SATYABHAMA SUNDARI *v.* MOHAMED ESAHAK MEAH **497**

——— *Penalty - Question of law.*

Where the question whether the interest claimed on a mortgage-deed is a penalty, depends on an interpretation of a clause in the deed, the question is not a simple question of fact, and may be raised for the first time in first appeal

Where a mortgage-deed provides for the payment of an increased rate of interest in case of default in paying the mortgage-money, and such increased rate is payable from the date of the mortgage, the provision is a penalty and ought not to be allowed. **L B** KO TINE *v* ISMAIL CASSIM MOORAD, 11 L. B. R. 356 **887**

——— *Suit on balance struck after account —Agreement or notice as to interest, absence of— Interest Act (XXXII of 83)—Contract Act (IX of 1872), s. 73.*

No interest is chargeable either under Act XXXII of 1839, or as damages under section 73 of the Contract Act on a balance struck after an account between the plaintiff and the defendant wherein no mention is made of interest and where no notice has been given that interest would be charged. **L** RANJIT SINGH *v* KARIM BAKHSH **678**

Interest Act (XXXII of 1839). *See* INTEREST **678**

Interpretation of Statutes - *Court, duty of*

It is not within the competence of any Court to usurp the functions of the Legislature, and a Court cannot in any way limit or extend the scope of any provision of the law on grounds of policy or other considerations **Pat** SHEBALAK SINGH *v* KAMARUDDIN MANDAL, 3 P. L. T. 574; (1922 PAT 4 ; 4 U. P. L. R. (PAT) 57; 23 CR. L. J. 519; ('9 2) A. I. R PAT) 435 **149**

Joint Hindu family—Karta, *contract by, for family benefit—Minor members, suit by, for specific performance—Lack of mutuality, plea of—* Karta, *relation of, to minor members*

Where the *karta* of a joint Hindu family enters into a contract which is binding on the minor members as well, as for instance, where it is for the family benefit, the minor members are entitled to bring a suit for its specific perfo. mance. There is no lack of mutuality in such a case betw the minor members and the other party to the contract so as to stand in the way of their suit

The relation of the manager of a joint Hindu family to a minor is not the same as that of a guardian to his ward The manager is not an agent of the other members, nor is he a mere manager. He is much more like a trustee for the other members **N** HARGOVIND *v.* MEHTAB SINGH, 8 N. L. R 67; (1922) A. I R (N) 9; **346**

Joint possession. *suit between co-owners for —Partition suit pending between the parties— Court, if should disturb existing possession—No hard and fast rule - Justice, equity and good conscience.*

No hard and fast rule can be laid down for the decision of the question whether a co-owner has the right to joint *khas* possession of the lands which have been exclusively occupied by another co-owner Each case must be decided on its merits according to justice, equity and good conscience.

Where during the pendency of a suit for partition one co-owner brings a suit against another for joint possession of certain lands comprised in the joint estate, the Court should be unwilling to disturb the existing possession of the lands during the pendency of the suit for partition between the parties, unless it feels bound to do so for very cogent reasons. **C** MOHAMMED HYDER ALI KHAN *v.* MOHAMMAD WAJID ALI KHAN, 36 C. L J 155 **285**

Jurisdiction—*Non British subject retaining stolen property in Native State—Theft committed in British India—Criminal Procedure Code (Act V of 8 8), s 80, application of*

A non-British subject retaining property in a Native State, stolen from British India, is not amenable to the jurisdiction of British Courts, and section 180 of the Criminal Procedure Code does not confer any such jurisdiction on them **L** MUHAMMAD HUSSAIN *v.* EMPEROR, 2 L. L. J. 3 8; 28 CR. L. J. 860 **160**

——— *Partition, suit for—Title, questions of, decision of—Conflicting claims as to shares, determination of—Equity and Law.*

All persons who have an interest in the partition are proper parties to a partition suit and matters in controversy amongst persons so interested in the partition must be decided in the suit.

A suit for partition may and does often involve the investigation of disputed questions of title an attempt to avoid them can only lead to needless multiplicity of litigation, and there is no reason why such questions should not be decided in the course of the suit for partition.

The Courts in India, having as they do jurisdiction to administer both legal and equitable remedies, may, in a suit for partition, determine issues of title, investigate disputes between different parties claiming the same share, and then proceed with the partition so as to dispose of the whole controversy between them.

Where there is conflicting claim to share in the land under the same right under which partition is sought the determination of the conflict is incidental to the partition and cannot be avoided before partition is directed Such a case does not fall within the category of claims utterly hostile where

Jurisdiction—concld.

each demands not a share but the whole. **C** ANNAPURNA DEBYA *v.* AMIYA NATH BANERJEE, 35 C. L. J. 540 (1922) A. I. R. (C.) 307 **432**

Jury trial—*Judge's charge to Jury—Judge, duty of, in stating law Judge giving his own opinion—Misdirection.*

Where in a trial by Jury the Judge wishes to inform the Jury as to what are the terms of a particular provision of the law, it is necessary for him to read the actual words of the section containing that provision to the Jury, and, if necessary, to explain what is meant by the section: if, instead of doing this, the Judge gives his own opinion of the meaning of the section, that would amount to a misdirection **C** EMPEROR *v.* DURGA CHARAN BEPARI 36 C. L. J. 171: 26 C. W. N. 1002; 23 CR. L. J. 567; (1922) A. I. R. (C.) 124 **407**

——— *Language of charge to Jury—Misinterpretation of words by Jury.*

Where, in dealing with one of the charges against the accused, the Judge in charging the Jury uses words which the Jury might misinterpret, and might thereby be induced to come to the conclusion that there was nothing more to be said about the matter, that would amount to a misdirection. **C** EMPEROR *v.* DURGA CHARAN BEPARI 36 C. L. J. 171; 26 C. W. N. 1002; 23 CR. L. J. 567; (1922) A. I. R. (C.) 124 **407**

Khoti Khasgi lands, *purchaser of—Faida, liability to pay.*

A purchaser of Khoti Khasgi lands from one of the co-sharers Khots, is liable to pay *Faida*, unless he is able to show that by virtue of some custom or agreement amongst the Khots the *Faida* is not payable **B** JAYANT BAISHA SAVANT *v.* ABDUL RAHIMAN MAHOMED IBRAHIM, 24 BOM. L. R. 358; 46 B. 819; (1922) A. I. R. (B.) 245 **335**

Khoti Settlement Act (Bom. Act I of 1880), s. 10—*"His land," meaning of*—Khoti *lands—Occupancy tenant—Unauthorised transfer of part of land—Forfeiture by landlord—Statutes, construction of—Clauses involving forfeiture.*

Where the occupancy tenant of Khoti land transfers a portion thereof without the consent of the landlord the latter is not entitled to take possession of the entire land comprising the tenancy under section 10 of the Khoti Settlement Act.

Per *Shah, J.*—In the case of an unauthorised transfer of any part of Khoti land by the occupancy tenant the consequences must be limited to the land transferred and cannot be reasonably extended to the entire holding or to all the lands comprised in the occupancy. For this purpose the smallest unit recognised by the Khoti Settlement Act must be taken, *i. e.*, a Survey Number or a recognised sub division thereof, as defined by the Bombay Land Revenue Code.

The Courts must construe clauses of forfeiture in Statutes so as to involve the least interference with the existing rights consistently with the plain meaning of the words used by the Legislature.

Per *Pratt, J.*—The phrase "his land" in the penal part of section 10 of the Khoti Settlement Act means the portion of the land in the holding which is purported to be transferred or in which an interest is purported to be transferred.

Khoti Settlement Act—concld.

If there is any ambiguity in a Statute, the Courts may adopt that construction which avoids hardship or injustice. **B** MADHAVRAO MORESHWAR BHANDARKAR *v.* KRISHNAJI SATURAO RANE, 24 BOM. L. R. 131; 4 B. 470 **277**

Land Acquisition Act (I of 1894)—*Acquisition proceedings, commencement of—Owner of land, right of, to effect private sale, if determined.*

The commencement of proceedings under the Land Acquisition Act for the acquisition of a piece of land does not estop the owner from entering into a binding agreement for a private sale of the same. Such an agreement can be enforced like any other contract. **P. C.** FORT PRESS CO., LTD. *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY, 43 M. L. J. 419; 15 L. W. 154; 24 BOM. L. R. 1228; (1922) M. W. N. 798; 46 B. 767; (1922) A. I. R. (P. C.) 365; 36 C. L. J. 559 **980**

——— **s. 18**—*Compensation, measure of—Valuation of immoveable property—Hypothetical calculations, value of—Important points that arise on compulsory acquisition.*

A purchase of property by a willing purchaser from a willing seller, is direct evidence of the market-value of the property, and when Government notifies its intention to compulsorily acquire a property, they are bound to offer what was given for the property, unless they are able to show conclusively that a fair value had not been given for the property here, however, the purchaser claims considerably more than what he gave for the property, he must show that in the neighbourhood there has been a general rise in the value of property between the date of his purchase and the date of the compulsory acquisition by Government

The valuation of immoveable property is not an exact science and the very best efforts of an expert or a Court to fix a market value for a property can never amount to much more than a *quasi* scientific guess which the Court should, in the case of compulsory acquisition, temper with liberality. Hypothetical calculations when put forward before a Court of first instance should be seriously considered, but they are usually of no assistance whatever in enabling it to come to a decision with regard to the market value of the property.

Where land is compulsorily acquired by Government under the Land Acquisition Act, the two most important questions that arise are:

(1) Whether the claimant has paid so high a price that a Court may consider that he has not displayed the ordinary caution which a purchaser of land should display.

(2) Whether there has been any increase in the value of property in the neighbourhood within the time which elapsed between his purchase and Government Notification, to show that the property is worth more than what he gave for it. **B** FRENCHMAN *v.* ASSISTANT COLLECTOR, HAVELI, 24 BOM. L. R. 782 (1922) A. I. R. (B.) 459 **521**

Landlord and tenant—*Agricultural lease, expiry of before the passing of the Bengal Tenancy Act—Holding over, effect of—Stipulation in the original* kabuliyat *as to rate of interest, if enforceable—Bengal Tenancy Act (VIII of 1885), ss. 53, 54 cl. (3), 67.*

The plaintiff brought a suit for arrears of rent in respect of an agricultural tenancy which had commenced with the execution of a registered *kabuliyat* for a term of three years on the 7th May 1896, the defendants in the suit were the sons and son-in-law of the executant of the *kabuliyat* and they or their predecessor had been holding over since the expiration of the first term of the *kabuliyat* The rent was payable partly in cash and partly in kind and the condition as to interest contained in the *kabuliyat* was that the tenant should pay interest at 6 pies per rupee per mensem on the cash rent and one *kotta* per rupee per month on the rent payable in paddy:

Held, that the provisions of section 67 of the Bengal Tenancy Act were a bar to the plaintiff's getting any higher rate of interest than that provided in the section.

Section 67 of the Bengal Tenancy Act is not limited in its application to a case where produce rent is paid quarterly.

Clause (3) of section 54 of the Bengal Tenancy Act is not so exhaustive a definition which includes every kind of arrears of rent. It only deals with cases of rent payable in instalments. C BRAHMAMOYI DEBYA *v.* SOMARALI SHEIKH, (1922) A. I. R. (C.) 77 **109**

——— *Dispossession of tenant by landlord from portion of holding—Suspension of rent.*

A, *B* and *C* succeeded to a tenancy. *A* who was entitled to a 12-annas share took possession of the same. The landlord, not knowing the exact shares to which the heirs were entitled, made a settlement of an 8-annas share with *B* and *C*. The effect of this settlement was that *A* was unable to realize rent from some of the under-tenants who took advantage of the situation In a suit by the landlord to recover rent :

Held, that there was a dispossession of the principal defendant from a portion of the holding such as to cause a suspension of the rent of the same. C RAMANI KANTA ROY *v* HARA CHANDAR DAS **495**

——— *Lease for a term of years—Lessee put into possession—Legal documents not executed and registered—Lease, if can be surrendered before expiry of term—Lessor's remedy—Damages or rent.*

When in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined.

A lessee of a tenancy for a term of years is not entitled to terminate it by notice of surrender before the expiry of the term of the lease.

Where a contract of tenancy, under which rent is payable periodically is unlawfully brought to a premature termination by the tenant, the landlord is entitled only to damages and not to rent for the unexpired term of the lease Acceptance of surrender does not preclude the lessor from suing for damages for the breach of contract by the lessee, as it does not destroy the existing cause of action C JOGENDRA KRISHNA ROY *v.* KURPAL HARSHI & CO. 35 C. L J 75: 44 C. 345 **993**

——— *Occupancy holding, non-transferable—Sale only of share, if entitles landlord to khas possession—Abandonment—Payment or offer of payment of rent by tenant, effect of.*

A sale only of a share of a non-transferable occupancy holding does not entitle the landlord to *khas* possession unless it is shown that there has been an abandonment.

There can be no abandonment of a holding where there has been all along payment or offer of payment of rent by the tenant. C SARAT CHANDRA DE *v* MONORAMA DEBI **295**

——— *Partial transfers—Occupancy holding non-transferable—Usufructuary mortgage by tenant—No abandonment—Landlord, if entitled to enter—Execution of usufructuary mortgage—Abandonment.*

A transfer by way of usufructuary mortgage stands on the same footing as other partial transfers.

Where there has been no abandonment by the tenant, the mere execution by him of a usufructuary mortgage in respect of a non-transferable occupancy holding, followed by possession of the mortgagee, does not entitle the landlord to re-enter on the holding or recover possession.

The mere execution of a usufructuary mortgage might not of itself be sufficient to establish abandonment. C AMBIKA DEBI *v* SWARNAMAYI DASI, (1932) A. I. R. (C.) 135 **425**

——— *Rent fixed by contract, if can be raised by settlement of rent under Diara Act (XXXI of 1858), —Settlement of rent under Chap. X of the Bengal Tenancy Act (VIII of 1885), effect of—Appeal.*

A contract contained in a *solenama* between a landlord and a tenant under which the tenant is liable to pay rent at a certain rate, cannot be affected by the settlement of rent at a different rate under the Diara Act (XXXI of 1858). But if the rent fixed under the Diara Act is also the rent settled under Chapter X of the Bengal Tenancy Act, the tenant, in spite of the contract is liable to pay the rent settled under Chapter X of the Bengal Tenancy Act. C AMBICA CHARAN SEN *v.* GIRISH CHANDRA SEN **719**

——— *Tenancy, denial of, by landlord—Road Cess Return, admissibility of, in evidence*—Batwara khasra, *admissibility of*—Batwara khasra *if "record"—Evidence Act (I of 1872), ss. 13, 35, applicability of*

A Road Cess Return signed by a landlord is admissible as against him to prove the relationship of landlord and tenant.

A *batwara khasra* is not a "record" within the meaning of section 35 of the Evidence Act and an entry made therein of the name of a tenant in possession is not admissible to prove the fact of his tenancy.

There is nothing, however, to prevent a tenant from putting the *batwara khasra* in evidence under section 13 of the Evidence Act to show the past history of the land before the creation of the tenancy in his favour if that can in any way lend support to his contention. Pat SABUJ SARAN *v.* AMBIKA LAL **873**

Landlord and tenant—concld.

Third person, suit for possession by, against tenant—Landlord not party to suit—Decree for possession by receipt of rent—Subsequent rent suit by landlord—Tenant, whether entitled to deduct rent paid to third person—Title paramount, eviction by, what is—Physical dispossession, whether necessary—Landlord's covenant for quiet enjoyment, meaning of—Tenant, whether entitled to be indemnified against acts of strangers—Transfer of Property Act (IV of 1882), s. 108 (c).

Eviction by title paramount means eviction by a title superior to the titles both of lessor and lessee against which neither is enabled to make a defence.

To constitute eviction by title paramount it is not necessary that there should be a forcible expulsion of the tenant, nor is it necessary that the tenant should actually go out of possession, and if, upon a claim being made by a person with title paramount, the tenant consents by an attornment to such person to change the title under which he holds or enters into a new arrangement for holding under him this will be equivalent to an eviction and a fresh taking. But an eviction, whether actual or constructive, must be by a party having a *good title*.

Section 108, clause *(c)* of the Transfer of Property Act, provides for an implied covenant to the lessee to hold a lease without interruption and the clause is wide enough to include disturbance of possession by a person with a paramount title. But it does not include a case of disturbance by persons having no lawful title or right of entry.

The plaintiff let out a certain plot of land to the defendant who obtained possession and was in possession, when a third party *S.* brought a suit for possession against him alone for a portion of that same land and obtained a decree for possession by receipt of rent In a suit by the plaintiff for rent the defence was that the defendant had been ejected from a portion of the land by a title paramount and that he was, therefore, entitled to a proportionate abatement of rent :

Held, (1) that, although *S.* had obtained a decree against the defendant, it could not be said that he had got a title superior to that of the plaintiff who was no party to the suit brought by *S.* and had no opportunity of showing that he had a title to the land and that, therefore, the defendant was not entitled to abatement of rent ;

(2) that the plaintiff, having once put the defendant in actual physical possession of the land, was not bound by any implied covenant to restore the defendant to possession unless it was shown that *S.* had a title superior to that of the plaintiff.

Obiter:—The express covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, even though followed by the words 'or by any other person or persons whomsoever,' does not extend to the unlawful acts of third persons having no title. C BANKA BEHARI GHOSH *v.* MADAN MOHAN ROY, 23 C. W. N. 143 **477**

Legal inference from facts, *if may be examined in second appeal.*

Legal inferences drawn from facts may be examined in second appeal. L GURDIT SINGH *v.* ISHAR KUAR, 3 L. 257; (1922) A. I. R. (L.) 392 **551**

Letters Patent (Mad.), cl. 15—*Decision on preliminary issue, whether judgment—Negotiable Instruments Act (XXVI of 1881), s. 13 (2).*

The decision of a Judge sitting on the Original Side of the High Court on an issue set for trial before the rest of the suit is a judgment within cl 5 of the Letters Patent. M KANALAL BHOYA *v.* BALARAM PARAMSUKDOSS, 31 M. L. T. 284; 43 M. L. J. 450; 16 L. W. 608 **921**

Limitation, *computation of—Appeal, limitation for—Appellant, if entitled to deduct period during which review application pending.*

In computing the period of limitation prescribed for preferring an appeal, the appellant is entitled to deduct the period during which an application for review was pending C PURNA CHANDRA *v.* MABUD BUKHSH **200**

———, *law of, method of construing.*

Inasmuch as the Law of Limitation restricts the enforcement of rights, it should be construed strictly, and if there is any doubt, the interpretation should be in favour of the right to proceed. L ANANT RAM *v.* INAYAT ALI KHAN, 2 L. L. J. 549 **135**

——— *Mesne profits, decree for, affirmed on appeal—Application for determination of mesne profits—Limitation* terminus a quo

Where a decree for mesne profits is affirmed on appeal, the limitation for an application for determination of mesne profits is to be computed from the date of the decree of the Appellate Court. O KUBER SINGH *v.* RAJ KUNWAR, 26 O. C. 132; (1922) A. I. R. (J. C.) 197 **896**

Limitation Act (IX of 1903), s. 5—*Period of limitation, extension of Revision.*

Where a lower Appellate Court exercises the discretion conferred by section 5 of the Limitation Act and extends the prescribed period of limitation, a High Court cannot interfere under section 115 of the Civil Procedure Code. M PERUMAL MOOPAN *v.* VENKATACHARIAR. 15 L. W. 506; 42 M. L. J. 563; (1922) M. W. N. 263; 31 M. L. T. 35; (1922) A. I. R. (M.) 193 **910**

——— **s. 5**—*"Sufficient cause," what constitutes—Litigant acting on Counsel's incorrect advice—Time, extension of.*

The English rule, that a mistake made by a Solicitor of a party, who is applying for an extension of time, is not a sufficient ground for extending it, is a salutary one and the Courts should ordinarily insist upon legal practitioners giving correct advice. But considering the present state of the profession, an honest mistake, even though a negligent one, ought not to be allowed to operate to the prejudice of clients.

What constitutes "sufficient cause" within the meaning of section 5 of the Limitation Act cannot be laid down by hard and fast rules, and must be determined on a reference to the circumstances of each case. The expression "sufficient cause" should be liberally construed, so as to advance substantial justice. An honest mistake made by a litigant upon incorrect advice given to him by his lawyer is a sufficient cause within the meaning of section 5 of the Act

Where an appellant is advised by his Vakil that copies of the judgment and decree of lower Appellate Court are sufficient for the purposes of his appeal to the High Court and he honestly believes that the advice given to him is correct and, consequently,

makes a delay in the presentation of the copy of the judgment of the Court of first instance and asks that his appeal be admitted although the period of limitation has expired, such an honest mistake made by a litigant upon incorrect advice given to him by his lawyer is a sufficient cause within the meaning of section 5 of the Limitation Act and entitles him to have his appeal admitted **A** SHIB DAYAL *v* JAGANNATH PRASAD, 20 A. L. J. 674; 44 A. 636; (1922) A. I. R. A 490 **12**

——— **ss. 5, 12**—*Civil Procedure Code (Act V of 90-), s. 12?, O. XLI, r. 1—Appeal, second—Limitation—Time spent in obtaining copy of First Court's judgment, whether can be excluded—Extension of time—Sufficient cause.*

Under section 12 of the Limitation Act the time requisite for obtaining the copy of the judgment on which the decree appealed against is founded can alone be excluded in computing the period of limitation In the case of a second appeal, therefore, the period spent in obtaining a copy of the First Court's judgment cannot be excluded under the provisions of this section, even where the Rules of the High Court require a copy of the First Court's judgment to be filed along with the memorandum of appeal

A High Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to section 122 of the Code, but it has no power to alter the period of limitation provided by the Limitation Act.

A Court is not bound to show indulgence to an appellant under section 5 of the Limitation Act, who has not been prompt in applying for copies **L** MADAN GOPAL *v.* MALAWA RAM **777**

——— **ss. 5, 14**—*Appeals, admission of, after limitation—Court whether may follow provisions of s. 14*

In the exercise of its discretion under section 5 of the Limitation Act in regard to the admission of an appeal, the Court may very well be guided by the provisions of section 14 of the Act, although the same do not in terms apply to appeals. **C** KUMUDINI RAY *v* KAMALA KANT SEN, 35 C. L. J. 106; (1922) A. I. R. (C.) 247 **575**

——— **s. 12 (2)**—*Judgment delivered on last day before vacation—Application for copy made on first day after re-opening—Time requisite for obtaining copy—Vacation included.*

The general rule is that the time requisite for obtaining a copy does not begin until an application for copy has been made.

Where, however, judgment is not delivered until the last day before the vacation and the application for copy is made on the first day after re-opening, it is only reasonable to include the vacation as part of the time requisite for obtaining the copy. **O** ABDUL GHAFFAR *v.* RASUL-UN-NISA, 25 O. C. 71; 9 O. L. J. 46; (1922) A. I. R. (J. C.) 39 **250**

——— **s. 12 (2)**—*Time requisite for obtaining copy of decree, how determined—Conduct of appellant.*

In determining what is the requisite time for obtaining a copy of a decree, the conduct of an appellant must be considered. No period can be regarded as requisite under section 12 of the Limitation Act which need not have elapsed, if the appellant had acted with reasonable promptitude and

taken reasonable and proper steps to obtain the copy. **P. C.** PRAMATHA NATH ROY *v.* WILLIAM ARTHUR LEE, 31 M. L. T. 193; 4 U. P. L. R. (P. C.) 103; (1922) A. I. R. (P. C.) 352; 43 M. L. J. 765; 27 C. W. N. 1?6 **900**

——— **s. 13**—*Foreign territory—Basra, whether under administration of Government of India—Period of absence in Basra, exclusion of.*

The fact that the territory of Basra was occupied by troops sent by the Government of India for the campaign in Mesopotamia and that the despatches relating to the operations of those troops were published in the *Gazette of India*, is insufficient to show that Basra was under the administration of the Government of India; for the purposes, therefore, of section 13 of the Limitation Act, absence in Basra is absence in a foreign territory, and a plaintiff is entitled to deduct the period of such absence from the period of limitation prescribed for a suit to recover on a pro-note executed by the absentee in British India. **A** FAKHRULLAH KHAN *v.* RAM SARUP, 20 A. L. J. 736; 4 U. P. L. R. A. 218 **978**

——— **s. 18**, application of. *See* CIVIL PROCEDURE CODE, 1908, O. XXI, R. 2 (3) **92+**

——— **s. 18, Sch. I, Art. 62**—*Fraud, plea of—Burden of proof—Party defrauded, right of, whether affected by lapse of time—Suit for money belonging to plaintiff received by defendant—Art 6?, application of—Appeal, second—New and inconsistent plea.*

A person, who desires to invoke the aid of section 18 of the Limitation Act, must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud, it is not sufficient for the defendant to show that the plaintiff had some clues and hints which, perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud

Where a remedy is given on the ground of fraud, it is governed by this important principle that the right of the party defrauded is not affected by lapse of time or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.

The form of suit indicated by Art. 62 of the Limitation Act is applicable where defendant has received money which, in justice and equity, belongs to plaintiff, under such circumstances as in law renders the receipt of it a receipt by the defendant to the plaintiff The Article most nearly approaches the formula of money had and received by the defendant for the plaintiff's use, if read as a description and apart from the technical qualifications imported in English Law and procedure.

A suit was brought to recover a certain sum of money deposited by the plaintiff's sister in law in a Bank through the defendant and withdrawn by the latter on her death In reply to the plaintiff'

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allegation that it had been misappropriated by the defendant, the latter repudiated the claim as unfounded and even denied that the money belonged to the plaintiff's sister-in-law. This fact was falsified by the information obtained by the plaintiff from the Bank. The defendant at last asked for permission in the second appeal to plead that he had been guilty of fraud and that as the plaintiff had been in full possession of the material facts for more than three years prior to the suit, the suit was time-barred:

Held, that the suit was governed by Art 62 of Schedule I to the Limitation Act and would be barred except for the provisions of section 18 of the Act, to the benefit of which the plaintiff was entitled;

(ii) that the defendant could not be allowed to set up and establish a position which would be contradictory to what had hitherto been his defence. ⚖ BIMAN CHANDRA DUTTA *v.* PROMOTHO NATH GHOSE, 36 C. L. J. 295; 49 C. 886; ('922) A. I. R. (C.) 157 **94**

——— **s. 19**—*Mortgage—Bond executed subsequently acknowledging liability to pay interest—Acknowledgment, whether extends to mortgagor's obligations under mortgage-deed.*

An admission of liability to pay interest due on a mortgage-deed, contained in bonds executed subsequently, amounts to an acknowledgment of liability under the mortgage, including liability to give possession to the mortgagee **L** ANANT RAM *v.* INAYAT ALI KHAN, 2 L. L. J. 543 **185**

——— **s. 20**—*Authorised agent—Judge paying decree-holder money deposited in Court by judgment-debtor—Judge signing paper indicating payment—"Agent duly authorised," construction of.*

A sum of money was deposited in Court in part-payment of a decree and the Judge while paying it to the decree-holder signed a paper indicating the payment in his presence and through Court The decree-holder took out execution for the balance of the money due under the decree, within three years from the date of payment by the Court but more than three years from the date of the decree:

Held, *(i)* that the execution was within time, as the part-payment gave a fresh starting point of limitation under section 20 of the Limitation Act:

(ii) that the fact that the Judge signed a paper indicating the payment in his presence and through Court, satisfied the condition that the fact of payment should appear in the handwriting of the person making the same:

(iii) that a Court paying in the course of its duty the money due by judgment-debtor is also a legally constituted agent of the judgment-debtor for that purpose

Per *Sadasiva Aiyar*, *J.*—In construing the words "agent duly authorised," Courts ought to be as liberal as possible The authorisation need not be a voluntary authorisation. The Law of Limitation is partly intended to promote diligence on the part of creditors in the matter of recovery of their debts. The provisions of sections 9 and 20 of the Limitation Act are intended to show that a creditor will not be penalised by the bar of limitation, if he had been diligent enough to get the handwriting of the debtor to evidence an acknowledgment of the fact of part-payment within the period of limitation. These sections, however, have not been based upon the fiction of an implied new promise to pay, for an acknowledgment signed by the party liable is sufficient, even when accompanied by a refusal to pay

Per *Coutts Trotter*, *J*—If a debtor's assets are so placed, either by his own act or by operation of law, that if some one other than he alone can realise them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. **M** GOVINDASAMI PILLAI *v.* DASAI GOUNDAN, 14 L. W. 3 0; (1921) M. W. N. 68?; 41 M. L. J. 423; 44 M. 971 **100**

——— **Sch. I, Art. 9**—*'Plaintiff' in Col. III, meaning of—Proof of knowledge*, onus *as to.*

A suit to set aside a deed of gift for undue influence is governed by Art. 91 of the Limitation Act.

The cessation of undue influence has no relevancy on the question of limitation, unless the matter could be brought under the heading of fraud so as to attract the operation of section 18 of the Limitation Act.

In cases to which Art. 9 of the Limitation Act is applicable the *onus* is not on the defendant to prove that the plaintiff's knowledge arose more than 3 years before suit

The word 'plaintiff' in Art. 91, column 3, includes his predecessor. **M** RAJARAJESWARA SETHUPATHI AVERGAL *v.* KUPPUSAMI IYER, 41 M. L. J. 474; (1921) M. W. N. 722 **352**

——— ——— **Arts. 11, 11A**—*"Person against whom," meaning of.*

The opening words of Art. 11 of the Limitation Act, namely "a person against whom" include a decree-holder. **A** BHIKHARI DAS *v.* ABDULLAH, (1922 A. I. R. (A.) 403; 20 A. L. J. 578; 44 A 607 **241**

——— ——— **Art. 11A**, applicability of.

See CIVIL PROCEDURE CODE, 1908, O. XXI, RR 98, 99, 102, 103 **524**

——— ——— **Arts. 30, 31**—*"Against a carrier for losing or injuring goods," meaning of—Loss, time of, proof of*—Onus—*Non-delivery of goods—No refusal to deliver—Limitation, operation of—Reasonable time for delivery*

Art 30 of Schedule I to the Limitation Act refers to losing or injuring goods by the Carrier, and not by the consignee, that is to say, time begins to run from the time when the Carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss The words "against a Carrier for losing or injuring goods", obviously suggest not a mere loss of goods to the owner, which might be caused by non-delivery, but an actual losing of goods by the Carrier himself, and the burden of proving that the goods were lost more than one year before the institution of a suit for damages, is on the Carrier

There is no inflexible rule that, in an action to recover damages for non-delivery of goods against a carrier, time, under Art. 31 of Sch I to the Limitation Act, must begin to run from the expiry of the ordinary period of transit.

In an action for damages for non-delivery of goods consigned to a Railway Company, where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being inquired into and that there was no refusal to deliver well within a year of the suit, Art 31 of Schedule I to the Limitation Act cannot be pleaded as a bar, for, in such a case, it cannot be said that the suit was brought more than a year from the expiry of a reasonable time within which the goods should have been delivered. **A** JUGAL KISHORE *v.* GREAT INDIAN PENINSULA RAILWAY, 10 A. L. J. 792; 4 U. P. L. R. (A.) 219 **981**

——— Sch. I, Arts. 44, 144—*Hindu Law—Alienation by co-parcener of minor co-parcener's share—Suit by minor to recover possession—Limitation*

A suit by a co-parcener in a Hindu joint family to recover possession of his share of the property alienated during the plaintiff's minority by another co-parcener who purported to act as, but was not in fact, the guardian of the plaintiff is governed by Art. 144 and not by Art. 44 of Schedule I to the Limitation Act. **L** SUNDER *v.* SHIAMAN, (1922) A. I. R. (L.) 286 **731**

——— ——— Arts. 57, 64, 85—*Suit to recover money from agent after balance struck—Limitation.*

Plaintiffs alleging that the defendants were their *gumashtas* set forth in their plaint that by agreement between the parties the plaintiffs financed the defendants and took with them an equal share in profit and loss on the defendants' transactions On the other hand, inasmuch as the plaintiffs financed the defendants, defendants undertook to pay interest. The plaint further recited a series of transactions terminating in the striking of a balance by the defendants in the plaintiffs' favour. Plaintiffs brought a suit upon the account supported by the acknowledgment:

Held, (1) that although there had been a mutual and current account between the parties, it was not open and current at the time of the suit, and that, therefore, the suit was not governed by Art 85 of Sch I to the Limitation Act;

(2) that if the suit was regarded as one for money payable for money found to be due on an account stated, it was governed by Art 64 of Sch. I to the Limitation Act;

(3) that if it was regarded as a suit for money payable for money lent, or as a suit for the re-payment of principal and interest less any credit due to the defendants in respect of profit on transactions effected by the defendants, then Art. 57 of Sch. I of the Limitation Act would be applicable. **L** FIRM GURDAS RAM-KOTU RAM *v.* BHAGWAN DAS, (1922) A. I. R. (L.) 82 **815**

——— ——— Art. 85—*Mutual, open and current account—Test of mutuality—Shifting balance.*

Where one party only makes payments to, or for, or on account of, the other and that other only from time to time makes payment in re-payment, the accounts cannot be said to be mutual within the meaning of Art. 85 of Schedule I to the Limitation Act.

The test of mutuality is the presence in the accounts of a shifting balance sometimes in favour of one side and sometimes in favour of the other, but its absence is not conclusive proof against mutuality. The fact that the balance no longer shifted is not in itself sufficient to justify the conclusion that the account had ceased to be a mutual, open and current account. **L B** ARUNACHALLAM CHETTY *v.* SOMASUNDARAM CHETTY, 11 L. B. R. 369 **928**

——— Sch. I, Arts. 89, 115, 116, 132—*Suit for accounts—Limitation—"Moveables," if include money—Termination of agency—Question of fact—Omission to render accounts—Refusal*

Art 89 of Sch. I to the Limitation Act, applies to a suit for accounts by a principal against his rent collector, as the term "moveable property" in that Article includes money.

To make Art. 116 of Sch I to the Limitation Act applicable, it must be shown, as provided in Art 115, that the suit is of a nature not specifically provided for in the Schedule.

The question whether an agency has terminated within the meaning of Art. 89 of the Limitation Act is a question of fact

An omission to render accounts where accounts are demanded may operate as refusal.

When a suit for accounts is decreed, the accounts are not necessarily restricted to the three years preceding the institution of the suit or three years preceding the termination of the agency. But where by reason of the happening of events the claim for accounts up to a certain date is barred by limitation at the date of the institution of the suit, the defendant can only be called upon to render accounts only in relation to transactions which took place after that date.

Obiter—Where immoveable property is hypothecated to secure the performance of an obligation undertaken by an agent, a suit by the principal may in essence be regarded as a suit to enforce a charge on immoveable property within the meaning of Art 132 of Schedule I to the Limitation Act and may, consequently, be governed by the period of 12 years provided by that Article. **C** PRANRAM MOOKERJEE *v.* JAGADISH NATH RAY, 35 C. L. J. 41; 26 C. W. N. 61; 47 C. 250; (1922) A. I. R. (C.) 355 **562**

——— ——— rt. 106. *See* CONTRACT ACT, 1872, s. 253 (10) **722**

——— ——— Art. 116—*Vendor and purchaser—Sale-deed, construction of—Covenant for title and quiet enjoyment, breach of—Damages, suit for—Limitation, starting point of—Cause of action.*

A sale-deed executed by defendant and another to plaintiff contained the following covenant: "If there is any dispute in respect of this by Gnatis, Samantas and others, etc., we shall settle them out of our expense and we shall be bound to carry out this sale without obstruction." The other vendor's son sued plaintiff for recovery of half the land comprised in the sale and obtained a decree in 1916 The present suit was filed by plaintiff in 1917 for recovery of half the sale price:

Held, that even assuming that there was no covenant for quiet enjoyment there was clearly a covenant for title and the suit would be governed

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by Article 116 of the Limitation Act. **M** SISTLA SUBBAYYA *v.* PATA PITCHANNA, (1922) M. W. N. 420 **190**

——— **Sch. I, Art. 120.** *See* BENGAL TENANCY ACT, 1885, s. 111A **489**

——— ——— **Art. 132,** applicability of. *See* MORTGAGE **707**

——— ——— **Art. 134**—*Transfer of title by mortgagee—Mortgaged property under ownership of Hindu widow—Reversioner, suit by, to recover possession—Limitation—Reversioner's disability, nature of—Acquiescence by female owner, effect of—Art.* 141, *application of.*

Where the mortgagee of an estate in the ownership of a Hindu widow transfers absolute title to the same, the reversioner must bring a suit for recovery of possession under Art. 134 of Sch I to the Limitation Act, as Art. 141 has no application to such a case.

Per *Spencer, J.*—A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate is not on the same footing as disability of a minor, an idiot, or an insane person in whose favour an extra period of limitation has been allowed for instituting their suits, whatever may be the Article applicable to a suit of the same description by a person not so disabled

A female owner's acquiescence in the transfer of an estate made by the mortgages will not amount to an act of alienation which a reversioner on succeeding to the estate can sue to set aside.

The expression "hereby otherwise specially provided for" in Art. 144 of Schedule I to the Limitation Act, indicates that that Article is the residuary Article for suits for the possession of immoveable property, but before a plaintiff can have resort to this Article, he must first show that Art. 134 is inapplicable.

Per *Ramesam, J.*—Art 141 covers only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction—in either case resulting in the loss of possession to a stranger and the need of a suit on behalf of the reversioner. But this Article applies only when the suit is of a kind not described in Arts. 134, 135, 138, 140, 142 and 143.

The object of Art. 134 of Sch. I to the Limitation Act is to cut down the period available to the mortgagor under Art. 48 and to compel him to watch the conduct of the mortgagee and to intervene on a transfer.

Though it is true that a reversioner cannot sue to redeem during the lifetime of a widow, yet if the intervening female's conduct is such as to raise an apprehension that the property will never be redeemed or altogether lost, a reversioner can maintain an action for the preservation of the property. **M** NARAYANASAMI NAICKER *v* PERIASAMY ODAYAR, 14 L. W. 116; (1922) M. W. N. 465; 43 M. L. J. 163; 44 M. 951 **734**

——— ——— **Art. 139**—*Tenant holding over—Adverse possession - Landlord, suit for possession by—Limitation.*

A tenant who holds over cannot set up adverse title to the landlord, nevertheless under Art. 139 of Sch. I to the Limitation Act, the latter can only recover possession if he sues within 12 years. **A** DEBI PRASAD *v.* GUJAR, 20 A. L. J. 696; (1922) A. I. R. (A) 423 **750**

——— **Sch. I, Arts. 141, 144**—*Suit by reversioners for possession of immoveable property—Adverse possession—Limitation.*

A suit by the reversioners of a deceased person, for possession of immoveable property originally owned by him, against the person in occupation, would be governed by Art. 141 of the Limitation Act, unless the defendant could show that adverse possession started in the lifetime of the deceased. **L** CHANAN SINGH *v* SALIG RAM, 36 P. L. R. 1922 **177**

——— ——— **Art. 144**—*Proof of title by plaintiff—Burden on defendant to prove possession for over 12 years before suit—Constructive possession—Title—Constructive possession always follows title.*

In cases falling under Art 144 of Schedule I to the Limitation Act, it is not incumbent on the plaintiff to establish possession within 12 years of suit. He has to prove title and it then rests on the defendant to prove that he and those under whom he claims have been in possession for over twelve year before suit. **N** SAKHARAM *v.* DEOBA **320**

——— ——— **Arts. 165, 181**—*Civil Procedure Code (Act V of 1908), O. XXI, r.* 100—*Application by judgment-debtor for restoration of excess property delivered in execution—Limitation.*

An application under O XXI, r. 100 of the Civil Procedure Code for restoration of excess property delivered in execution, is, where the applicant is the judgment-debtor, governed by Art. 181 and not Art. 165 of the Limitation Act. **B** RASUL MALIK PINJAR *v* AMINA HANIF, 24 BOM. L. R. 771; (1922) A. I. R. (B.) 271; 45 B. 1031 **349**

——— ——— **Arts. 174, 181,** application of. *See* EXECUTION OF DECREE **783**

——— ——— **Arts. 181, 182.** *See* APPLICATION FOR POSSESSION BY PURCHASER, NOT STEP-IN-AID OF EXECUTION **635**

——— ——— **Arts. 181, 182**—*Preliminary decree—Amendment after expiry of limitation for applying for final decree—Final decree, application for—Extension of time.*

The holder of a preliminary decree applied for amendment of the same on the ground that the sum as entered in the decree was less than that granted by the judgment. The application was made after the expiry of the period of limitation prescribed for applying for a final decree. The Court made the amendment as desired The decree-holder preferred an application for a final decree counting the limitation from the date of the amendment:

Held, that the application was not maintainable as the decree-holder by postponing his amendment till after the expiry of the period of limitation prescribed for making the preliminary decree final, could not revive his right to obtain a final decree by reason of such a variation in the preliminary decree. **N** NANEHLAL *v* GULSHAN RAI, 18 N. L. R. 58; (1922) A. I. R. (N.) 217 **919**

——— ——— **Art. 182**—*Execution of decree—Incompetent appeal by judgment-debtor—Limitation, running of, whether suspended.*

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The running of limitation against a decree-holder is not suspended by reason of an incompetent appeal by the judgment-debtor, such as an appeal against an order dismissing his application for review against the decree. **C** RAM RATAN *v.* UPENDRA CHANDRA **727**

——— **Art. 182 (2)**—*"Appeal," meaning of—Appeal against order dismissing application to set aside* ex parte *decree whether included.*

The words "where there has been an appeal" in clause 2 of the Art. 182 of the Second Schedule to the Limitation Act mean an appeal from the decree or order sought to be executed, and do not include an appeal from an order dismissing an application to set aside an *ex parte* decree. **N** JABARKHAN *v.* RAHIMKHAN, (1922) A. I. R. (N.) 197; 18 N. L. R. 190 **728**

——— **Art. 182 (5)**—*Decree transferred to another Court—Application for further transfer made to First Court not step-in-aid of execution.*

When a Court which has passed a decree transfers it for execution to another Court, an application for transfer to still another Court should be made to the Court to which the decree has already been transferred. Such an application made to the First Court cannot be treated as a step-in-aid of execuion, as it ceases to be the proper Court within the meaning of Sch. I, Art. 182 (5) of the Limitation Act, as soon as it has transferred the decree **B** RANGASWAMI SHETTI *v* SHESHAPPA MANJAPPA SHIMPI, 24 BOM. L. R. 798; (1922) A. I. R. (B.) 359 **566**

Local inspection—*Magistrate, power of, to view the* locus in quo *for understanding evidence taken.*

It is legitimate for a Magistrate trying a case to make a local inspection at the request of the parties and in the presence of their leaders for the purpose of enabling him to understand the evidence which had been taken in the case. **C** AZIZ MANDAL *v.* GIRISH CHANDRA CHOUDHURY, 23 CR. L. J. 502 **38**

Madras Estates Land Act (I of 1908)—*Affirmation of old customary law—New right, creation of, by Act to settle disputes between landlord and tenant.*

In declaring the rights of occupancy *raiyats* and emphasizing the distinction between a landlord's "private lands" and "*raiyati* lands", the Madras Estates Land Act affirmed the old customary law that has always been recognised by the British Administration Apart from the rules relating to procedure and jurisdiction of Revenue Courts, it created one new right in order to settle the constant disputes between landlords and tenants and gave occupancy rights to all *raiyats* in occupation of lands within an "estate" at the time it was passed. It also declared and gave statutory recognition to existing rights and status These remarks do not apply to *raiyatwari* tracts in the direct possession of Government which are let out to *mirasidari* or hereditary *raiyats* for purposes of cultivation. **P C** CHIDAMBARA SANNADHIGAL *v.* VEERAMA REDDI, 31 M. L. T. 54; 16 L. W. 102; 45 M. 586; (1923) M. W. N. 74; 43 M. L. J. 640; (1922) A. I. R. (P. C.) 292 **538**

——— **s. 3 (3)**—*"Holding" whether means ascertained holding—Co-tenants—Ejectment suit—Suit for ascertainment of shares in holding—Civil Court, jurisdiction of.*

Under the Madras Estates Land Act a tenant cannot sue for ejectment of his co-tenant in the case of an unascertained holding, for the definition of the word "holding" in section 3 (3) of that Act shows that only ascertained holdings are contemplated by it.

Therefore, although in the case of a tenancy-in-common, a tenant cannot bring a suit for ejectment of his co-tenant in a Civil Court, yet he can sue for ascertainment of his share in the holding in that Court to enable him to bring the ejectment suit in the Revenue Court. **M** DUVVURY RAMAMURTHY *v.* PABBINEEDI BULLIRAJU, 41 M. L. J. 431; 14 L. W. 500 **907**

Madras High Court Original Side Rules, r. 63 (a), *scope of.*

Per *Schwabe, C. J.*—Rule 63 *(a)* of the Original Side Rules includes all documents in the nature of negotiable instruments specifically described in it and the questions of how far a particular Bill of Exchange might be negotiable or what the restrictions might be on its negotiability are alien to the rule. **M** KANALAL BHOYA *v* BALARAM PARAMSUKDOSS, 31 M. L. T. 284; 43 M. L. J. 480; 16 L. W. 603 **941**

Majority Act (IX of 1875), s. 2—*Muhammadan Law—Guardian for marriage—Majority.*

The age of majority of a Muhammadan guardian, so far as his capacity for giving a person in marriage is concerned, is to be determined by the Muhammadan Law, and such age under that law is fifteen years. **L** YUSAF *v* ZAINAB **727**

Mamlatdars' Courts Act (Bom. II of 1906), s. 5, *Explanation—Ouster by co-owner, whether amounts to dispossession—Jurisdiction of* Mamlatdar *to award joint possession.*

A *Mamlatdar* has no jurisdiction to award joint possession under Bombay Act II of 1906.

The meaning of the explanation to section 5 of the Mamlatdars' Courts Act is that any action of one co-owner who has rights over the whole property, although it may interfere with the joint ownership of his co-owner, does not amount to dispossession under the Act, and it was not intended that ouster by one co-owner of the other should amount to dispossession within the meaning of the Act, so as to entitle the Mamlatdar to award joint possession. **B** JINA JIBHAI *v.* MATHUR JIBHAI, 23 BOM. L. R. 1016; 45 B. 289. (1922) A. I. R. (B.) 126 **225**

Martial Law Ordinance (II of 1921), cls. 6, 16—Offence committed in Martial Law Area—Arrest of offender outside area, legality of—Summary Magistrate, remand by, of offender arrested outside Martial Law Area, legality of. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 54, 58, 60. 177, 491 **26**

——— **ss. 6, 7**—*Offence, commission of, in Martial Law area—Trial by Summary Magistrate outside area, legality of*—Habeas corpus, *writ of, issue of, to jailor of prison where prisoner confined, validity of—Jurisdiction.*

The trial of a person for an offence committed in the Martial Law area proclaimed under Ordinance II of 1921 by a Summary Magistrate holding his Court

outside such area is illegal and a conviction following thereon is liable to be set aside.

In case of such conviction the High Court has power to interfere by the issue of a writ of *habeas corpus* to the jailor of the jail in which the prisoner is confined. M ERADA PADINHAREDIL GOVINDAN, *In re*, 16 L. W. 349; 43 M. L. J. 356; 31 M. L. T. 304; 24 CR. L. J. 614 (1922) A. I. R. (M.) 499 **838**

Mesne profits, *application for ascertainment of—Venue—Application, nature of—Interest—Discretion—High Court, power of, to interfere*

The proper Court in which to institute proceedings for the ascertainment of mesne profits is the Court passing the decree, even though the claim exceeds the ordinary pecuniary jurisdiction of such Court

An application for ascertainment of mesne profits decreed is not a suit, but a proceeding in a suit, consequently, where mesne profits are decreed, the plaintiff is entitled to such profits for three years before the date of the suit.

It is entirely within the discretion of a Court to fix the rate of interest decreed, and the High Court will not, in second appeal, interfere with that discretion. Pat SURAJ PRASAD v. SOMAR MAHTO, 2 P. L. T. 648 **903**

Minor, *sale in favour of, validity of—Minor, whether can sue for possession of property sold.*

There is nothing in the law to prevent a minor becoming a transferee of immoveable property and a minor in whose favour a valid deed of sale has been executed is competent to sue for possession of the property conveyed thereby. N BALKRISHNA v. LAKHU, (1922) A. I. R. (N.) 239 **191**

Mortgage—*Covenant postponing redemption, when amounts to clog on equity of redemption—Redemption before expiry of term, when allowed.*

A covenant postponing redemption for a long term need not necessarily of itself amount to a clog on the equity of redemption, but the effect of all the conditions in the deed must be considered as a whole, and if those conditions would result in making redemption very difficult, if not impossible, at the end of the term, a Court may ignore the covenant postponing redemption and may allow redemption at any time on such terms as it thinks fit. O KUNJ BEHARI LAL v. PRAG NARAYAN, 9 O. L. J. 294; (1922) A. I. R. (J. C.) 283 **529**

——— *Perpetual lease in favour of mortgagee—Same transaction—Clog on redemption*

Where a perpetual lease by a mortgagor in favour of the mortgagee of the property mortgaged and the mortgage form one and the same transaction, the lease acts as a clog on the equity of redemption and the Courts are bound on principles of equity to relieve against it N VITHAL v. BHOLU **237**

——— *Redemption—Long term—Clog—Usufructuary mortgage for long term—Term, particular, void and unenforceable, effect of—Mortgage, whether invalid as a whole.*

A long term in a mortgage does not necessarily amount to a clog on the equity of redemption It only does so where it is such as to render redemption practically impossible or where the bargain is unconscionable and the long term is unaccompanied by any corresponding advantage to the mortgagor. A long term in a usufructuary mortgage is less likely to operate as a clog on redemption than in any other class of mortgage, because redemption is effected on payment of a fixed sum and there is no danger of arrears of interest mounting up to an extent which may far exceed the value of the property.

Where in consideration of a reduction of interest a long term is agreed upon between the parties to a usufructuary mortgage and the other terms are also such as are naturally incident to a possessory mortgage for a long term, there is no clog on equity of redemption.

The fact that a particular covenant in a mortgage, (*e. g*, that the mortgage is not to be redeemed with borrowed money, is void and unenforceable does not invalidate the mortgage as a whole. O ZULFIQAR ALI v. SURAJ PRASAD, 9 O. L. J. 365; (1922) A. I. R. (J. C.) 221 **998**

——— *Subrogation—Purchaser of equity of redemption paying off incumbrances—Subrogation, right to, on sale being set aside—Suit to enforce security—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 132, applicability of.*

The right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound. It cannot be claimed by a mortgagor or any other person who has assumed the payment of the mortgage-debt without having any interest to protect

However, a purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property becomes entitled to the benefit of the securities when the purchase is afterwards set aside,

A suit seeking to enforce such securities is governed by Art. 132, Schedule I, to the Limitation Act and must be brought within 12 years from the date of the mortgage.

Subrogation is, in most cases, rather an additional remedy than an additional right and may exist concurrently with and as a further security to the right to a simple action for reimbursement.

A second mortgagee paying off a prior mortgagee neither "acquires" a charge on the property nor does he acquire it on the date on which he pays off the prior mortgagee. The charge is already there; all that he acquires is a right to enforce the charge and to a cession in his favour of the securities held by the prior mortgagee. Pat SIDHANAND MISRA v. JAGMOHAN LAL, 3 P. L. T. 533; (1922) PAT. 331; (1922 A. I. R. (PAT.) 499; 1 PAT. 780 **707**

——— *Subsequent invalid sale by mortgagor—Mortgagee, adverse possession by.*

A mortgagee cannot rely upon the twelve years' rule of limitation in support of a plea of adverse possession unless he can prove a subsequent valid sale.

Where one of several mortgagors effects a sale of the equity of redemption the mortgagee cannot set up the plea of adverse possession as against those mortgagors whose shares have been illegally sold. L AMIR v. NADIR ALI **733**

Mortgage decree *for sale—Execution—Claim to mortgaged property, if entertainable—Civil Procedure Code (Act V of 1908), O. XXI, r. 58, applicability of.*

Mortgage decree—concld.

It is not open to an Execution Court to entertain and adjudicate upon a claim to property under O. XXI, r. 58 of the Code of Civil Procedure in the course of executing a mortgage-decree which contains a provision that the property in question should be sold. C MAHABIR PRASAD SINGH v. NOGENDRA NATH MANDAL, 26 C. W. N. 50 271

Mortgagee *in possession, duty of.*

Where a mortgagee is put in possession of the mortgaged property the intention of the parties is that the land shall be properly cultivated and that the mortgagee shall put it to the best use, so that a fair amount of profits may be realised and credited towards interest due on the principal mortgage debt. L ZORA v. CHANDU 883

Muhammadan Law—*Legitimacy—Acknowledgment.*

The rule of legitimation by acknowledgment permitted by the Muhammadan Law applies only when the alleged marriage is uncertain, that is, not proved, but no benefit can be derived from this rule when it is found as a fact that the alleged marriage never took place. L HUSSAIN BAKHSH v. JHANDA SINGH, (1922) A. I. R. L.) 460 749

——— *Lien for unpaid dower on husband's property in possession of wife—Lien, nature and extent of.*

The lien of a divorced Muhammadan wife or widow for unpaid dower attaches her to her husband's property in her possession. No lien exists during the continuance of the marriage relation M NARAYANA AIYAR v. BIYARI BIVI, (1922) A. I. R. (M) 221; 14 L. W. 524; 41 M. L. J. 557; (1921) M. W. N. 808; 45 M 103 673

——— Sunni—*Gift—Will—Distinction—Gift, essentials of—Usufruct, reservation of, by donor—Possession, constructive, by donee—Registration—Zemindari estate—Mutation of names—Construction of document—Gift or Will*—Taluqdari *law—Primogeniture* sanads—"*Successor*," *meaning of.*

In Muhammadan Law the broad distinction between a gift *hiba* and a bequest *wasiat* is that in the case of a gift the immediate right of property in the subject-matter of the gift is conferred and in the case of a bequest the vesting of the right of property is postponed.

For a valid gift *inter vivos* under the Muhammadan Law three conditions are necessary:—( ) manifestation of the wish to give on the part of the donor, ( ) the acceptance of the donee, either expressly or impliedly, and ( ) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively.

The reservation of usufruct by a donor does not by itself make a gift of the property void under Muhammadan Law.

A *Taluqdar* made a gift to the following effect: "I have gifted my moveable and immoveable property, all my *Zemindari* and *lambardari* estate, etc. to *M* with the exception of the villages set out below which will remain in my possession for the duration of my life and dependent relatives free of rent and Government revenue . such villages will be kept by me without transfer by mortgage or sale or gift for my lifetime and after my death the donee will be the proprietor *malik* of the aforesaid ex-

Muhammadan Law—contd.

cepted property whose revenue the donee will pay from the *Ilaqa*, and will pay all the debts outstanding against the estate." *M* did not take physical possession of the excepted villages till after the death of the donor nor did he apply for mutation of names in his favour in respect of them. He, however, obtained mutation of names in his favour of all the other *Zemindari* property and paid the Government revenue which became due in respect of the *taluqdari* part of the entire property :

Held, (1) that the document could not even in regard to the excepted property be regarded in any respect as a Will but was a deed of gift *inter vivos*;

(2) that the whole *Zemindari* property mentioned in the deed must be regarded as one property, the taking possession of any part of which being constructively a taking possession of the whole.

(3) that the actual physical possession of the donee over a portion of the *zemindari* estate and the mutation of names in respect thereof and the payment of Government revenue by him in respect of the *taluqdari* part of the entire estate must be regarded as amounting to constructive possession of the donee over the whole property, subject of the gift in question, and that the gift of the excepted villages was also consequently valid.

In considering what is the Muhammadan Law on the subject of gifts *inter vivos* it must be borne in mind that when the old and admittedly authoritative texts of Muhammadan Law were promulgated there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land or any *zemindari* estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Muhammadan Law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

The word "successors" in a primogeniture *sanad* means those designated persons who would succeed in the event of an intestacy and not persons who may take by sale, gift or bequest. P. C. ABDUL GHANI KHAN v. FAKHR JAHAN BEGAM, 25 C. W. N. 95; 31 M. L. T. 21; 44 A. 201; 9 O. L. J. 369; 43 M. L. J. 453; 24 Bom. L. R. 1265; 27 C. W. N. 53; 20 A. L. J. 94; (1922) A. I. R. (P. C.) 281 254

——— Trust property—Power of Mutwalli. *See* RELIGIOUS ENDOWMENTS ACT, 1863, s. 7 764

——— *Widow in possession of husband's property in lieu of dower-debt—Right to transfer lien apart from dower-debt—Construction of sale-deed—Transfer of dower-debt.*

A Muhammadan widow in possession of her husband's estate in lieu of her unsatisfied dower cannot transfer the lien on the property without also transferring her dower-debt as the lien is not an interest in property which can be severed from the right to dower and transferred as a separate interest.

Muhammadan Law—concld.

The widow may, however, as long as she does not transfer the dower-debt or that debt remains undischarged, transfer for her lifetime, the possession of the property the proceeds of which belong to her until the debt is paid off. The possession of the transferee in such a case might constructively be regarded as the possession of the widow.

A sale-deed executed by a Muhammadan widow after reciting that the widow was in possession of the property of her deceased husband, "by virtue of inheritance and in lieu of dower" purported to transfer to the vendee, "the whole and entire property owned and possessed by me together with all rights and appurtenances" It further added, "In short, the proprietary interest and all rights, title and interest which I had in the vended properties have under this sale-deed been transferred from me and become extinguished in so far as I am concerned and have devolved on and vested in the said purchaser and his heirs and representatives":

Held, that the deed transferred simply the share to which the widow was entitled in the property of her deceased husband as an heir and not the dower-debt. **Pat** ABDUR RAHMAN *v.* WALI MOHAMMAD, (1922) PAT. 313 **601**

Murder—*Jury, method of charging.*

In charging a Jury in a trial for murder, and in directing them as to what constitutes murder, the Judge should refer to the sections of the Penal Code which relate to culpable homicide, and direct the Jury as to what is culpable homicide, and in what circumstances culpable homicide amounts to murder. To direct the Jury that "murder is the intentional killing of another human being with malice aforethought," although a comprehensive way of describing what the meaning of murder is, is not the way in which a Jury ought to be charged, and amounts to a misdirection **C** EMPEROR *v.* DURGA CHARAN BEPARI, 36 C. L. J. 171; 26 C. W. N. 1002; 23 CR. L. J. 567 (1922) A. I. R. (C.) 124 **407**

Negotiable Instruments Act (XXVI of 1881), s. 4—*Promissory-note—Instrument containing unconditional undertaking to pay certain sum with interest annually, whether pro-note.*

An instrument in writing which contains an unconditional undertaking to pay a certain sum of money with interest annually is not a promissory-note within the meaning of section 4 of the Negotiable Instruments Act. **L** JOTI PARSHAD *v.* BRIJ RAJ SHARAN, 52 P. L. R. 1922; 4 U. P. L. R. (L.) 97 **461**

——— **s. 13 (2).** *See* LETTERS PATENT (MAD.) CL. 15 **921**

——— **s. 48 (a)**—*Pro-note — Consideration — Presumption* — Onus *of proof.*

Although under the law there is a presumption that the maker of a pro-note has received the consideration for it, yet if the statement of the plaintiff's agent as to consideration is altogether inconsistent with the plaintiff's allegation in his plaint, the *onus* will shift to the plaintiff, and he must prove that consideration passed. **L** SIRAJ-UD-DIN *v.* CHAMPO, 3 L. L. J. 439 **443**

Notice, *constructive—Registration.*

Registration does not operate as constructive notice and a purchaser from an ostensible owner whose title-deeds are themselves complete is not bound to search the registration office to see if the original owner may not have given a title to somebody else **N** KASTURIBAI *v* BALIRAM **732**

——— *to quit—Delay in suing for ejectment, effect of—Fresh notice not necessary.*

Where a notice to quit is served upon a tenant his possession thereafter is that of a trespasser. Mere inaction on the part of a landlord to sue for ejectment after a notice to quit has been served on a tenant, does not amount to acquiescence of his possession as a tenant on the part of the landlord, as no fresh notice is necessary. **N** YESHWANT *v.* SHIWAPPA **178**

Official Assignee, rights of. *See* INSOLVENCY **898**

Opium Act (I of 1878), ss. 3, 9—*"Opium," whether includes morphia.*

Though morphia is not a preparation or admixture of opium, yet it is an intoxicating drug prepared from the poppy and, as such, fulfills the requirements of the definition of "opium" contained in section 3 of the Opium Act. **L** EMPEROR *v.* ROBINSON, 3 L. 230; 24 CR. L. J. 580; (1922) A. I. R. (L.) 216 **612**

Order *dismissing execution petition for default if appealable.*

No appeal lies from an order dismissing an application for execution on account of the decree-holder's failure to prosecute it. **Pat** GOUR CHANDRA ROY *v* JANARDAN PRASHAD THANUR **337**

Ostensible owner—*Alienation—Suit by real owner to recover property—Notice of title—Burden of proof—Question of fact, decision on—Decision, when not final.*

In order to allow the real owner of property to recover from an alienee the property taken from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the title or the existence of circumstances which ought to have put the purchaser on an enquiry which if prosecuted would have led to a discovery of the real title.

Ordinarily, a decision on a question of fact is final, but when it is shown that that decision was reached without assessing the evidence on the record at its proper value and that, while appraising that evidence, various important factors were not considered, the decision cannot be accepted as final. **N** LALSINGH *v* PARSHRAM, (1922 A. I. R. (N.) 226 **332**

Oudh Estates Act (I of 1869), ss. 22 (11), 23—*Succession—'Ordinary law," meaning of.*

The expression 'ordinary law,' referred to in section 23 of the Oudh Estates Act, is the law which would govern the parties apart from the Statute, and includes any Sanad giving title to the property in dispute. **P. C.** BADRI NARAIN SINGH *v.* HARNAM KUAR, 44 A. 449; 31 M. L. T. 196; 4 O. L. J. 425; (1922) A. I. R. (P. C.) 289; 27 C. W. N. 129; 25 O. C. 313 **1000**

Parda-nashin lady, *transactions with—Principles applicable—Persons standing in relation of personal confidence—Absolute strangers—Independent and competent advice, what is.*

Parda-nashin lady—contd.

All transactions with *parda-nashin* ladies fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of the transaction is one who stood towards her in a fiduciary character or some relation of personal confidence and, secondly, cases where such person was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted: in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The fairness of the bargain is the crucial test

The Court, when called upon to deal with a deed executed by a *parda-nashin* lady, must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do: secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered and thirdly, that she had independent and disinterested advice in the matter.

The circumstances under which a *parda-nashin* woman agrees to transfer property in which she is interested must be carefully examined in order to ascertain that she had independent advice and that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepesentation

It is not necessary to insist upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities: it is sufficient that the general result of the transaction should be understood and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady.

Independent and competent advice does not mean independent and competent approval; it simply means that the advice should be removed entirely from the suspected atmosphere, and that from the clear language of an independent mind, free from taint of interest, the party acting should know precisely the nature and consequences of the transaction

The absence of advice would not by itself necessarily vitiate a transaction, if it is otherwise established to be righteous, that is, such as a right-minded person might be expected to do

The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself.

The above are only general principles. There is a great fear of failure of justice, if they are moulded into inelastic formulas or crystallised into inflexible rules and treated as of universal application, regardless of the special facts and surrounding circumstances of the concrete case requiring adjudication.

Whenever any person derives a benefit under a deed, if any confidential or fiduciary relation subsists between the parties, the Courts so far presume against the validity of the instrument as to require some proof, varying in amount according to circumstances, of the absence of anything approaching to imposition, overreaching, undue influence or unconscionable advantage.

If a confidence is reposed and that confidence is abused, Courts of Equity will grant relief. Equity demands in such circumstances the most abundant good faith *(uberrima fides)* in the transaction between the parties. There need not necessarily be misrepresentation by one party to the other to invalidate the deed if there is any concealment of a material fact, any failure to disclose material information or any just suspicion of artifice, equity will interpose and pronounce the transaction void and, as far as possible, restore the parties to their original right. SATISH CHANDRA GHOSH v. KALIDASI DASI, 34 C. L. J. 529; 26 C. W. N. 477; (1922) A. I. R. (C.) 203 **577**

Parda-nashin woman, *disposition of property by—Court, duty of.*

A Court when dealing with the dispesition of a property by a *parda-nashin* woman ought to be satisfied that the transaction was explained to her and she knew what she was doing. Consequently, a deed of relinquishment written by a *parda-nashin* lady, during the course of her illness of which she died and in the house of the person in whose favour it was executed without having had any opportunity of consulting her relatives, is open to grave suspicion and it lies heavily upon the person relying upon the deed to show that it was properly obtained and that the lady knew what she was about. **L** HARI CHAND v. UGAL KISHORE, (1924) A. I. R. L.) 349 **722**

Parties—*Co-sharers—Partition suit by transferee of one co-sharer—Transferor, whether necessary party.*

Where the interest of one of several co-sharers has been transferred to a third person and has property vested in him, he can bring a suit for partition without joining his transferor, for the latter, although a proper party to the suit, is not a necessary party. **Pat** NANDKESHWAR MISRA v. SUDARSHAN RAM TEWARI **804**

——— *Sale in insolvency proceedings—Appeal against order confirming sale—Auction-purchaser and Official Receiver, whether necessary parties.*

In an appeal from an order confirming a sale in insolvency proceedings, the auction purchaser and the Official receiver are necessary parties and the omission to make them parties is fatal to the appeal. TARLOK DEVI v. OTI RAM **716**

Partnership *Suit by one of surviving partners respecting partnership transaction, whether maintainable*

A suit by one of two surviving members of a partnership, after dissolution of the partnership, in respect of a transaction with the partnership, is not maintainable. M. ADITHAYYA CHETTY v. SOMASUNDARAM CHETTY, 16 L. W. 427 **927**

Patwari, whether "public servant." *See* PENAL CODE, (10, ss 21 (10), 24, 403, 405 **157**

Penal Code (Act XLV of 1860), s 21 (10), 24, 403, 405—*"Wrongful loss"—"Wrongful gain"—Temporary wrongful loss or*

Penal Code—contd.

gain, meaning of—Criminal breach of trust, what constitutes—Patwari, whether "public servant"

Temporary wrongful loss and temporary wrongful gain are within the meaning of "wrongful loss" and "wrongful gain", contained in section 24 of the Penal Code.

Reading sections 403 and 405 of the Penal Code together, it is clear that criminal breach of trust is a species of criminal misappropriation, being a criminal misappropriation by a person entrusted with the property misappropriated, and as regards criminal misappropriation, a dishonest misappropriation for a time only is misappropriation. The same principle applies to temporary misappropriation.

Under section 158, Land Revenue Code, cesses can be collected as if they were land revenue, and as it is within the duties of a *Patwari* to collect land revenue and cesses due on land in his village he is a public servant within the meaning of section 21, clause (10) of the Penal Code. N LOCAL GOVERNMENT, C. P. *v.* MADHO PATWARI, 23 CR. L. J. 557 **157**

——— **ss. 23, 425**—*Mischief—Wrongful loss—Causing injury to neighbour's wall by digging one's own land, whether mischief.*

The essential element of the offence of mischief in section 425, Indian Penal Code, is the causing of "wrongful loss" to another's property, which is defined in section 23 of the same Code as being loss caused by "unlawful means".

The right to lateral support from an adjacent land belonging to others is a right which can only be acquired by prescription,

Therefore, where a person by digging his own land causes injury to the wall of his neighbour provided the latter has not acquired by prescription the right to lateral support from that land, his action, however malicious, does not amount to mischief within the true construction of section 425 of the Penal Code. M ATHI IYER, *In re*, 14 L. W. 728; 23 CR. L. J. 107 **831**

——— **s. 34**—*Isolated assaults—No common object—Joint trial, legality of*

During a trial, for a political offence a crowd gathered with a view to make a demonstration and as a result a number of Policemen posted to keep order received injuries and the assailants were tried together under section 332/34 of the Penal Code and convicted:

Held, that their joint trial was illegal and section 34 of the Code did not apply, because the assaults on individual members of the Police force were isolated and the accused were not actuated by any common object A FATEH CHAND *v.* EMPEROR, 20 A. L. J. 706; (1922) A. I. R. (A.) 423; 23 CR. L. J. 596 **820**

——— **ss. 34, 73, 395, 397**—*Dacoity—Use of deadly weapons.*

Where several persons join in committing a dacoity and some of them use deadly weapons, all of them are liable to be punished under section 397 of the Penal Code. The provisions of section 34 of the Penal Code are applicable to such a case. L DANGAR KHAN *v.* EMPEROR, 23 CR. L. J. 593 **817**

——— **ss. 100, 102**—*Right of private defence of body, when commences.*

Penal Code—contd.

Section 100 of the Penal Code gives the right of private defence of the body only against actual assailants, it does not authorise the killing or causing of hurt to persons who may in the future when re-inforced by others become assailants. The right arises only on the occurrence of an offence, or of an attempt to commit an offence, and as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed. L NARAIN DAS *v* EMPEROR, 4 L. L. J. 91; 3 L. 144; (1922) A. I. R. (L.) 1; 9 P. W. R. 1922 CR 23 CR. L. J. 513 **113**

——— **s. 145,** conviction under. *See* POLICE ACT, 1861, ss. 30, 30A, 32, scope of **945**

——— **s. 177.** *See* INCOME TAX ACT, 1918, s. 40 **843**

——— **s. 300, Excep. (1)**—*Grave and sudden provocation—Continuing under influence of provocation—Act, whether must immediately follow provocation.*

Accused suspected his wife of being intimate with one *M.* and frequently remonstrated with, and warned her: one night accused and his wife were sleeping in the courtyard of their *haveli* when, after some little time, accused awoke and found his wife's bed unoccupied: his suspicions being aroused, he immediately proceeded to the *khola* adjoining the *haveli*, where he found his wife and *M.* together: he attacked *M.* and killed him, and then attacked his wife and killed her also: he was placed upon his trial for the offence of murder and was sentenced to death, the Sessions Judge holding that the accused did not receive such grave and sudden provocation as to deprive him of the power of self-control. On appeal:

Held, that the provocation received by the accused was grave and sudden, and he continued to be under the influence of provocation until he had killed his wife, and that he was entitled to the mitigation provided in Exception (1) to section 300 of the Penal Code, as that exception does not contemplate that, in order to entitle an accused person to earn the mitigation, the act must immediately follow the provocation. L KADIR BAKHSH *v* EMPEROR, 2 L. L. J. 406; 24 CR. L. J. 563 **403**

——— **ss. 361, Exp., 366**—*Guardianship, lawful, kidnapping from—Kidnapping minor while under temporary custody of servant or friend—Consent of custodian, whether material—"Include," meaning of*

The fact, that a mother allows her minor girl to be in the custody of a servant or friend for a limited purpose and for a limited time, does not determine the mother's rights as guardian or her legal possession for the purposes of the criminal law, and if an accused kidnaps her from the possession of such servant or friend and marries her without the consent of her mother, he is guilty of an offence under section 366 of the Penal Code. The consent of the servant or friend is immaterial.

The word "include" in the Explanation to section 361 of the Penal Code is not intended to limit the protection which the section gives to parents and minors but rather to extend that protection by including in the term "lawful guardian" any person law-

Penal Code—concld.

fully entrusted with the care and custody of the minor. **L** BAZ *v.* EMPEROR, 3 L. 215; (1922) A. I. R. (L.) 1380; 23 CR L. J. 588 **620**

——— **ss. 408, 477A**—*Forgery—False entries made to cover defalcation—Offence.*

Where an accused person makes false entries in an account with the object of covering a defalcation made by himself, his conviction for forgery is not sustainable. **A** SHUJA-UD-DIN AHMAD *v.* EMPEROR, 20 A. L. J. 662; (1922) A. I. R. (A.) 425; 23 CR. L. J. 610 **834**

——— **s. 420** *Cheating—Dishonest intention*

In cases under section 420 of the Penal Code the evidence must establish the existence of a fraudulent or dishonest intention at the time of the commission of the act in respect of which the cheating is alleged **N** JAFFAR AYUB KATCHI *v.* EMPEROR, (1922) A. I. R. (N.) 195; 23 CR L. J. 589 **621**

——— **s. 426**—*Mischief—Removing fruit from trees—Essential to be established—*Bona fide *dispute between contending parties—Magistrate, jurisdiction of, to take cognizance.*

In order to invest a Magistrate with jurisdiction to summon a person charged with having committed the offence of mischief under section 426 of the Penal Code by removing the fruits of certain trees, it is essential for the complainant to make out a *prima facie* case in his petition of complaint or, in his statement on oath, of any deterioration caused by the accused in the value or utility of the fruit, and unless such deterioration is made out there can be no conviction for the offence of mischief.

A Magistrate has no jurisdiction to take cognizance of a case of mischief where there is a *bona fide* dispute between the contending parties with regard to the right in, and possession of, the property, the subject-matter of the charge. **Pat** GAINU PANDAY *v.* EMPEROR 2 P. L. T. 394; 23 CR L. J. 504 **40**

——— **s. 498.** *See* CRIMINAL PROCEDURE CODE, 1898, ss. 4 (*h*), 199 **624**

Pensions Act (XXIII of 1871), s. 7—*Pension, attachment of—Facts showing attachability be set out.*

Ordinarily a pension is not attachable for sale. Where a decree-holder wishes to attach and sell a pension, and his case is that the pension belongs to that class which is referred to in section 7 of Act XXIII of 1871, it is his duty to set out the facts and prove his case by appropriate proof. **A** MAZHAR ALI KHAN *v.* MAHFUZ HASAN, 20 A. L. J. 679; (1922) A. I. R. (A.) 429; 44 A. 697 **854**

Pleading—*Fraud—Variance between pleading and proof—Plaintiff, position of.*

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

Every variance between pleadings and proof is not fatal; the Court must carefully consider whether the objection is one of form or of substance.

When a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated; for, it is only fair play between man and man that the defendant should know what is charged against him. A charge of fraud must be

Pleading—concld.

substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.

Per *Buckland, J.*—In a case of fraud, it will not suffice to find fraud otherwise than as alleged on behalf of the plaintiff, and even should the Court find that fraud was practised, if such fraud is other than the fraud alleged, the defendant is entitled to have the suit dismissed. This is a proposition which may be applicable in cases between man and man or where a *parda-nashin* lady is not concerned But where a *parda-nashin* lady is involved, other rules have to be applied and conformity with them has to be established. **C** SATIS CHANDRA GHOSH *v.* KALIDASI DASI, 34 C. L. J. 529; 26 C. W. N. 177; (1922) A. I. R. (C.) 203 **577**

Pleadings—*Amendment.*

An amendment in the pleadings should be made if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided **O** HAMID MIRZA BEG *v.* AHMAD MIRZA BEG, 9 O. L. J. 359; 4 U. P. L. R. (J. C.) 89; (1922) A. I. R. (J. C.) 266 **986**

Police Act (V of 1861), ss. 30, 30A, 32, *scope of—Penal Code (Act XLV of* 1860*),* s 145, *conviction under—Essentials—General notification prohibiting procession without license—Notification by Executive Authority, whether law—"Resistance", meaning of—Power to prohibit procession whether incident to power to regulate—Power of Police to prohibit procession—Rule and enactment, difference between—"Law," meaning of—"Execution of law," meaning of—Offence created by Statute—Indictment under general law.*

Section 30*A* of the Police Act only applies where there is a violation of the conditions of a license granted under section 30 (3) of the Act, not where a procession is formed without a license.

Per *Mullick and Coutts, JJ.*—In order to secure the conviction of an accused under section 145 of the Indian Penal Code, some formal evidence should be given to prove a common object to resist the execution of an order promulgated by a lawful authority, and the accused should be given an opportunity of meeting the case in the Trial Court

The words of section 30 of the Police Act are sufficiently general to enable a Superintendent of Police to issue a general notification containing a prohibition, without any limit of time, against convening or collecting assemblies or directing or promoting processions without a license and any person contravening the terms of such notice is punishable under section 32 of the Act. A person is free to join an assembly or a procession, which has already been collected, if he has no notice that the convener or promoter has omitted to take out a license but if, after becoming aware of this fact, he persists in remaining with the assembly or procession he will be said to share the common object of such person to resist the execution of the notification

When a notification is issued by an Executive Authority in exercise of a power conferred by Statute, that notification is as much a part of the law as if it had been incorporated within the body of the Statute at the time of its enactment. A notification, issued in compliance with section 30 of the Police Act, is a law and certainly a legal process. It is

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immaterial if the wording of the notification is not in the exact language of the section so long as there is, on the whole, a substantial compliance and the public are in no error or doubt as to its purport

Resistance connotes some overt act: mere words without any intention of carrying them into effect, are not sufficient to prove an intention to resist.

Per *Das, J.*—Section 30 of the Police Act does not prohibit the common rights of a subject to form a procession on a public road or in a public street or a thoroughfare

A power to prohibit a procession is not incident to a power to regulate. The power of licensing is a power to regulate not a power to prohibit.

Under sections 30 and 30A of the Police Act, the Police have no power to prohibit a procession where the persons directing and promoting such procession decline to apply for a license, although there is such power where such persons take out a license and violate its conditions But the Police have no power to issue an order to have operation for a certain period, each case must be dealt with as it arises and discretion must be exercised by a District Magistrate on each occasion.

There is no difference between a rule and an enactment where there is a provision in the enactment that the rules shall be of the same effect as if they were contained in the Act; there is a wide difference between the two when there is no such provision. An order issued by a Superintendent of Police, under section 30 of the Police Act, cannot be regarded as law as there is no provision in the Act giving to such order the same effect as if it were contained in the Act.

"Law" means something which is enforceable and not capable of being rejected by a Court as unreasonable or repugnant to the law of the land. Rules, regulations and bye-laws, which cannot be canvassed in a Court of Law on any ground, have the character of law and are in fact law.

"Execution of the law" means enforcing it, and to be lawful it must follow the procedure laid down in an Act.

Resistance on the part of a person forming a procession must not be to the law but to the execution of the law. It means something more than non-submission and consists of an overt act showing an intention to make opposition to the execution of the law.

A person cannot be convicted under the Penal Code for an offence under the Police Act. Where a Statute creates a new offence which is not an offence at Common Law and imposes a penalty in respect of such offence, a person committing such offence can only be proceeded against under the Statute which creates the offence and cannot be indicted under the general law. **Pat** EMPEROR *v.* ABDUL HAMID, 3 P. L. T. 585; (1922) PAT. 274; 4 U. P. L. (PAT.) 79; 23 CR. L. J. 625 **945**

Practice—*Criminal revision—Case referred by Sessions Judge for enhancement of sentence—Application by accused thereafter on the merits, whether barred—Alternative charges—Complainant, whether can alter election.*

The mere fact that a reference has been made to the High Court by a Sessions Judge for enhancement of sentence, has not the effect of depriving

Practice—concld.

the accused of the right to apply to the High Court in revision

It is contrary to public policy and to the recognised principles of the administration of the Criminal Law that when a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, to hold that it is open to a complainant to alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction. **A** KOHNA RAM *v.* EMPEROR, 20 A. L. J. 775; 23 CR. L. J. 496; 4 U. P. L. R. (A.) 162; (1922) A. I. R. (A.) 502 **32**

Pre-emption—*Perpetual under-proprietary lease—Rent reserved exceeding Government revenue—Nature of transaction—Lease or sale.*

Where a grantor reserves no right of re-entry, whether the document is described as a lease or a sale, the test applied to determine its real nature is whether any rent was reserved to the grantor over and above the Government revenue, which he himself had to pay on the land. This applies only to deeds executed by the superior proprietor whereby an under-proprietary right is created in the grantee

A transaction, therefore, called a *pattah istimrari matahti*, that is, a perpetual under-proprietary lease, which reserves an annual rent, a portion of which is payable by the lessee as Government revenue and the remainder to the lessor, is a lease not giving rise to a right of pre-emption **O** SAHEB BAKHSH SINGH *v.* THAKUR DIN SINGH, 9 O. L. J. 334; 4 U. P. L. R. (J. C.) 85; (1922) A. I. R. J. C. 229 **966**

——— **suit**—*Sale—Cause of action—Registration—Limitation, operation of—Registration Act (XVI of 1908), s 47, application of*

A right of pre-emption arises only when a sale is completed, that is, when there is an entire cessation of right on the part of the vendor, and until a registered deed is executed there cannot be such cessation of right and no right of pre-emption can arise.

Therefore, the period of limitation for a pre-emption suit runs from the date of the registration of the sale-deed.

Section 47 of the Registration Act has no application to such a case. **M** RAGHO *v.* SAKHARAM, (1922) A. I. R. (N.) 200 **715**

——— *Valuation—Compensation for improvements, whether to be included in valuation.*

In determining the value for purposes of jurisdiction of a suit for pre-emption any compensation found to be equitably due to the vendee and not as a part of the price paid by the vendee, ought not to be taken into consideration. **L** CHIRAGH DIN *v.* SERAJ DIN, 3 L. 386 **890**

Presidency Small Cause Courts Act, 1882, ss. 19, 41. *See* CITY CIVIL COURTS ACT, 1892, S 3 **983**

Presidency Towns Insolvency Act (III of 1909), s. 36, *scope of—Matters involving difficult questions of title.*

Section 36 of the Presidency Towns Insolvency Act, 1909, like section 26 of the Indian Insolvent Act 1848, which it replaced, is discretionary.

The Court should not deal with a matter under, section 36 of the Presidency Towns Insolvency Act, if it involves difficult questions of title but should

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leave the parties to litigate such matter in a regular suit.

Quære:—Whether a suit is maintainable for the determination of the question of title after the matter has been decided under section 6 of the Presidency Towns Insolvency Act? C RASH BEHARI GHOSE *v.* OFFICIAL ASSIGNEE OF CALCUTTA, 25 C. W. N. 852 **341**

Probate *application—Verification, whether essential.*

The provision about the verification of an application for Probate by an attesting witness is directory and not mandatory and an omission of the verification is not fatal to the Probate proceedings. N RAM SINGH RAJPUT *v* MURTIBAI **940**

Probate and Administration Act (V of 1881), s. 50—*Hindu reversioner, whether entitled to be heard in Probate proceeding—Application for revocation of Probate—Immediate female reversioner not entitled to maintain application—Next reversioner, if can apply—Minor reversioners—Natural guardian omitting to apply for revocation—Reversioners, whether estopped.*

Although a reversioner under the Hindu law has no present interest in the property left by the deceased, yet the reversioner, whether male or female, is substantially interested in the protection or devolution of the estate, and, as such, is entitled to appear and be heard in a Probate proceeding. If the immediate reversioner is a female, the male reversioner in the second or third degree, as the case may be, (for instance, where the deceased has left a widow, daughter, mother and brother), is similarly entitled to be heard.

Where the immediate reversioner, a female, has rendered it impossible for himself by her own conduct to successfully maintain an application for revocation of a Probate, the application may be made by the next male reversioner who is unquestionably a proper party to the Probate proceedings.

A reversioner who was a minor at the time of the grant of the Probate is not estopped from making an application for revocation by reason of the fact that his father who was his natural guardian did not intervene on his behalf at the time when the Probate was granted. C HARIDASI DASI *v* BIDHUMUKHI DASI, 35 C. L. J. 66; (1922) A I. R (C.) 88 **795**

——— **ss. 67, 77**—*Probate, grant of—Additional District Judge acting as District Judge, powers of.*

Under the Probate and Administration Act there can be no District Delegate except by appointment by a High Court: an Additional District Judge, in the absence of such appointment, cannot act as a District Delegate and grant Probates in a contentious case. But when he is exercising powers as a District Judge he can grant Probate or Letters of Administration in all cases whether there is contention or not N RAM SINGH RAJPUT *v.* MURTIBAI **940**

——— **s. 83,** meaning of. *See* PROCEEDINGS FOR GRANT OF LETTERS OF ADMINISTRATION **671**

Proceedings *for grant of Letters of Administration—Finding as to title to property—Finding, whether* res judicata *in, subsequent suit to establish title—Probate and Administration Act (V of 1881), s.* 83, *meaning of.*

Proceedings—concld.

In a proceeding for grant of Letters of Administration, the question before the Court is one of representation to the estate and not of distribution, and it is only for the purpose of determining the question of representation that the Court is called upon to decide whether the applicant is entitled to the whole or any part of the estate of the deceased within the meaning of section 2 of the Probate and Administration Act, and such finding is not *res judicata* in a suit in which the question of title to the properties has to be determined.

Section 83 of the Probate and Administration Act is merely a rule of procedure and does not lay down that proceedings under the Act shall become or be deemed to be a suit. L B MAUNG TUN YIN *v.* MA SEIN YIN, 11 L. B. R. 331 **671**

Provincial Insolvency Act (III of 1907), s. 16 (2) (a)—*Acquisition of property by insolvent after adjudication—Receiver, vesting in—Declaratory suit by Receiver, competent*

All property which is acquired by or devolves on an insolvent after the passing of an order of adjudication and before his discharge, vests in the Court or Receiver and becomes divisible among the creditors in accordance with the provisions of section 16 (2) *(a)* of the Provincial Insolvency Act, and the Receiver is entitled to a declaration that such property is saleable for the benefit of the creditors; he is under no obligation to sue for physical possession of the insolvent's property and can seek mere declaratory relief. A FATIMA *v.* MOHAMMAD MASHUQ ALI, 20 A. L. J. 569; 4 U. P. L. R. (A) 181; 44 A. 617; (1922) A I. R. (A) 448 **245**

——— **s. 37**—*Secured creditor, whether "creditor."*

The word "creditor" in section 37 of the Provincial Insolvency Act includes a secured creditor. N JASKARAN *v.* GAIND PRASAD, (1922) A I. R. (N.) 235 **460**

Provincial Insolvency Act (V of 1920), ss. 24, 25—*Insolvency petition by creditor—Debt, proof of.*

Where a creditor applies to have his debtor adjudged an insolvent, the Court is bound to require the creditor to prove his debt, and ought not to require him to do this by means of a regular suit. L B A. K. R. M. C. T. CHETTY FIRM *v.* MAUNG AUNG BWIN, 11 L. B. R. 351 **885**

——— **ss. 28 (2), 34**—*"Provable debt," meaning of—Obligation incurred subsequent to adjudication, effect of.*

D. was adjudicated an insolvent in 1914. His father died in 1917 leaving him separate property. In 1918 *P.* sued *D.* and his mother on a bond executed by his father in 1915 and obtained a decree in execution of which he attached certain property which *D* had inherited from his father. It was objected that the debt was one provable in the Insolvency Court, and that, consequently, the proceedings in execution in the ordinary Court were barred under section 28 (2) of the Provincial Insolvency Act:

Held, that according to the definition in section 34 of the Provincial Insolvency Act, a "provable debt" was one to which an insolvent became subject by reason of an obligation incurred before the

Provincial Insolvency Act, 1920—concld.

date of his adjudication as an insolvent; that as the obligation in the present case was not incurred until after that date, the debt was not a "provable debt," and that, therefore, the bar of section 28 (2) of the Act did not apply to it. **N** KESHEORAO *v.* GOVINDRAO **340**

——— **s. 51 (1) Excep.**—*Civil Procedure Code (Act V of 1908), s. 73—Rateable distribution, order for—Money not drawn by creditors—Intervening insolvency of judgment-debtor, effect of—Official Receiver, rights of, to amounts ordered to be rateably distributed.*

Where rateable distribution has been ordered under section 73, Civil Procedure Code, the exception to section 51 (1) of the Provincial Insolvency Act applies not only to the amount credited in favour of the attaching decree-holder but also to the amounts rateably distributed to the other decree-holders under the section.

Where the insolvency of the judgment-debtor supervenes before the moneys allocated for rateable distribution are actually distributed to the creditors, they do not vest in the Official Receiver, but belong to the creditors from the date of the order. The order for rateable distribution removes the money from the operation of the Insolvency Act altogether. **M** THE OFFICIAL RECEIVER OF TANJORE *v.* VENKATARAMA IYER, 15 L W. 37; (1922) M. W. N. 51; 30 M L. T. 67; 42 M L. J. 361; (1922) A. I. R (M) 31 **512**

Public Gambling Act (III of 1867), ss. 3, 4, 5—*Keeping gaming house and being found in it—Joint trial—Search—Procedure—Criminal Procedure Code (Act V of 1898), s. 103.*

The joint trial of the keeper of a common gaming house and of other persons for being found in the house is not illegal.

A search conducted after the issue of a warrant under section 5 of the Public Gambling Act is not a search under Chapter VII of the Criminal Procedure Code, and section 103 of the Code has, therefore, no application to such a search. **L** KHILINDA RAM *v.* EMPEROR, 3 L. 359; 23 CR. L. J. 621; (1922) A. I. R. (L.) 458 **845**

——— **ss. 5, 8**—*Seizure of money found upon search of persons—Forfeiture, whether legal.*

Section 5 of the Public Gambling Act merely authorises, among other things, the search of a common gaming house and the seizure, among other things, of all monies found therein It does not authorise the seizing and forfeiture of money found on the persons of individuals in the house at the time of the search **N** CHATURBHUJ *v.* EMPEROR, 23 CR. L. J. 608 **832**

——— **s. 13**—*Foot-path running through private grove—Public place.*

A foot-path running through a private grove is a public place if it is used by the public as of right. **O** EMPEROR *v.* LALJI, 25 O. C. 114; (1922) A. I R. (J. C.) 196; 23 CR L. J. 579 **611**

——— **s. 13**—*Public place—Blind alley removed from highway.*

A blind alley approachable by a circuitous lane and at a considerable distance from a highway is not a "public place" within the meaning of section 13 of the Public Gambling Act. **L** MUHAMMAD ALI *v.* EMPEROR, 23 CR. L. J. 624 **848**

Public Gambling Act—concld.

——— **s. 13**—*"Public place," meaning of—Publicity of situation.*

A public place must be a place which is either open to the public or is used by the public and the mere publicity of a situation does not make it a public place within the meaning of section 13 of the Public Gambling Act. **O** EMPEROR *v.* BASHIR, 9 O. L. J. 288; 4 U. P. L. R. (J. C.) 69; 23 CR. L. J. 581; (1922) A I. R (J. C.) 275 **613**

Punjab Courts Act (VI of 1918), s. 41, (3). *See* FINDING AS TO CUSTOM **106**

——— **s. 41 (3)**—*Grazing rights—Question of custom—Appeal, second—Certificate.*

A question relating to grazing rights claimed by the tenants of a village over the *shamilat* area of the village by virtue of custom is a question of custom and cannot be agitated in second appeal without a certificate. **L** SARUP SINGH *v.* KHEMAN, (1922 A I. R. (L. 470 **751**

——— **ss. 41, 42.** *See* CIVIL PROCEDURE CODE, 1908, O. XLI, R. 23, O. XLIII, R. 1 (4) **849**

Punjab General Clauses Act (I of 1893), s. 22. *See* PUNJAB PRE-EMPTION ACT, 1913, s. 6 **729**

Punjab Municipal Act (III of 1911), ss. 3 (13), 172, 193—*"Street," what is—Lane looked after by* mahalladars *but accessible to public, whether street—Committee, refusal of, to allow projection over such lane—Jurisdiction of Civil Court to interfere.*

A lane which is accessible to the public, whether permanently or temporarily, is a 'street' within the meaning of the definition contained in section 3 (13) of the Punjab Municipal Act.

The fact that the arrangements for lighting and clearing the lane are made by the *mahalladars* at their expenses, and that the lane is comented by them, is not material; nor the fact that the *mahalladars* have a right to close the lane to the public, if, as a matter of fact, the public have never been prevented by any physical obstruction from entering it.

A Municipal Committee has full power to withhold permission for the building of a structure that will project over a street, and a Civil Court has no jurisdiction to interfere in such a matter.

Section 193 of the Punjab Municipal Act refers only to buildings to be erected on private property and has no application to a structure that projects over a street **L** GANGA RAM *v.* MUNICIPAL COMMITTEE, AMRITSAR, (1922) A. I. R (L.) 41 **675**

——— **s. 61 (B) (b)**—*Profession tax—Offerings made by disciples whether income derived from profession or calling.*

The income derived by a spiritual leader from offerings made by his disciples is income derived from a profession or calling within the meaning of section 61 *(B) (b)* of the Punjab Municipal Act. **L** MOTI SINGH *v.* PRESIDENT OF THE NOTIFIED AREA COMMITTEE OF ANANDPUR **996**

Punjab Pre-emption Act (II of 1905), s. 4—*Village immoveable property—Building, standing, apart from site.*

A standing building in a village is village immoveable property and is liable to pre-emption, even apart from the site. **L** WAUGA *v.* MUHAMMAD ALI, 2 L. L. J. 345 **193**

Punjab Pre-emption Act, 1905—concld.

——— **s. 7.** *See* PUNJAB PRE-EMPTION ACT, 1913, s. 6 **729**

Punjab Pre-emption Act (I of 1913), s. 4—*Sale.*

A., the owner of certain land, stipulated with *B.* that if the latter built a well on the land and brought it into working order within a certain period he would become the owner of a one-third share in the land :

Held, that the transaction did not amount to a sale and was not, therefore, liable to pre-emption **L** ALLAH RAKHIYA KHAN *v.* AHMAD **1008**

——— **s. 6**—*Punjab Pre-emption Act (II of 1905), s. 7—Punjab General Clauses Act (I of 1898), s. 22—Notification under repealed Act whether cancelled by repealing Act.*

A notification made under section 7 of the Punjab Pre-emption Act of 1905, excluding an area from the scope of the Act, is not automatically cancelled by section 6 of the Punjab Pre-emption Act of 1913, and continues in force by virtue of section 24 of the Punjab General Clauses Act until such time as Government sees fit to cancel it. **L** JALAL DIN *v* NATHURAM, 1924 A. I R. (L.) 474 **729**

——— **s. 30**—*Limitation—Physical possession—Joint holding.*

A share in an undivided *mahal* is not susceptible of physical possession within the meaning of section 30 of the Punjab Pre-emption Act. **L** MUHAMMAD ATA ULLAH KHAN *v.* GOPALA MAL **906**

——— **s. 30**—*Pre-emption suit — Limitation—Physical possession—Land in possession of tenants.*

The term "physical possession" used in section 30 of the Punjab Pre-emption Act means personal and immediate possession and not merely proprietary possession.

Land which is in possession of tenants is not capable of physical possession within the meaning of section 30 of the Punjab Pre-emption Act of 1913. **L** HAIDER ALI SHAH *v* BHIKHE SHAH **811**

——— **s. 30**—*Pre-emption suit—Sale of undivided share in joint holding—Limitation—Physical possession of part.*

Inasmuch as a co-sharer in a joint undivided property has a right to every part of that property until partition, what he sells is his share or a fraction of his share in the whole of that undivided property; in other words, he sells to the extent of his interest or a portion of his interest therein the whole property, and if his assignee takes possession under the sale of any portion of that joint property, limitation for a suit for pre-emption in respect of such a sale begins to run under the second clause of section 30 of the Punjab Pre-emption Act of 1913, from time of such assumption of possession. **L** SARDAR ALI *v.* FAZIL **895**

Punjab Tenancy Act (XVI of 1887), s. 59—*Succession to occupancy rights—Customary heir—Adopted son.*

In order that an adopted son may succeed to the occupancy land left by his adoptive father, the adoption must be under Hindu Law, and must comply with the requirements of that law as applicable to the parties concerned, the mere appointment as an heir according to custom is not sufficient. **L** HIRA *v.* HARDAT SINGH, 47 P. L. R. 1922 **763**

Question of onus *mixed question of fact and law.*

The question of onus is not a mere question of law. Once the principle of onus has been settled, the question still remains in the decision of each particular case as to whether, having regard to the transactions which have been established by evidence, the onus still remains where it was or whether, on the other hand, it has been made to shift So that in each particular case whether the onus has been shifted or not becomes a mixed question of fact and law.

The onus may be totally shifted without any express evidence beyond what may be afforded by documents or the admitted circumstances of a case. **A** PEARE LAL *v.* SUNDER SINGH, 20 A. L. J. 658; (1922) A. I. R. (A.) 736; 44 A 756 **805**

Railway Company—*Delivery of goods—Consignee, inspection by—Damage to goods—Delivery Register, note in—Register, signing of, if constitutes "clear receipt"—Unconditional offer to pay damages—Liability, acknowledgment of.*

A consignee of goods by Railway has no right to demand that the goods shall be opened and inspected on the Railway premises before he can be called upon to take delivery.

There is no provision of law, nor any statutory rule which obliges a Railway Company to make, or allow to be made, in its Delivery Register any note alleging that goods are in a damaged condition, and the refusal by a Railway Company to make such an entry in their books is no justification for refusing to take delivery.

Where a consignee of goods by Railway signs the Delivery Register of the Company, such signature does not constitute a "clear receipt" so as to bar a suit against the Company for damages.

Where goods travel over the systems of several Railways, compensation for damages is only recoverable from that Railway on which damage is proved to have been caused.

An unconditional offer by a Railway Company to compensate a consignor of goods for damage caused, amounts to an acknowledgment of liability on the part of the Company for such damage. **A** SRI GANGAJI COTTON MILLS CO LD. *v* EAST INDIAN RAILWAY CO, 20 A. L. J. 761; 4 U. P. L. R. (A.) 222; (1922 A. I. R. (A.) 514; 44 A. 763 **961**

——— *Risk Note, Form B—Consignment, loss of—Proof necessary to render Company liable.*

Where, while goods are being carried by a Railway Company, a theft occurs while the train is running, the Railway Company is protected by the Risk Note. It is, however, open to a plaintiff in such a case to prove that theft did not occur in a running train or that it was brought about by the Company's servants. **B** B. B. & C. I. RAILWAY *v.* SAKARCHAND, 24 BOM. L. R. 787; (1922) A I. R. (B.) 256 **534**

Railways Act (IX of 1890), s. 72—*Consignment of goods under Risk Note, Form H—Contract, if legal—Suit for damages*—Onus probandi—*Undue delay, if actionable without proof of its being wilful.*

When goods are consigned under a special Risk-Note form exempting a Railway Company from liability except under certain contingencies, the liability of the Company is not the general liability

Railways Act—concld.

imposed on common carriers or imposed by section 72 of the Railways Act and the onus of proving the fact necessary to bring the Company within the terms of the contract is on the consignor.

There is nothing illegal in a consignor, in consideration of the reduced rates charged, agreeing to hold the Company liable only on certain specified contingencies.

Delay in the delivery of goods in order to be actionable must be shown to be wilful. It does not follow that because there was delay it was wilful. **M** ALBUQUERSQUE & SONS *v.* SOUTH INDIAN RY. CO., LTD, (1922) M. W. N. 328; 43 M. L. J. 90; (1922) A. I. R. (M.) 231; 16 L. W. 667; 31 M. L. T. 470 **269**

——— **ss. 120, 121** — *Obstructing Railway servant—Abuse, whether obstruction—Travelling without ticket—Removal from carriage.*

Travelling without a ticket is not one of the circumstances mentioned in section 120 of the Railways Act as justifying the removal of a person from a Railway carriage by a Railway servant.

The complainant, a Station Master, removed the accused from a Railway carriage as the latter was travelling without a ticket. Accused used abusive language towards the Station Master and was convicted of an offence under section 121 of the Railways Act:

Held, (1) that abuse or insult did not necessarily constitute obstruction or impediment to a Railway servant in the discharge of his duties, and that there was nothing to show that it had done so in this case,

(2) that, therefore, the accused could not be convicted of an offence under section 121 of the Railways Act. **L** RADHA KISHEN *v.* EMPEROR, 23 CR. L. J. 622 **846**

Record of Appeal *to Privy Council, inclusion of irrelevant matter in, condemned.*

The wholesale inclusion of irrelevant documents in the record of a Privy Council appeal prepared in India, condemned as "a scandal and a hindrance to the proper administration of justice." **P. C.** BIJAI RAJ KUNWAR *v.* JAI INDRA BAHADUR SINGH, 31 M. L. T. 69; 9 O. L. J. 385; 44 A. 435; 4 U. P. L. R. (P. C.) 76; (1922) A. I. R. (P. C.) 317; 43 M. L. J. 632; 36 C. L. J. 511; 25 O. C. 260 **876**

Redemption of Mortgages (Punjab) Act (II of 1913), s. 12—*Redemption proceedings—Possession delivered to mortgagor by Collector's order—Suit by mortgagee for* mere *declaration, if maintainable.*

Where by an order under the Redemption of Mortgages Punjab Act, the mortgagor obtains possession of the mortgaged property on payment of a sum fixed by the Collector, the mortgagee, if aggrieved by the order, can, under section 12 of the Act, sue for a mere declaration without suing for possession. **L** NARINJAN SINGH *v.* CHARN DAS, 3 L. 239; (1922) A. I. R. (L.) 363 **557**

Register, signing of, if constitutes "clear receipt." *See* RAILWAY COMPANY **961**

Registration Act (III of 1877), ss. 3, 34—*Hindu married woman—Minor—Father, if "representative."*

The father of a Hindu minor girl ceases to be her natural guardian on her marriage and if he has not been appointed her legal guardian, he is not her representative within the meaning of section 3 of the Registration Act. **P. C.** AMBA *v.* SHRINIVASA KAMATHI, 14 L. W. 575; 26 C. W. N. 369; (1922) A. I. R. (P. C.) 135 **754**

Registration Act (XVI of 1908), s. 17—*Deposit of tittle-deeds—Document amounting to charge also executed—Document containing reference to execution of formal mortgage-deed later on—Document, registration of, if necessary—Registration not effected—Mortgage, enforcement of—Formal mortgage, right to demand execution of.*

Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, the general rule will not apply where there is a deposit accompanied by an actual written charge. In that case one must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone the parties must be governed. Such a document must be registered.

Where there is a document amounting to a complete contract containing a reference to a more formal document to be executed later on if desirable, it takes effect unless there is a condition that it is not to take effect unless the second document is executed.

The defendant deposited the title-deeds of a house with the plaintiff, and on the same day passed a *chithi* in respect thereof which after reciting the taking of a certain sum of money stated: "I have given my house in mortgage for the above amount and.....shall execute a *pucca* document in respect of the same whenever you may ask me. The interest is settled at the rate of eight annas ... ...This is agreeable and binding on me." This *chithi* was not registered. The plaintiff sue to recover his money by sale of the mortgaged house, or in the alternative for a registered mortgage-deed thereof:

Held, (1) that the *chithi* required registration;

(2) that in the absence of such registration, the plaintiff was not entitled to a declaration that he had a charge on the property mentioned in the title-deeds deposited with him, or to an order for sale of that property to satisfy his claim;

(3) that the plaintiff was not entitled to obtain a mortgage-deed from the defendant as he had already got a mortgage and the only effect of his getting another document would be to have the terms of the mortgage settled in a more formal manner and that if the first document was not registered, he could not by getting another document cure the defect. **B** CHUNILAL SOMESHVAR BHATT *v.* VITHALDAS KARSANDAS, 24 BOM. L. R. 502; (1922) A. I. R. (B.) 440 **1005**

——— **ss. 17, 49**—Kararnama *virtually deed of partition, admissibility of, without registration.*

A *kararnama*, which is virtually a deed of partition affecting property, valued at more than one hundred rupees, is inadmissible in evidence to prove the partition unless it is registered. **N** ABDUL RAHIM *v.* SHEIKH KAWADOD, (1922) A. I. R. (N.) 236 **712**

Registration Act—1908—concld.

—— — **s. 22 (1) (2)**—*Notification under cl. 1—Description of property—Refusal of Registration—Sufficiency of description for identification*

The mere fact that there has been a notification under clause (1) of section 22 of the Registration Act would not, under clause (2) of the same section, be enough for refusal of registration to a document not described according to that notification, unless the power of refusal in such a case was expressly given by the notification.

Where a notification merely provides that in certain districts the description should be in a certain manner and does not give any further direction, the proviso under clause (2) of section 22 of the Registration Act would have the effect of entitling a document to be registered provided the description is sufficient to identify the property.

Where a compromise agreement contains a recital that "all the immoveable property pertaining to the family of the executants and mentioned in Schedule A described herein below shall be divided into four equal shares," the description of the property, for purposes of registration, is sufficient for its identification. **M** APPALACHARYULU *v.* RAMACHANDRACHARYULU, 16 L. W. 287 **901**

——— **s. 47,** applicability of. *See* PRE-EMPTION SUIT **715**

Regulation (XVII of 1806), ss. 7, 8—*Mortgage—Foreclosure notice, proper form of—Defective notice, effect of.*

Section 7 of Regulation XVII of 1806 provides either for payment or tender to the mortgagor or for deposit in Court, and a notice which simply informs the mortgagor that he must pay the money within the year and says nothing as to the alternatives of tenders and deposit in Court is misleading and the defect is not cured merely by the addition of the words "in the manner provided for in section 7 of the Regulation"

A defective notice is fatal to the validity of proceedings taken under Regulation XVII of 1806. **L** ZORA *v.* CHANDU **833**

Religious Endowments Act (XX of 1863), s. 7, *Committee appointed under—Mosque property—Lease of shops—Committee, powers of, whether restricted to those of* Mutwalli *under Muhammadan Law—Muhammadan Law—Trust property—Power of* Mutwalli—*Lease of house property for more than one year.*

The powers of an "Islamia Committee" appointed under section 7 of the Religious Endowments Act to take charge of a mosque and the property attached to it are not necessarily governed by the rules of Muhammadan Law relating to the powers of a *Mutwalli*. Such a Committee can, in a proper case, lease house property for more than one year.

Obiter:—According to the Muhammadan Law, a *Mutwalli* is not in general authorised to make a lease of house property for a period longer than one year, but a Qazi might empower him to grant leases for a longer period if such a grant is for the benefit of the trust estate. **A** BAIJNATH *v.* MOHAMMAD ISMAIL, 20 A. L. J. 697; (1922) A. I. R. (A.) 417; 44 A. 617 **764**

Remand, *propriety of—Inherent jurisdiction—Appeal—Remand order, treatment of, as preliminary decree.*

Remand—concld.

Where an Appellate Court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject-matter of the preliminary decree is not warranted.

Where a decree, being in substance a preliminary decree is not passed as such by an Appellate Court and the case is wrongly remanded, it is open to the High Court, in second appeal, to allow the appellant to argue the appeal on the footing that, though the form of the decree was wrong, it was in substance a decree adjudicating finally the rights of the parties and was thus appealable as a final decree. **M** SUBBE GOUNDAN *v.* KRISHNAMACHARI, 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; 45 M. 449; (1922) A. I. R. (M.) 112 **869**

Res judicata—*Decision in rent suit on question of title—Suit for possession by receipt of rent—Limitation—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, applicability of.*

The plaintiff brought a suit for a decree for possession of land upon a declaration that he was entitled to receive rent at a certain rate from defendant No 2 upon a finding and a declaration that the plaintiff was a tenant under defendant No. 1 in respect of the land under claim. The defendant No. 2 was on the land holding under defendant No. 1 but the plaintiff claimed that he took a settlement of the land from defendant No. 1 and that as a result of such settlement the defendant No. 2 was bound to pay the rent to him which he had previously paid to the first defendant. Previous to the present suit the plaintiff had unsuccessfully brought a rent-suit against the second defendant in which the latter had put forward the defence that he held the land not under the plaintiff but under the first defendant who was no party to that suit:

Held, (1) that as the present suit was not a suit as between landlord and tenant, the special rule of limitation contained in Art. 3, Sch. III of the Bengal Tenancy Act had no application and the general law of limitation was applicable to the suit;

(2) that the decision in the previous rent-suit on the question of the plaintiff's title did not operate as *res judicata* even though the question of title had to be investigated in that suit by reason of the fact that defendant No. 2 was previously on the land. **C** GOPINATH JALUA *v.* BHAJAHARI DAS ADHIKARI **472**

——— Execution proceedings. *See* CIVIL PROCEDURE CODE, 1908 **239**

——— *Rent-decree—Rate of rent—Presumption arising from entry in the Record of Rights, rebuttal of.*

A rent-decree may not be *res judicata* in the sense that it finally decided the rate of rent between the parties but it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. Hence the decision may be sufficient to support a finding that the presumption arising from an entry (of a different rate of rent) in the Record of Rights has been rebutted. **C** BROJENDRA KISHORE ROY *v.* SOMAR ALI **298**

———, *rule of, application of.*

In applying the rule of *res judicata* Courts should be influenced by no technical considerations, but by

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matters of substance within the limits applied by law. **L B** MAUNG TUN YIN *v.* MA SEIN YIN, 11 L. B. R. 331 **671**

Revision *against acquittal, when lies.*

Where there is an appeal by a Public Prosecutor or the Crown from an acquittal, the High Court sets its face against revision. But when an aggrieved complainant moves the Government to appeal under section 417 of the Code of Criminal Procedure and the Government refuses, he can move the High Court in revision, but the latter will exercise its jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. **M** SANKARALINGA MUDALIAR *v.* NARAYANA MUDALIAR, 16 L. W. 413; 43 M. L. J. 364; (1922) M. W. N. 579; 31 M. L. T. 342; 23 CR. L. J. 583; (1922) A. I. R. (M.) 502 **615**

——— High Court, duty of. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 195, 476 **827**

Revenue and Civil Courts. *conflict of—Landlord, civil suit by, for declaration that defendant not adopted son of deceased occupancy tenant—Relation of landlord and tenant subsisting between the parties—Civil Courts, jurisdiction of—Agra Tenancy Act (II of 1901), ss. 58, 95, 167—Revenue Courts—Jurisdiction to decide questions of status or adoption.*

While it is necessary to guard against formulating any such general rule as that a suit for a declaration of legal status cannot be entertained by a Civil Court merely because such a suit may be brought in consequence of a dispute which originally arose between landlord and tenant, nevertheless where it appears on an examination of the plaint in the light of the surrounding circumstances that the suit in fact offends against the provisions of section 167 of the Agra Tenancy Act, the jurisdiction of the Civil Courts is ousted.

In all such cases it must be determined what is the real contest between the parties and what is the real object of the suit.

L. an occupancy tenant died. The defendant alleging that he was the adopted son of *L.* applied for mutation of his name in place of the deceased. The landlord brought this civil suit for a declaration that the defendant was not the adopted son of *L.* From an examination of the pleadings it appeared that the relationship of landlord and tenant subsisted between the parties and the only dispute was as to the nature of the tenancy:

Held, (1) that the appropriate suit by either party would be under section 95 *(a)* and *(b)* of the Agra Tenancy Act, a suit as to which the cognizance of the Civil Courts was expressly ousted;

(2) that the object of the present suit being to forestall that suit or else to enable the plaintiff to bring a suit for ejectment under section 58 on the ground that the defendant was a non-occupancy tenant, it was not cognizable by the Civil Court.

A Revenue Court has jurisdiction to decide a question of status or adoption. **A** JAGANNATH *v.* BALWANT SINGH, 20 A. L. J. 570; (1922) A. I. R. (A.) 372; 4 U. P. L. R. (A.) 194; 44 A. 692 **247**

Riwaj-i-am, *entry in, unsupported by instances, value of.*

An extract from the *riwaj-i-am* containing merely an expression of opinion and unsupported by instances, cannot be raised to the dignity of a custom, unless it is followed in practice for a sufficiently long period and recognised as binding by the members of a community. **L** ASA NAND *v.* ROSHNI BAI, 2 L. L. J. 178 **92**

———, *entry in, value of—Burden of proof.*

An entry in a *riwaj-i-am*, even when unsupported by instances, is a strong piece of evidence in support of the custom which it records and is sufficient to shift the *onus* of proof on to the party which disputes the correctness of the custom laid down in the *riwaj-i-am*. **L** JAGIR SINGH *v.* SANTI, 3 L. 181 **711**

——— **of 1865,** *how far evidence of custom.*

The value of the *Riwaj-i-am* of 1865 is considerably minimised by the fact that it did not lay down what the custom was but what the compilers thought it to be. **L** GURDIT SINGH *v.* ISHAR KUAR, 3 L. 257; (1922) A. I. R. (L.) 392 **551**

Rules and Orders of the Original Side Calcutta High Court, Chap. XXXV, r. 57. *See* COSTS—TAXATION **451**

Sanad—*Primogeniture, rule of—Custom—Instances prior to* sanad—*Evidence.*

Where a Sanad, under which an estate in Oudh is held, lays down the succession according to the rule of primogeniture, evidence of a single unexplained instance of the widow of one of the grantees having succeeded to the exclusion of male heirs, is insufficient to establish a custom binding on another branch of the family. Similarly, evidence of widows having succeeded prior to the grant of the Sanad cannot be used to set up a rule of succession directly contrary to the terms of the Sanad under which the estate is held **P. C.** BADRI NARAIN SINGH *v.* HARNAM KUAR, 44 A. 449; 31 M. L. T. 195; 9 O. L. J. 425; 1922 A. I. R. P. C.) 289; 27 C. W. N. 129; 25 O. C. 313 **1000**

Shah jog hundis *whether negotiable instruments.*

Shah jog hundis are negotiable instruments. **M** KANALAL BHOYA *v* BALARAM PARAMASUKDOSS, 31 M. L. T. 84; 43 M. L. J. 480; 6 L. W. 608 **21**

Specific performance *of contract, who can sue for—Geneal rule.*

No person can sue for specific performance, if he cannot be sued for it, whether because he is a minor or for any other reason. **N** HARGOVIND *v.* MEHTAB SINGH, 18 N. L. R. 67; 1922) A. I. R. N.) 193 **346**

Specific Relief Act (I of 1877), s. 9—Archaka *of Temple, suit by, against trustee for possession, maintainability of—Master and servant, relationship of, as between trustee and* archaka.

Though hereditary *archakaship* is treated under Hindu Law as immoveable property divisible among co-parceners, it is not immoveable property under section 9 of the Specific Relief Act

An *archaka* of a Temple who has been dispossessed by the trustee cannot maintain a suit against the latter for possession

Section 9 of the Specific Relief Act does not confer on a servant a right of suit against his master.

Specific Relief Act—contd.

Obiter.—Joint possession cannot be given under section 9 of the Specific Relief Act **M** VANAMAMALAI JEER SWAMIGAL *v.* PERIA VENKATARAMANA CHARIAR, (1922) M. W. N. 422; (1922) A. I. R. (M.) 183; 16 L. W. 931 **183**

——— **s. 9**—*Execution of decree—Order in execution—Appeal.*

An order passed in execution of a decree under section 9 of the Specific Relief Act is not appealable. **L** WARIS *v.* FATEH DIN **760**

——— **ss. 9, 56 (b)**—*S. 9, object of—Decree for restoration of possession—Suit by person in possession to restrain execution.*

The object of section 9 of the Specific Relief Act is to discourage people from taking the law into their own hands, however good their title may be It provides a summary and speedy remedy through the medium of a Civil Court for the restoration of possession to a party dispossessed by another leaving them to fight out the question of their respective title by a regular suit if necessary.

Where a person obtains a decree for restoration of possession of land under section 9 of the Specific Relief Act, the person against whom it is passed and who is in possession of the land, can institute a suit to establish his title to the land and obtain an injunction to restrain the decree-holder from dispossessing him by enforcing his decree, notwithstanding the provisions of section 56, clause *(b)* of the same Act. **B** MARI DODDATAMMA MARKUNDI *v.* SANTAYA RAMAKRISHNA PAI, 24 BOM. L. R 768; (1922) A. I. R. (B.) 216 **490**

——— **s. 23**—*Contract, enforcement of—Stranger—Equity.*

A stranger to a contract is, as a rule, not entitled to sue, but relief may sometimes be granted in his favour on principles of equity.

B contracted to sell certain property to *N.* in order to satisfy a money-decree obtained against him by *S.* The consideration was fixed at Rs 2,900. Out of this *B.* actually received Rs. 300 and the balance of Rs 2,600 was left with the purchaser for payment to *S.* The sale, however, was not carried out, and eventually *S.* himself got a sale-deed from *B.* of the same property and out of the price fixed appropriated Rs. 3,000 to the satisfaction of his decree. Subsequently *N.* sued *B.* for specific performance The suit was decreed and *S.* lost possession of the property. *S* brought the present suit to recover from *N.* Rs 3,000 being the amount appropriated in satisfaction of his decree. The lower Courts held that although *N.* was not liable to pay Rs. 3,000 he was liable to the extent of Rs. 2,600, being the amount which under his contract with *B* was left with him for payment to *S.* In second appeal *N* contended that *S* being not privy to that contract was not entitled to enforce any covenant under the same:

Held, dismissing the objection, that though *S* was at the outset a stranger in dealings between *N.* and *B.*, nevertheless by reason of the subsequent proceedings terminating in the decree for specific performance, *S.* was brought into a degree of privity with *N* so as to be entitled to relief on principles ofequity. **A** NEHAL SINGH *v.* FATEH CHAND, 20 A. L. J. 708; (1922) A. I. R. (A.) 426; 44 A. 702 **778**

Specific Relief Act—concld.

——— **s. 25**—*"Marketable title," meaning of.*

The phrase "marketable title" is equivalent to the phrase "a title free from reasonable doubt" in section 25 of the Specific Relief Act

The question whether a "marketable title" free from reasonable doubt has been made out or not, must be answered with reference to the facts of each case. **B** HAJI OOSMAN HAJI ISMAIL *v.* HAROON SALLEH MAHOMED, 24 BOM L R. 978 **862**

——— **ss. 38, 41.** *See* GUARDIAN **15**

——— **s. 42**—*Declaration contemplated by section—Suit for declaration by candidate at Municipal Election that election of his competitor illegal.*

Section 42 of the Specific Relief Act does not sanction every form of declaration, but only a declaration that the plaintiff is entitled to any legal character, or to any right as to any property.

Quære.—Whether the provisions of section 42 of the Specific Relief Act are applicable to a suit by an unsuccessful candidate for election as a Municipal Commissioner, for a declaration that the election, being in contravention of the plaintiffs' right and franchise, right of election and right of being present at the election, was not, according to law, proper and valid, and that the election of his competitors was illegal. **C** CHAIRMAN OF THE MUNICIPAL COMRS. OF KATRUNG *v.* CHARU CHANDRA MUKERJEE, 26 C. W. N. 91 **229**

——— **s. 42, proviso**—*Person in joint possession with another—Declaratoy suit that other person has lost his interest in property, whether maintainable.*

A person in joint possession with another cannot sue for a mere declaration that the other person has lost his interest in the property and is not entitled to remain in possession because in such a case the plaintiff can and should sue for exclusive possession. **L** SHANKARI *v.* JODHA, 3 L. L. J. 47 **576**

Statutes, *interpretation of—Long and established interpretation.*

Where the terms of a Statute or Ordinance are clear, a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the clear meaning of the enactment, but where such is not the case, it is the duty of a Judge to accept the interpretation so often and so long put upon the Statute by the Courts, and not to disturb those decisions. **A** LALLU SINGH *v.* GUR NARAIN, 20 A. L. J. 744; (1922) A. I. R. (A.) 467 **798**

Subrogation—*Reimbursement, right of—Distinction.*

The right to reimburse arises on a contract, express or implied, to reimburse and the party who claims the right enforces it in his own right and not in the right of another. Consequently, the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person who not being primarily liable to discharge an obligation, does discharge it and it is a right to demand the performance of the original obligation and the application thereto of all the securities held by the creditor.

The right to reimbursement accrues to the person paying off a debt on the date on which he pays

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it off, while the right to enforce a security arises from the date of mortgage. **Pat** SIBANAND MISRA *v.* JAGMOHAN LAL, 3 P. L. T. 533; (1922) PAT. 331; (1922 A. I. R. (PAT.) 499; 1 PAT. 780 **707**

Succession *Exclusion from inheritance—Murderer—Descendants, lineal, position of—Personal law—Public policy.*

A murderer as well as his lineal descendants are precluded from inheriting the property of the person murdered.

The question of the exclusion of the murderer and his lineal descendants from inheritance has reference to the broad view of public policy and justice rather than to the provisions as to exclusion from inheritance of the personal law to which the parties may be subject.

Therefore, the son of a Hindu murderer is also excluded from inheriting to the murdered person even though under his personal law he may have a right to succeed to the murdered man independently of his father. **L** HAR BHAGWAN *v.* HUKAM SINGH, 4 L. L. J. 245; 3 L. 242; (1922) A. I. R. (L.) 243 **769**

Succession Certificate Act (VII of 1889). *See* HINDU LAW—SUCCESSION **417**

——— **s. 1 (4)**—*Will not governed by Succession Act or Hindu Wills Act—Succession Certificate, grant of, to executor—Jurisdiction—Sub-Judge, Second Class, invested with powers of District Court—Jurisdiction to entertain application for collection of debts exceeding Rs.* 5,000.

Section 1 (4) of the Succession Certificate Act does not preclude the executor of a Will, to which neither the Succession Act nor the Hindu Wills Act applies, from obtaining a certificate under the Succession Certificate Act, authorising him to collect debts due to the deceased. The mere fact that the executor might have applied for Probate of the Will is not an adequate ground for refusing to entertain his application for a Succession Certificate.

Where a Sub-Judge of the Second Class is invested with the functions of a District Court under the Succession Certificate Act, and no restriction is placed on the limits of his jurisdiction, he is competent to entertain and adjudicate upon an application for a Succession Certificate involving debts the amount of which exceeds Rs 5,000. **L** RATTAN SINGH *v.* RAJ SINGH, 2 L. L. J. 578 **302**

Suit, *dismissal of, in default—Restoration against some defendants and exemption of others by plaintiff—Court's power to restore against others.*

Where after the dismissal of a suit in default the plaintiff applies for restoration against some only of the defendants and exempts the rest, the Court has no power to take action *suo motu* and restore the suit as against those so exempted. **O** NAGESHAR *v.* BHAGY DUBEY, 25 O. C. 67; (1922 A. I. R. (J. C.) 160 **246**

——— *, events happening subsequent to institution of—Declaration of title, suit originally brought for—Possession, relief as to becoming necessary—Trial Court, power of—Plaint, amendment of.*

If events which have happened subsequent to the institution of a suit render the relief prayed for useless, if granted, and introduce matters which become the real questions in controversy between the parties, a Court of Original Jurisdiction at any rate has power to order such an amendment as may be necessary for the purpose of determining questions so arising.

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Where a suit as originally brought is for a mere declaration of title, but subsequent events render it necessary to claim possession of the property to which the title related, the Trial Court is quite competent to order amendment of the plaint so as to include the relief as to possession as well. **O** HAMID MIRZA BEG *v* AHMAD MIRZA BEG, 9 O. L. J. 359; 4 U. P. L. R. (J. C.) 89; (1922) A. I. R. (J. C.) 266 **986**

——— *to enforce registration—Necessary parties.*

When a document purports to be executed by certain persons it is essential that those persons, even though they are minors, should be brought on record in a suit to enforce registration so as to make the proceeding binding upon them in so far as the proceedings have been conducted *bona fide* by their guardians. **M** APPALACHARYULU *v.* RAMACHANDRACHARYULU, 16 L. W. 287 **901**

Summons, *mode of service of—Civil Procedure Code (Act V of 1908), O. V, r.* 15—*Requirements of Statute to be strictly carried out.*

Before making an *ex parte* decree against a defendant the requirements of the Statute as regards the service of summons should be strictly complied with. The inquiry contemplated by r. 5 of O. V of the Civil Procedure Code should not be confined to the son of the defendant, or to a person related to him. An attempt should be made to find the defendant by an inquiry from his neighbours or other persons. **C** DHARAM CHAND GAIN *v* KANAK SARKAR, 26 C. W. N. 359; 35 C. L. J. 203 **991**

Sureties—*Magistrate, duty of—Police report, acting on, illegal.*

A Magistrate ought not to reject sureties on the report of the Police: when sureties are offered, it is the duty of the Magistrate to accept them, unless he is satisfied that they are not proper persons. **A** GOPI KHATIK *v.* EMPEROR, 20 A. L. J. 760; 23 CR. L. J. 499; (1922) A. I. R. (A.) 541 **35**

Taluqdari Law—Primogeniture Sanads. *See* MUHAMMADAN LAW—SUNNI **254**

Teji-mandi *contracts—Wagering contracts—Intention.*

Teji-mandi contracts cannot be held as wagers on account of their apparent nature and characteristics alone without any other proof of the intention of the contracting parties. The party who pleads that a *teji-mandi* contract is in the nature of a wager must prove that fact **B** MANILAL DHARAMSI *v.* ALLIBHAI CHAGLA, 24 BOM. L. R. 812; (1922 A. I. R. (P.) 408 **481**

Tenancy—*Tenant-at-will, mortgage by—Mortgage, whether void* ab initio—*Landlord, position of—Suit for redemption, maintainability of.*

A mortgage by a tenant-at-will is not binding on a landlord, but it is open to the latter to recognise it by accepting rent from the mortgagee during the currency of the tenancy. Such a mortgage is not *ab initio* void and a suit to redeem it is maintainable.

Where a tenant effects a mortgage with possession of his tenancy holding and subsequently sues